STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1112

In the Matter of the Welfare of: D. L. W., Child

Filed February 11, 2013
Affirmed
Bjorkman, Judge

Ramsey County District Court
File No. 62-JV-12-206

David W. Merchant, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant D.L.W.)

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

John J. Choi, Ramsey County Attorney, Kathryn S. Richtman, Assistant County Attorney, St. Paul, Minnesota (for respondent State of Minnesota)

Considered and decided by Cleary, Presiding Judge; Peterson, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant challenges his certification for prosecution as an adult on charges of first-degree aggravated robbery, arguing that the district court abused its discretion by concluding that retaining his case in the juvenile system would not serve public safety.

Because the district court did not abuse its discretion in this presumptive-certification case, we affirm.[1]

FACTS

Shortly before 9:00 p.m. on December 22, 2011, 17-year-old appellant D.L.W. and two adult males entered a group home for adults with special needs located in Roseville. Two female residents and a patient advocate were home at the time. Upon entering the residence, D.L.W. ordered the patient advocate to the ground, struck him on top of the head with a gun several times, and told him not to look up or move or he would "blow his f---king head off." D.L.W. and the two men then demanded keys to the group-home lockbox and medicine cabinet, taking a small amount of cash and a debit card from the lockbox. One of the three then confronted a resident upstairs, ordering her to get downstairs or he would "blow her brains out." He took her ring and forced her to give him the PIN for the debit card. The other two found the other resident getting out of the shower, pointed a gun at her, and took her cell phone.

The three males and an adult female used the debit card immediately after the robbery at a nearby SuperAmerica and made four more withdrawals at a Holiday station. Surveillance videos show one of the men entering a PIN written on a piece of paper to withdraw money while the others watched. The patient advocate identified the three

[1] D.L.W. also argues for the first time on appeal that certifying him as an adult is unconstitutional. Because D.L.W. did not raise this argument before the district court, we decline to address it. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that an appellate court generally will not consider matters not argued to and considered by the district court); *State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989) (stating that even constitutional claims are generally waived unless the interests of justice compel review and addressing them would not result in an unfair surprise on a party).

males from the surveillance videos as the people who committed the robbery and told the police that they seemed familiar with the group-home operation. When questioned by police, one of the adult males identified D.L.W. by the street name "Lee Blood" and stated that he was the one who had the gun and used it to strike the patient advocate. The man further stated that the three knew they were robbing a group home and that D.L.W. and the adult female received most of the money.

Respondent State of Minnesota charged D.L.W. with one count of first-degree aggravated robbery and filed a motion for presumptive adult certification under Minn. Stat. § 260B.125, subd. 3 (2010).[2] The district court ordered a psychological evaluation and certification study. On May 15, 2012, the district court held a contested certification hearing, during which it heard testimony from D.L.W.'s mother, a juvenile probation officer, a law enforcement officer, and two psychologists.

D.L.W.'s mother testified that he has had behavior issues in school and has received supportive programming, including an individual education plan and counseling, since the age of six. Ramsey County juvenile probation officer Ken Barber, who performed the certification study, opined that public safety would not be served by retaining D.L.W. in the juvenile system and recommended adult certification. St. Paul Police Officer Tim Moore testified that D.L.W. is involved with a criminal gang.

Court-appointed psychologist Patricia Orud, M.A., L.P., testified about her evaluation of D.L.W. Orud administered an intelligence assessment and the Minnesota

[2] On February 1, 2012, D.L.W. was charged with three counts of first-degree aggravated robbery in an amended juvenile-delinquency petition.

Multiphasic Personality Inventory (MMPI-A), which indicated D.L.W. has no cognitive impairment but has a history of family disruption and contention, feels alienated, experiences anxiety and depression, and has personality characteristics that place him at risk for making poor choices. She also noted D.L.W.'s history of behavioral problems, affiliation with delinquent peers, substance abuse, poor judgment, and mood instability. Orud diagnosed D.L.W. with Conduct Disorder, Attention-Deficit/Hyperactivity Disorder, and narcissistic, antisocial and borderline personality traits. And Orud provisionally diagnosed D.L.W. with Bipolar Disorder and Fetal-Alcohol Spectrum Disorder. Orud expressed concern about D.L.W.'s amenability to treatment and found that D.L.W.'s risk for future violence, as measured by the Structured Assessment of Violence Risk in Youth (SAVRY), is moderately high. D.L.W. refused to complete other psychological testing for Orud.

On the issue of certification, Orud acknowledged that D.L.W. "has not had prior long term correctional interventions" but recommended adult certification because "[t]he presumption of certification is not clearly overcome in this case." Orud further explained that the seriousness of the offense, D.L.W.'s "ongoing needs for assessment and management of his medical and mental health symptoms," and his "moderately high risk for future criminal and violent behavior based on known factors of his history" support certification.

Paul Reitman, Ph.D., L.P., performed a second psychological evaluation of D.L.W. and testified on his behalf. Dr. Reitman re-administered the MMPI-A and testified that he was "floored" by the results. Dr. Reitman interpreted the second

assessment as showing that D.L.W. is highly amenable to treatment, has insight, and is capable of honest self-examination, despite his elevation on the psychopathic-deviant and paranoia scales. But Dr. Reitman generally agreed with Orud's diagnosis of D.L.W.'s mental health.

Dr. Reitman assessed D.L.W.'s recidivism risk under the HARE Psychopathic Checklist and the Violence Risk Appraisal Guide (VRAG). The HARE revealed a low risk of recidivism that Dr. Reitman opined would be even lower if D.L.W. received treatment. Dr. Reitman found that D.L.W. presents a 48% risk (low to moderate) of recidivating in seven years and a 58% risk (moderate to high) of recidivating in ten years based on the VRAG.

On the issue of certification, Dr. Reitman recommended extended juvenile jurisdiction (EJJ), stating "I believe the community would be safe and I believe that [D.L.W.] will benefit greatly from rehabilitation and treatment." Dr. Reitman testified that three years of programming with the juvenile system, including a two-year program at the Woodland Hills facility, would be sufficient. But Dr. Reitman conceded that Woodland Hills is not a secure facility.

Following the hearing, the district court granted the state's certification motion, concluding that the state "established by clear and convincing evidence that retaining this proceeding in juvenile court does not serve public safety."[3] This appeal follows.

[3] The parties agree that the district court's conclusion misstates the burden of proof. The statute requires the juvenile to rebut the certification presumption "by clear and convincing evidence that retaining the proceeding in the juvenile court serves public safety." Minn. Stat. § 260B.125, subd. 3. But we discern no reversible error. It is clear

D E C I S I O N

"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).

Generally, children alleged to have committed a crime remain in the juvenile system. Minn. Stat. § 260B.101, subd. 1 (2010). But certification of a child for adult prosecution is presumed if:

> (1) the child was 16 or 17 years old at the time of the offense; and
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> (2) 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, or that the child committed any felony offense while using, whether by brandishing, displaying, threatening with, or otherwise employing, a firearm.

Minn. Stat. § 260B.125, subd. 3. A child may rebut the presumption by showing that there is "clear and convincing evidence that retaining the proceeding in the juvenile court serves public safety." *Id.*

When assessing whether retaining a proceeding in the juvenile system serves public safety, the district court must consider the following six factors:

> (1) the seriousness of the alleged offense in terms of community protection, including the existence of any

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from the district court's findings of fact and the transcript of the certification hearing that the district court correctly placed the burden of rebutting the presumption of certification on D.L.W. Moreover, even if the district court misapplied the burden of proof, the error inured to D.L.W.'s benefit.

> aggravating factors recognized by the Sentencing Guidelines, the use of a firearm, and the impact on any victim;
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> (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.

Id., subd. 4 (2010). The district court must give "greater weight" to the first and third factors. *Id.* For purposes of certification, the charges against the juvenile are presumed to be true. *In re Welfare of N.J.S.*, 753 N.W.2d 704, 708 (Minn. 2008).

Because D.L.W. was 17 years old at the time of the offense, the charges carry a presumptive prison sentence, and he used a firearm, adult certification was presumed in this case. The district court concluded that retaining the proceeding in the juvenile system does not serve public safety. The district court found that the seriousness of the offense, D.L.W.'s culpability, his programming history, and the dispositional options available favor certification, while D.L.W.'s prior record and the adequacy of the punishment or programming available in the juvenile justice system favor EJJ. D.L.W. argues that the district court abused its discretion by failing to properly assess the evidence and weigh the certification factors. We address each of the factors in turn.

Seriousness of offense

The district court concluded that this factor favors certification because D.L.W. (1) committed the robbery with two others, (2) targeted a group home for vulnerable, mentally disabled persons, (3) committed an assault that resulted in physical injuries, and (4) used a firearm. D.L.W. contends that, because the group home was staffed, no one was killed or seriously injured, and the gun was never fired, the district court abused its discretion by weighing this factor in favor of certification. We disagree.

The certification statute expressly directs the district court to consider "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 sentencing guidelines identify a victim's particular vulnerability, participation of two or more other offenders in the offense, and commission of the offense in the victim's residence as aggravating factors. Minn. Sent. Guidelines II.D.2.b.(1), (10), (14) (2010). The district court therefore properly considered the particular vulnerability of the group-home residents, the location of the robbery, and D.L.W.'s commission of the crime with two other people.

Moreover, certification is not reserved for cases involving death or serious bodily harm, and it is not required that a gun be fired. The district court properly considered D.L.W.'s use of a gun to threaten and injure others in the commission of the offense. As Dr. Reitman acknowledged in his report, "[t]his is serious criminal behavior and this would support certification to Adult Court." On this record, the district court did not

abuse its discretion by weighing the seriousness of the offense in favor of adult certification.

Child's culpability

The district court concluded that D.L.W.'s culpability favors certification based on (1) his age, cognitive capacity, lack of impairment, and principal role in the offense; (2) evidence that the group home was specifically targeted; and (3) the absence of mitigating factors.

D.L.W. challenges the district court's conclusion on three grounds. First, he argues that the district court erred in finding that he has no cognitive impairment. *See* Minn. Sent. Guidelines II.D.2.a.(3) (2010) (recognizing one's lack of substantial capacity for judgment due to mental impairment as a mitigating factor). We disagree. Both examining psychologists determined that D.L.W. has no cognitive impairment. Dr. Reitman opined that "[D.L.W.] is not cognitively or emotionally impaired to not understand that what he did was criminal." And Orud found "no impairments of mental processing."

Second, D.L.W. challenges the district court's finding that D.L.W. was the principal actor, arguing that he was the only child involved in the offense and a follower rather than a leader. *See* Minn. Sent. Guidelines II.D.2.a.(2) (2010) (recognizing an individual's minor or passive role in the crime as a mitigating factor). But there is evidence in the record that D.L.W. helped plan the robbery, possessed the gun, verbally and physically assaulted the patient advocate, used the ATM card immediately after fleeing the scene, and received a large portion of the money. In addition, Dr. Reitman

acknowledged that "[D.L.W.] was part of a gang type criminal encounter" in which he "fully participated."

Finally, D.L.W. argues that the court failed to consider that children are categorically less culpable than adults. But the statute makes clear that the culpability factor relates to the child's participation in the charged crime, not the child's general culpability when compared to adults. *See* Minn. Stat. § 260B.125, subd. 4(2) (requiring consideration of the juvenile's culpability "in committing the alleged offense"). Given D.L.W.'s full participation in the planning and execution of the home-invasion robbery and the absence of mitigating factors, we conclude that the district court did not abuse its discretion by weighing D.L.W.'s culpability in favor of certification.

Prior record of delinquency

D.L.W. does not have an extensive delinquency record and does not challenge the district court's determination that this factor favors EJJ. Rather, D.L.W. argues that the district court did not give this factor enough weight. Because this argument is best characterized as a challenge to the manner in which the district court weighed all six factors, we address it after reviewing the six certification factors.

Programming history

The district court determined that D.L.W.'s programming history favors certification, noting (1) his behavioral problems in school that did not improve despite supportive programming and (2) his remarkably poor behavior at the juvenile detention center (JDC) following his arrest. D.L.W. contends that the court misconstrued his

struggles in school and over-emphasized his initial adjustment problems at the JDC. We are not persuaded.

When examining a child's programming history, a district court may consider the child's experience with supportive programming in school settings. *See N.J.S.*, 753 N.W.2d at 711 (concluding district court did not err in considering child's prior voluntary programming); *St. Louis Cnty. v. S.D.S.*, 610 N.W.2d 644, 646, 649 (Minn. App. 2000) (considering evidence that supportive efforts by child's high school principal, counselors, and teachers were unsuccessful). Although D.L.W. does not have a long history of court-ordered programming, he has demonstrated a pattern of behavioral problems in school since kindergarten, despite receiving continuous educational support services and other programming. According to Orud, "the basic fact was he didn't improve with all the services. Whether they were great services or not, the history didn't show improvement. He also—his behavior in school, the suspensions and expulsion. This is a challenging young person to work with." The district court did not err in considering D.L.W.'s response to many years of programming provided by his schools.

A district court may also consider a child's behavior during detention when evaluating the programming-history certification factor. *See N.J.S.*, 753 N.W.2d at 711 (concluding that the district court did not err by considering the child's detention and civil-commitment records as part of child's programming history). According to JDC staff, D.L.W. "manifested a pattern of disruptive and risky behaviors across different situations" during his placement at the JDC. He made physical and sexual threats toward JDC staff members, failed to comply with staff directions, harassed another resident,

exhibited gang behavior by throwing gang signs to other residents waiting to go to court, and told the bailiffs that he was "going to put a bullet in your head and your dog." As a result, JDC staff placed D.L.W. on a special-management plan on January 19, which required that he be placed in a separate unit from his peers and supervised by two staff members while out of his room. Orud characterized the behavior leading to the special-management plan as unusual because most children are motivated to behave once in JDC. Orud concluded that D.L.W. was "somebody not quite ready to engage in the change process." Probation officer Barber similarly testified that he has "never worked with a client that's been placed on a special behavior management plan."

D.L.W.'s primary argument is that he overcame his initial difficulties in the JDC and has demonstrated his ability to respond to programming. He cites Dr. Reitman's testimony that his second MMPI-A reveals substantial improvement with respect to his amenability to treatment. Orud disagreed, testifying that "even though there's a difference in elevation, the same general pattern is there," and that any change reflects D.L.W. settling down and getting used to the whole situation rather than maturation. And the day after Dr. Reitman performed his evaluation, D.L.W. was placed on a second special-management plan for verbally abusing and threatening staff and encouraging disruption in the unit.[4] Dr. Reitman testified that he was not aware that D.L.W. had been put on a second special-management plan.

[4] Only three days separated D.L.W.'s return to regular programming and his conduct that led to the creation of a second special-management plan.

The district court implicitly found Orud's testimony more credible than Dr. Reitman's, accepting many of Orud's opinions in regard to programming history and stating that "Dr. Reitman's testimony that [D.L.W.] has now recently changed is not sufficient to overcome the clear implications of [his] long term behaviors." It is not this court's function to weigh evidence or second-guess a district court's credibility findings. *See In re Welfare of K.M.*, 544 N.W.2d 781, 785 (Minn. App. 1996) (stating that "[w]here the experts' testimony is at issue, we defer to the juvenile court's credibility determinations").

Based on our careful review of the record, we conclude that the district court did not abuse its discretion by determining that D.L.W.'s programming history favors certification.

Adequacy of punishment and programming in juvenile system

D.L.W. does not contest the district court's determination that "[d]evelopmentally appropriate programming is available in the juvenile services system" and thus that this factor favors maintaining the proceedings in the juvenile system.

Dispositional options available

The district court concluded that this factor favors certification because of "the significant risk of recidivism and the need to supervise [D.L.W.] beyond the age of 21." The district court reasoned that "[c]ertifying [D.L.W.] as an adult will allow the court an appropriate amount of time to supervise and provide [him] with the rehabilitation that he needs," noting that "those who are on supervised probation/parole have a lower likelihood to reoffend than predicted by the VRAG."

D.L.W. argues that the district court erred in finding that there are not consequences, programming, or services still available to him in the juvenile system and that the court's overall findings do not support the conclusion that this factor favors adult certification. We are not persuaded. First, the district court's determination that there is not enough time left in the juvenile system for D.L.W. to complete necessary programming finds support in the law and the evidence. "Insufficient time for rehabilitation under the juvenile system is an appropriate consideration when deciding whether to refer the juvenile to adult court." *In re Welfare of U.S.*, 612 N.W.2d 192, 197 (Minn. App. 2000). And if a juvenile has a substantial need for treatment that would require a longer period of time than available under extended juvenile jurisdiction, certification may be appropriate. *In re Welfare of H.S.H.*, 609 N.W.2d 259, 263 (Minn. App. 2000). Orud's testimony supports the findings that D.L.W. requires more time for supervision and treatment than is available under EJJ supervision. When asked about D.L.W.'s amenability to treatment, Orud stated:

> This is a nearly-18-year-old and when you look at how much time is left under EJJ, if the person needs to spend years getting ready for treatment, they may run out of time under the court's ability, and so you want to make sure there's adequate time for all the interventions.
>
> And the amenability piece is really important. We're going to spend years not getting going. We don't have that many years. So that's why this one favored certification to adult court, because my experience was that this was an individual not ready to participate, and his history showed the same thing.

Barber similarly cited D.L.W.'s failure to cooperate in the structured environment of the JDC when concluding that public safety would not be served by retaining D.L.W. in the juvenile system. And Dr. Reitman testified that the likelihood for general recidivism is lower for individuals who undergo treatment and have supervision.

Second, the expert testimony supports the district court's finding that D.L.W. presents a significant recidivism risk. Risk assessments performed by both experts indicate that D.L.W. presents a moderate to high likelihood of reoffending or being violent in the future, and the VRAG indicates that D.L.W.'s risk of reoffending will increase over time. Dr. Reitman admitted that D.L.W. is a danger to public safety given the offense and his mental-health diagnoses. The record supports the district court's findings that D.L.W. needs supervision and treatment beyond the age of 21 and presents a significant recidivism risk. Accordingly, the district court did not abuse its discretion by weighing this factor in favor of certification.

Weighing of factors

D.L.W. argues that the district court abused its discretion because it did not give enough weight to the third factor—D.L.W.'s prior record of delinquency—and improperly used the six certification factors as a mathematical formula. *In re Welfare of D.M.D.*, 607 N.W.2d 432, 438 (Minn. 2000) (stating that the certification factors "must be applied but are not a rigid, mathematical equation"). While we agree that D.L.W.'s prior record favors EJJ, we discern no abuse of discretion on the part of the district court in concluding that, on balance, the certification factors support certification.

A child's prior record is one of two factors that must receive greater weight, but it is not determinative. *See N.J.S.*, 753 N.W.2d at 706 (affirming adult-certification decision despite no prior record of delinquency). Rather, the district court must weigh it, albeit more heavily than four of the other factors, to determine whether the presumption of certification has been rebutted. Ideally, the district court would expressly weigh the seriousness-of-the-offense and prior-delinquency-record factors together given their similar weight. But there is no indication that the district court failed to properly weigh D.L.W.'s delinquency record and the other certification factors. And the record, including Dr. Reitman's testimony, supports the district court's conclusion that despite D.L.W.'s limited history of adjudicated delinquency, public safety is not served by retaining D.L.W. in the juvenile system.

This is not a case involving a child with no prior record. D.L.W. has had repeated contact with law enforcement since 2007 and has been on probation twice for misdemeanor adjudications for obstruction of legal process and disorderly conduct. Moreover, the other factor that is to be given greater weight, the seriousness of the offense, weighs heavily in favor of certification. The charged offenses are extremely serious; D.L.W. targeted a residence for vulnerable adults, inflicted physical and emotional injuries on the victims, endangered the surrounding community, and used a firearm. And as noted above, the record supports the district court's determination that three of the other certification factors—D.L.W.'s culpability, programming history, and dispositional options—all favor certification. Under the circumstances of this

presumptive-certification case, the district court did not abuse its discretion by concluding that retaining the proceeding in juvenile court does not serve public safety.

Affirmed.