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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0314**

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

**Filed August 19, 2013
Affirmed
Ross, Judge**

Hennepin County District Court
File No. 27-JV-12-10836

Susan J. Andrews, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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Considered and decided by Johnson, Chief Judge; Ross, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

ROSS, Judge

The district court certified this case for prosecution of sixteen-year-old J.M.B. as an adult for aiding and abetting second-degree intentional murder. J.M.B. had allegedly led two other boys in punching, dragging, and kicking K.D.S., and then repeatedly jumping onto his crumpled body from a seven-foot wall. Because of J.M.B.'s age and the offense, he met the criteria for presumptive adult certification. The district court found

that J.M.B. did not rebut this presumption. J.M.B. appeals the district court's order certifying the case for adult prosecution, arguing that he did rebut the presumption. Because the district court considered the relevant factors and did not abuse its discretion by certifying the case for adult certification, we affirm.

FACTS

In November 2012, sixteen-year-old J.M.B. and at least two others attacked K.D.S. in the basement of his home. J.M.B. started the beating by "sucker punching" K.D.S. J.M.B. and the others dragged K.D.S. up the stairs, kicking and hitting him on the way. They pulled him outside and continued to beat him. They continued until K.D.S. lay on the ground badly wounded, just beside a seven-foot retaining wall. That's when J.M.B. leapt from atop the wall down onto K.D.S.'s body below. J.M.B. did this three or four times, screaming "I'm a killer!" on the way down.

Police officers arrived and found K.D.S. lying in the alley. He was bleeding from his head, not breathing, and he had no pulse. Paramedics arrived and determined that K.D.S. was dead. The autopsy revealed that he died from traumatic injuries, including 14 broken ribs, a nearly severed liver, bleeding from his lungs, and multiple contusions, abrasions, and lacerations.

J.M.B. was arrested two weeks later and admitted to participating in the assault. But he denied intending to kill K.D.S. The state charged J.M.B. in Hennepin County Juvenile Court with aiding and abetting second-degree intentional murder, and it also moved for adult certification. Relying on the statutory presumption to certify along with a certification study by probation officer Timothy Turrentine and a psychological

evaluation of J.M.B. by psychologist Patricia Orud, who perceived J.M.B. to be at a “high risk for continued violence without significant long term in-depth interventions and external behavior controls,” the district court issued an order certifying the case for prosecution of J.M.B. as an adult. It found that all the public-safety factors favor certification. J.M.B. appeals.

D E C I S I O N

J.M.B. asks us to reverse the adult certification order. We do not reverse certification orders unless the district court’s findings are “clearly erroneous so as to constitute an abuse of discretion.” *In re Welfare of H.S.H.*, 609 N.W.2d 259, 261 (Minn. App. 2000) (quotation omitted). We give the district court a wide lane in which to make its decision. *Id.* Children accused of criminal conduct are generally to be tried in the juvenile system. Minn. Stat. § 260B.101, subd. 1 (2012). But when a child is, like J.M.B., sixteen or older and charged with a crime carrying a presumptive prison sentence, certification for adult prosecution is presumed. Minn. Stat. § 260B.125, subd. 3 (2012); Minn. R. Juv. Delinq. P. 18.06, subd. 1.

The adult-certification presumption is rebutted only if the child demonstrates by clear and convincing evidence that “retaining the proceeding in the juvenile system serves public safety.” Minn. Stat. § 260B.125, subd. 3. Once the court determines that probable cause supports the charge, as it did here, it considers evidence bearing on the following six public-safety factors to determine whether the child has met that burden:

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

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

(2) the culpability of the child in committing the alleged offense, including the level of the child's participation in planning and carrying out the offense and the existence of any mitigating factors recognized by the Sentencing Guidelines;

(3) the child's prior record of delinquency;

(4) the child's programming history, including the child's past willingness to participate meaningfully in available programming;

(5) the adequacy of the punishment or programming available in the juvenile justice system; and

(6) the dispositional options available for the child.

Minn. Stat. § 260B.125, subd. 4; Minn. R. Juv. Delinq. P. 18.06, subd. 3. More weight is given to the seriousness of the offense and the child's prior record of delinquency than the other factors. Minn. Stat. § 260B.125, subd. 4; *see also In re Welfare of P.C.T.*, 823 N.W.2d 676, 684 (Minn. App. 2012).

The district court found that all six factors weigh in favor of certification. Our review leads us to agree.

Seriousness of the Offense

J.M.B.'s crime is plainly serious. The district court considers the seriousness of the alleged offense in terms of community protection. Minn. Stat. § 260B.125, subd. 4(1). The presence of aggravating factors makes a defendant's conduct "significantly more . . . serious than that typically involved in the commission of the crime in question." *State v. Cox*, 343 N.W.2d 641, 643 (Minn. 1984). The district court found two aggravating

factors present: that J.M.B. committed the crime with a group of three or more persons and that he perpetrated it with particular cruelty. J.M.B. disputes this finding.

J.M.B. contends that because he was charged with aiding and abetting second-degree intentional murder, a crime that already includes acting with others, committing the crime with three or more persons cannot constitute an aggravating factor. But *State v. Losh* teaches that participation of three or more individuals can be an aggravating factor in a murder by a defendant convicted as an aider or abettor. 721 N.W.2d 886, 896 (Minn. 2006).

We also reject J.M.B.'s next argument, which is that the "particularly cruel" manner in which he committed the crime cannot be an aggravating factor. It is true that intent to kill is an element of the crime charged, but the alleged, barbaric manner of the killing is not. A district court can depart from a presumptive sentence for particular cruelty when the cruelty is "of a kind not usually associated with the commission of the offense." *State v. Rourke*, 773 N.W.2d 913, 922 (Minn. 2009) (quotation omitted). J.M.B. stomped a helpless man to death, allegedly. He allegedly cheered gleefully as he crushed the man in repeated seven-foot drops onto his defenseless body. He and his fellows used their fists and feet and body weight with such force that their victim suffered the kind of fatal injuries that are more commonly associated with being hit by a truck. The district court's decision that these acts are particularly cruel and weigh in favor of certification is well within its discretion.

Child's Culpability

The second factor concerns the child's culpability for the crime. The district court must also consider the existence of any mitigating factors. Minn. Stat. § 260B.125, subd. 4(2). When the juvenile is a "primary participant," culpability may weigh in favor of certification. *See St. Louis Cnty. v. S.D.S.*, 610 N.W.2d 644, 648 (Minn. App. 2000). J.M.B. initiated the attack and fully participated. His culpability is obvious. We are not persuaded otherwise by *Miller v. Alabama*, a recent Supreme Court decision that holds that children are constitutionally different from adults for purposes of sentencing. 132 S. Ct. 2455, 2466 (2012). We believe that J.M.B. relies prematurely on *Miller* because *Miller* bears on sentencing, not charging.

The district court considered J.M.B.'s childhood, observing that "[i]t is an understatement to note that J.M.B. has had a difficult upbringing." But the district court was persuaded that this was no mitigating factor by the fact that J.M.B. had an average IQ despite evidence of mental-health issues. The analysis is sufficient in favor of certification as an adult.

Prior Record of Delinquency

The third factor concerns a juvenile record of delinquency before the alleged crime and invites the district court to evaluate whether the defendant's prior record shows "deeply ingrained, escalating behavior that presents a threat to the public." *H.S.H.*, 609 N.W.2d at 263. J.M.B. argues that despite his record of delinquency, the district court did not properly consider the "chaotic world [he] was trying to survive in." But the district court accounted for J.M.B.'s challenging childhood, and at only sixteen, J.M.B.

has been adjudicated delinquent of felony second-degree aggravated robbery, gross-misdemeanor fourth-degree assault on a peace officer, misdemeanor fifth-degree assault, and misdemeanor disorderly conduct. The district court's finding that this factor favors certification was not an abuse of discretion.

Programming History and Amenability to Programming

The fourth factor is the child's "programming history, including the child's past willingness to participate meaningfully in available programming." Minn. Stat. § 260B.125, subd. 4(4); Minn. R. Juv. Delinq. P. 18.06, subd. 3(D). J.M.B. argues that the district court erred in weighing this factor because the psychologist believed that J.M.B. could progress in future programming. But this factor focuses primarily on his programming *history*, and the district court did not err by considering J.M.B.'s delinquent past with his programming and treatment.

The district court detailed J.M.B.'s long history of programming with only a "varied willingness to participate meaningfully." The district court noted that J.M.B. has "displayed aggressive, violent, and gang-related behaviors since 2010" and "frequently absented school." It noted a series of troubling experiences with programming, such as threatening treatment staff with gang references, only superficially internalizing treatment, failing to complete treatment requirements, and continuing to "view[] the gang as a positive influence in his life." Although *future* treatment might help, the burden is on J.M.B. to prove with clear and convincing evidence that his history with programming and amenability to programming weigh against his certification. The district court found

that he failed to meet that burden and its finding does not constitute an abuse of discretion.

Adequacy of the Punishment or Programming Available and Dispositional Options

The fifth factor involves “the adequacy of the punishment or programming available in the juvenile justice system.” Minn. Stat. § 260B.125, subd. 4(5). The amount of time a juvenile will spend in programming is an appropriate consideration regarding whether the juvenile system will allow sufficient time for rehabilitation. *In re Welfare of U.S.*, 612 N.W2d 192, 197 (Minn. App. 2000). And the sixth factor requires the court to consider “the dispositional options available for the child.” Minn. Stat. § 260B.125, subd. 4(6). J.M.B. argues that the district court abused its discretion on these two factors because it determined that the only viable option was adult prison. He contends that he presented evidence that “MCF-Red Wing is a secure dispositional option that both serves public safety and offers age appropriate programming” and that a stayed guidelines sentence would compel his rehabilitation because his probation could be revoked if he does not succeed.

But the district court was not persuaded that the 4.5 years before J.M.B. turns 21 would be enough time to make the necessary changes, especially considering that he “is not amenable to juvenile probation.” It found that J.M.B. is at a high risk to reoffend and needs “long term in-depth interventions.” The record provides substantial evidence supporting these determinations and the district court’s overall finding that J.M.B. failed to overcome the presumption of certification.

Affirmed.