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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0018**

In the Matter of the Welfare of: W. P. B., Child.

**Filed July 20, 2020
Affirmed
Bjorkman, Judge**

Crow Wing County District Court
File No. 18-JV-19-381

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant W.P.B.)

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Donald F. Ryan, Crow Wing County Attorney, Anne Soberg, Assistant County Attorney, Brainerd, Minnesota (for respondent state)

Considered and decided by Bratvold, Presiding Judge; Segal, Chief 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 to stand trial as an adult for sexual conduct he committed between the ages of 14 and 18. Because the district court did not abuse its discretion by determining that clear and convincing evidence supports certification, we affirm.

FACTS

In August 2018, the female victim first reported that her older cousin, appellant W.P.B., sexually abused her about ten times between August 2012 and October 2016, beginning when she was just six years old. At the time of the offenses, W.P.B. was between the ages of 14 and 18. On February 1, 2019, the state filed a juvenile delinquency petition alleging that W.P.B. committed first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2016). The state also moved to certify W.P.B.—who was then 20 years old—for adult prosecution under Minn. Stat. § 260B.125, subs. 1, 2 (2018). Following a February 22 hearing, the district court ordered a certification study.

Court-appointed psychologist Frank Weber interviewed W.P.B., and conducted a psychosexual evaluation and other testing. W.P.B. underwent: (1) the Minnesota Multiphasic Personality Inventory-2 (MMPI-2), which yielded no diagnoses because the nature of his answers suggested he did not respond honestly but followed a pattern; (2) the Millon Clinical Multiaxial Inventory-III (MCMI-III), which indicated depressive and dependent personality characteristics, anxiety, somatoform disorder, dysthymic disorder, and posttraumatic stress disorder; and (3) the Hamilton Depression Inventory (HDI), which indicated no clinical level of depression, but “excessive feelings of guilt and psychological anxiety.” Weber also administered three risk-assessment tools designed to predict adult sex-offender recidivism; W.P.B. scored “above average,” “moderate,” and “high.” Weber diagnosed W.P.B. with paraphilic disorder, major depressive disorder, trauma- and stressor-related disorder, and attention-deficit hyperactivity disorder, and opined that W.P.B. needs sex-offender treatment. Weber considered the six public-safety factors

contained in the certification statute, and issued a report recommending W.P.B. be certified as an adult.

Probation officer Ashley Abear also evaluated W.P.B. She reviewed Weber's report and W.P.B.'s criminal history, which includes delinquency adjudications for: petty misdemeanor theft in 2010; and petty misdemeanor disorderly conduct, misdemeanor disorderly conduct, misdemeanor damage to property, and gross misdemeanor theft by false representation in 2011. Abear's certification report also covers W.P.B.'s family situation, placement and programming history, education and employment, and other aspects of his life. The report notes that the victim has had "a lot of trauma," has difficulty "emotionally and interacting with other people," exhibits irrational behavior, "often feels anxious and sucks her thumb," and, until early 2019, experienced bed-wetting. Based on her review of the six public-safety factors, Abear recommended that W.P.B. be certified as an adult.

The certification hearing took place on October 14, 2019. The district court heard testimony from Weber and his assistant,¹ Abear, and Marie Grace, a sex-offender therapist W.P.B. retained. Weber and Abear testified in accordance with their reports. Grace challenged the psychosexual evaluation, questioning (1) the predictive accuracy of the recidivism assessment tools because they were not normed to juvenile populations, (2) whether the questionnaires were peer reviewed or "empirically based," and (3) the efficacy of the treatment recommendations because they are vague and outdated.

¹ Tiffany Madson is a sex-offender treatment counselor who conducted some of W.P.B.'s psychological assessments and helped Weber prepare the certification report.

The district court issued an order certifying W.P.B. for adult prosecution. The court found that four of the six public-safety factors favor certification: the seriousness of the alleged offense, W.P.B.'s culpability, the adequacy of punishment or programming, and dispositional options. The district court found the remaining two factors, W.P.B.'s prior delinquency record and programming history, were neutral. W.P.B. challenges the certification decision.

D E C I S I O N

When a child age 14 or older “is alleged to have committed . . . an offense that would be a felony if committed by an adult, the juvenile court may enter an order certifying the proceeding for action under the laws and court procedures controlling adult criminal violations.” Minn. Stat. § 260B.125, subd. 1. To determine whether public safety is served by certifying a child for adult prosecution, the district court must consider:

- (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 (2018); *see* Minn. R. Juv. Delinq. 18.06, subd. 3. In considering these factors, courts must “give greater weight to the seriousness of the alleged

offense and the child’s prior record of delinquency.” Minn. Stat. § 260B.125, subd. 4; *see* Minn. R. Juv. Delinq. 18.06, subd. 3.

These statutory factors are designed to “assess whether a juvenile presents a risk to public safety and . . . to predict whether a juvenile is likely to offend in the future.” *In re H.S.H.*, 609 N.W.2d 259, 262 (Minn. App. 2000). The state must prove “by clear and convincing evidence that retaining the proceeding in juvenile court does not serve public safety.” Minn. Stat. § 260B.125, subd. 2(6)(ii); *see* Minn. R. Juv. Delinq. P. 18.06, subd. 2. “For purposes of certification, the juvenile is presumed guilty of the alleged offenses.” *In re Welfare of U.S.*, 612 N.W.2d 192, 195 (Minn. App. 2000).

We review a district court’s certification decision for abuse of discretion. *In re Welfare of J.H.*, 844 N.W.2d 28, 34 (Minn. 2014). We consider legal questions de novo and review findings of fact for clear error. *Id.* at 34-35. A district court’s “finding is clearly erroneous only if there is no reasonable evidence to support the finding or when an appellate court is left with the definite and firm conviction that a mistake occurred.” *Id.* at 35 (quotation omitted).

W.P.B. argues that the district court misapplied the law, basing its certification decision on the fact he was 21 years old at the time of the certification hearing rather than the statutory public-safety factors. And he contends the state did not prove that public safety requires certification. These arguments are unavailing. The district court considered and made findings on all six certification factors before concluding adult certification is warranted. We now turn to the district court’s findings and the evidence.

A. Severity of the Offense

The district court noted that first-degree criminal sexual conduct is a very serious offense that carries a presumptive sentence of 144 months. The district court also cited two aggravating sentencing factors that Abear identified—the victim’s young age and the four-year duration of the abuse. And the court referenced the significant trauma W.P.B.’s abuse caused to the victim. W.P.B.’s argument that his “youthful offense should not be punished as if he offended as an adult” rings hollow since his abusive conduct continued into his adulthood. The record supports the district court’s finding that this factor weighs in favor of certification.

B. W.P.B.’s Culpability

The district court found that W.P.B. alone committed the offense over the course of four years while threatening to harm the victim if she told anyone about the abuse. The court noted that W.P.B. had a difficult childhood² and was only 14 years old when he began abusing the victim. But the court found these facts did not mitigate W.P.B.’s culpability, specifically noting that nothing in the psychosexual assessment “indicates that [W.P.B.] has any sort of mental impairment result[ing] from these difficulties that would have reduced his culpability for the crime.” W.P.B. asserts that courts must consider the “characteristics of youth,” which, according to caselaw, includes “a lack of maturity and an underdeveloped sense of responsibility.” *See Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 1195 (2005) (quotation omitted). The district court did so. We discern

² The certification study reveals that W.P.B. was sexually abused by an uncle.

no clear error by the district court in determining that W.P.B.'s culpability favors certification.

C. W.P.B.'s Prior Record of Delinquency

The district court considered two prior “instances of delinquency”: the 2011 incident involving misdemeanor disorderly conduct and misdemeanor criminal damage to property, and a separate 2011 gross misdemeanor theft by false representation. Because W.P.B.'s prior conduct was not as serious as the current offense and did not “mirror [its] sexual and harmful nature,” the district court concluded that W.P.B.'s history of delinquency “does not weigh meaningfully for or against certification.” The record supports this determination.

D. W.P.B.'s Programming History

The district court found that W.P.B. has not received juvenile programming relevant to the current offense, but stated that his history shows “significant issues with authority” and that he “creates issues when subject to restrictive rules of any variety.” The district court noted W.P.B.'s failure to take some of his psychological testing seriously,³ as well as his repeated probation violations, failure to finish high school, and overall “problems with authority,” concluding these facts show “a need [for] significant intervention that the juvenile system may not be able to provide.” The district court's finding that this factor “does not weigh significantly for or against certification” is supported by the record.

³ According to Weber's report, W.P.B. was only “marginally cooperative throughout his interview” and “appeared to shut down when asked to discuss his offending behaviors.”

E. and F. Adequacy of Punishment and Availability of Programming

The district court considered the fifth and sixth public-safety factors together, as courts often do. *See, e.g., In re Welfare of S.J.T.*, 736 N.W.2d 341, 354 (Minn. App. 2007) (considering programming, punishment, and dispositional options together), *review denied* (Minn. Oct. 24, 2007). The court found that both factors favor certification because W.P.B. needs programming, including sex-offender treatment, that is no longer available in the juvenile system because he had reached the age of 21. The district court also noted that there were no “favorable dispositional paths left for [W.P.B.] in the juvenile systems.” The court noted the similarity of this case to *S.J.T.*, in which we affirmed adult certification on a charge of first-degree criminal sexual conduct because the juvenile needed extended rehabilitative therapy and had less than two years to receive it in the juvenile system. *Id.* We concluded that this factor favored certification because the juvenile “system was inadequate for treating or punishing” the child. *Id.* Here, the district court found that testimony at the hearing clarified that W.P.B. “requires some sort of intervention for there to be any chance of rehabilitation” and that his recalcitrance to date in participating in assessments is “indicative of a long road to accepting responsibility for his actions and being able to deal with them in any sort of constructive fashion.” *See U.S.*, 612 N.W.2d at 197 (stating that “[i]nsufficient time for rehabilitation under the juvenile system is an appropriate consideration . . .”).⁴

⁴ W.P.B. does not allege that the lack of juvenile options is due to any delay on the part of the prosecutor in seeking certification. And he does not argue that certification is inappropriate under Minn. Stat. § 260B.125, subd. 6 (2018) (stating that the district court

W.P.B. first argues that Weber’s opinions and recommendations do not support the district court’s findings. He asserts that “[b]ecause Weber did not properly assess [him] and had no specific treatment plan and no prediction as to future risk to public safety, Weber had no real basis upon which to recommend any particular type or length of treatment.” We are not persuaded. The district court was presented with Weber’s qualifications, the content of his interviews with W.P.B., and the factual bases for his professional opinions and recommendations. The district court credited his testimony over that of W.P.B.’s expert. Such weighing of evidence and credibility determinations rest entirely with the district court in a certification case. *See St. Louis County v. S.D.S.*, 610 N.W.2d 644, 650 (Minn. App. 2000) (“Ordinarily, where expert testimony conflicts, this court will defer to the [district] court’s credibility determination.”); *In re Welfare of K.M.*, 544 N.W.2d 781, 785 (Minn. App. 1996) (“Where the experts’ testimony is at issue, we defer to the juvenile court’s credibility determinations.”).

W.P.B. next asserts that the district court’s certification decision did not turn on his risk to public safety but on the fact that he “had turned 21.” He contends that the state should have been required to present “uncontradicted facts that [he] will re-offend if he is no longer under delinquency jurisdiction,” citing *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011). *Palmer* has no relevance here—it is a first-degree murder appeal that addresses the standard of proof for circumstantial evidence of premeditation. 803 N.W.2d at 733. Nor are we persuaded that “lack of time for treatment should only result in

may not certify if adult demonstrates the state delayed prosecution to create an unfair advantage).

certification in a nonpresumptive proceeding if the state has proved uncontradicted facts that the juvenile will re-offend if he is no longer under delinquency jurisdiction.” The availability of programming in the juvenile system is only one of the six public-safety factors. And the law requires the state to produce clear and convincing evidence, not “uncontradicted” facts. Minn. Stat. § 260B.125, subd. 2(6)(ii); Minn. R. Juv. Delinq. P. 18.06, subd. 2. We decline W.P.B.’s invitation to require a heightened standard of proof based on the unique facts of this case.⁵

Based on our review of the record, we discern no clear error in the district court’s findings that four out of the six public-safety factors favor certification. It is undisputed that W.P.B. has significant mental-health issues and needs sex-offender treatment. The court carefully considered the state’s evidence, including testimony offered by the court-appointed psychologist and the probation officer, in finding that retaining this case in juvenile court will not serve public safety. And we see no error in the court’s assessment that the state’s evidence is clear and convincing. In sum, we conclude that the district court did not abuse its discretion by certifying W.P.B. for adult prosecution.

Affirmed.

⁵ W.P.B.’s reference to “uncontradicted facts” comes from a civil employment case that defines clear and convincing evidence as “unequivocal and uncontradicted, and intrinsically probable and credible.” *Deli v. Univ. of Minn.*, 511 N.W.2d 46, 52 (Minn. App. 1994), *review denied* (Minn. Mar. 23, 1994). W.P.B. appears to use the word to suggest the near certainty required under the criminal beyond-a-reasonable-doubt standard, which does not apply here.