

IN THE COURT OF APPEALS OF IOWA

No. 3-059 / 92-76

FILED

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CLERK SUPREME COURT

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STATE OF IOWA,

Appellee,

vs.

ERIC WILLIAM QUERREY,

Appellant.

Appeal from the Iowa District Court for Lucas County,
James W. Brown and William H. Joy, Judges.

The defendant appeals his conviction claiming the
juvenile court abused its discretion in waiving its
jurisdiction over the defendant. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and B. John
Burns, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Thomas S. Tauber,
Assistant Attorney General, and Paul Goldsmith, County
Attorney, for appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

HABHAB, J. 000860

Defendant, Eric Querrey, appeals his conviction of murder in the first degree. Querrey claims the district court: 1) abused its discretion in waiving juvenile court jurisdiction over Querrey; 2) abused its discretion in excluding the testimony of Reverend Lutz; and 3) abused its discretion in sentencing. Querrey also claims his trial counsel was ineffective in failing to object to biographical information of the victim. We affirm.

Sixteen-year-old Stacey Halferty¹ died at the Querrey household as a result of two shotgun blasts fired one to two feet away, one striking her in the back and the other in the head. Stacey was wearing a school jacket with Mormon Trail Softball lettered on the back. She was fatally shot with a 20-gauge shotgun approximately four inches above her waistline and immediately below the letter "T" in Softball inscribed on the back of her letter jacket. Additionally, after Stacey was on the floor, she was again shot with a 20-gauge shotgun into the back of her head. According to Division of Criminal Investigation Agent David Button, both shotgun wounds were inflicted from

1. The victim was sixteen-year-old Stacey Lynn Halferty, a friend of the Querrey family who also lived in Derby. Stacey was described as a friendly, well-liked girl who had no bad habits. She was an eleventh-grade student in the Mormon Trail Community School System. According to Sheriff Lowe, results of Stacey's autopsy shows no sign of a struggle prior to her being shot to death.

identical ammunition. Also, both wounds were reportedly inflicted from a distance of less than eighteen inches.

The Querreys' fifteen-year-old son was home alone and gave varied accounts of the crime. Originally he stated Stacey came by looking for his sister but that he told her she was not home and returned to his bedroom. A short time later he heard one or two shots and found Stacey shot and an unknown man in his kitchen with a gun. Eric said the man escaped on foot and described his path. In a later version of events, Eric admitted he shot Stacey. He said he heard a skirmish in the kitchen, grabbed his shotgun, and found an armed man holding Stacey around the neck. He said he attempted to shoot the man from a distance of six to ten feet but hit Stacey. Although it had been raining and was muddy outside, no evidence of the unidentified man could be found.

Although Eric had never had problems with the juvenile justice system, the district court waived juvenile court jurisdiction because of the nature of the crime and because it concluded the prospects of rehabilitation in the juvenile system were not good.

A jury found Querrey guilty of first-degree murder and sentenced him to life imprisonment. Querrey appeals.

1. Waiver of Juvenile Court Jurisdiction.

Querrey contends the district court erred in waiving juvenile court jurisdiction because the prospects for

rehabilitation in the juvenile system were superior to those in the adult system.

Iowa Code section 232.45 vests discretion in the juvenile court when ruling on a waiver application. State v. Bickell, 493 N.W.2d 100, 102 (Iowa App. 1992); Iowa Code § 232.45(6) (1991). Our standard of review is de novo only to the extent of examining all the evidence to determine whether the juvenile court abused its discretion in ordering waiver of jurisdiction. State v. Greiman, 344 N.W.2d 249, 251 (Iowa 1984).

A juvenile court may waive its jurisdiction if all of the following apply:

a. The child is fourteen years of age or older.

b. The court determines, or has previously determined in a detention hearing under section 232.44, that there is probable cause to believe that the child has committed a delinquent act which would constitute the public offense.

c. The court determines that the state has established that there are not reasonable prospects for rehabilitating the child if the juvenile court retains jurisdiction over the child and the child is adjudicated to have committed the delinquent act, and that waiver of the court's jurisdiction over the child for the alleged commission of the public offense would be in the best interests of the child and the community.

Iowa Code § 232.45(6) (1991).

Querrey admitted (a) and (b) of Iowa Code section 232.45(6) have been met. Querrey challenges the third criteria for waiving jurisdiction under this section.

Iowa Code section 232.45(7) provides:

7. In making the determination required by subsection 6, paragraph "c", the factors which the

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court shall consider include but are not limited to the following:

a. The nature of the alleged delinquent act and the circumstances under which it was committed.

b. The nature and extent of the child's prior contacts with juvenile authorities, including past efforts of such authorities to treat and rehabilitate the child and the response to such efforts.

c. The programs, facilities and personnel available to the juvenile court for rehabilitation and treatment of the child, and the programs, facilities and personnel which would be available to the court that would have jurisdiction in the event the juvenile court waives its jurisdiction so that the child can be prosecuted as an adult.

Iowa Code § 232.45(7) (1991).

At the waiver hearing the juvenile court found that in the juvenile court system, Querrey would most likely be placed at the Iowa Training School at Eldora until he reached eighteen. A broad range of rehabilitative counseling, therapy, and other services would be available, but those services and all jurisdiction over Querrey would terminate completely at age eighteen. Iowa Code § 232.53(2) (1991). (Although not particularly germane to the disposition of this issue, according to our computations, Querrey would be released from the jurisdiction of the juvenile court within six or seven months from the date this ruling takes effect.)

If Querrey were placed in the adult system, all of the Eldora services and facilities would also be available. There are presently two juveniles convicted of murder as adults in residence; there are none there who have been convicted of that charge in the juvenile justice system.

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In addition, a full range of rehabilitative services would be available through the adult corrections system after age eighteen. Also, certain out-of-state facilities may be utilized between the ages of eighteen and twenty-one.

Since equal services are available in either system, the juvenile court considered whether the time available in the juvenile system was sufficient to effectively rehabilitate Querrey. J. David Hook, an experienced chief juvenile probation officer, felt strongly the remaining time was not adequate.

Contrary testimony was received from John Garfield, a psychologist. Garfield visited with Querrey on four occasions and interviewed him for no more than six hours. Garfield's conclusion that Querrey was rehabilitable was based on the fact that Dr. Garfield found that Querrey did not fit the mold of the conventional stereotype of a child who typically runs afoul of the system and because of his MMPI test. But the juvenile court, as we do, had a problem with Garfield's analysis because Dr. Garfield also stated,

If I had seen Eric Querrey on the first of April [before the murder], administered the same tests, conducted the same interviews, I would have predicted that he was at low risk for the commission of a violent act. That is true. Frankly, I would make the same prediction today. I mean, based on the psychological analysis.

We interpret this to mean that if Dr. Garfield had administered the tests relied on in reaching his conclusions a day or so before the murder, he would

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conclude that the defendant was low risk for the commission of the brutal murder of this young lady.

The juvenile court agreed with Mr. Hook's assessment of the reasonable prospects of rehabilitation. Mr. Hook admittedly spent a limited amount of time with Querrey. However, he testified in investigating his report on the motion to waive jurisdiction,² in addition to interviewing Querrey he interviewed the investigators involved in the case, the parents, the school personnel, and all other individuals or parties that had pertinent information.

2. The following appears in the report on motion to waive jurisdiction, which is part of the record:

Enclosed are copies of interviews with friends and teachers of Eric. Included therein are statements describing their perception of Eric. In general, he seems quiet, immature, and somewhat nervous. Although the parents report that his behavior is normal and satisfactory at home, some teachers report that he is flighty and hard to handle at school. Please refer to the investigation interviews and to the school material enclosed herein.

* * *

Eric is currently in the 9th grade at Mormon Trail Community School. Enclosed herein are reports showing Eric's scholastic achievement and showing his ability, attitude and performance as provided by his individual teachers. Last semester, Eric received 2 F's, 1 D-, 2 D's, 1 C+, and a satisfactory in physical education. In general, the reports show that he lacks effective motivation, lack of serious approach and inadequate preparation, and lacks attention of participation. In general, his overall evaluation was unsatisfactory. It appears that Eric was absent 6.5 days during the first three quarters of the current academic school year. Again, this officer would refer the reader to the enclosed investigation interviews with some of Eric's teachers.

Child Psychiatrist David Windsor stated that he would tend to concur with Hook's recommendation that the juvenile court should waive its jurisdiction.

The juvenile court found waiver of jurisdiction would be in the best interest of Querrey and the community. There is strong, persuasive evidence that the "programs, facilities, and personnel" available to the juvenile court could not rehabilitate Querrey within the time available. In addition, the "senseless and heinous" nature of the offense strongly supports this conclusion. On this record, the juvenile court could reasonably have found that the State had established that there were not reasonable prospects for rehabilitating Querrey in the juvenile court.

We hold the waiver of jurisdiction by the juvenile court is supported by the record. The juvenile court did not abuse its discretion in waiving its jurisdiction and ordering Querrey's transfer to district court for prosecution as an adult. It cannot go unnoticed that at the waiver hearing it was clear this was not an accidental killing. We affirm the district court on this issue.

II. Exclusion of Reverend Lutz's Testimony.

Querrey next claims the district court abused its discretion in excluding the testimony of Reverend Lutz. Querrey proffered Reverend Lutz's testimony that two years before her death, Stacey had told Lutz that her father sexually abused her and threatened to kill her if she ever

refused him. Querrey argues this testimony is relevant because it shows a motive for someone to kill Stacey. Although Querrey admits that it was not Stacey's father who tried to kidnap her, he claims that the person who did may have been hired or otherwise procured by Stacey's father to commit the crime.

The State objected to the proposed testimony on grounds that it was hearsay, that it was not relevant, and that its potential for prejudicial effect outweighed any probative value it might have. Querrey argued that it was admissible under Iowa Rules of Evidence 804(b)(5), one of the residual exceptions to the hearsay rule. The trial court held the testimony inadmissible and therefore excluded the testimony.

We find the district court did not abuse its discretion in refusing to admit Reverend Lutz's testimony under rule 804(b)(5). The pertinent part of rule 804(b)(5) states:

(5) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Iowa R. Evid. 804(b)(5).

The residual hearsay exception is intended to be used very rarely, and only in exceptional circumstances. State

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v. Brown, 341 N.W.2d 10, 14 (Iowa 1983). We do not find this to be such a circumstance. We find Stacey's statement lacks circumstantial guarantees of trustworthiness. Stacey's alleged statements were not made under oath; we know little of Stacey's propensity to tell the truth; we know nothing of her motivations; and there was no other evidence to corroborate her statements to Reverend Lutz.

We also find Stacey's statement was not offered as evidence of a material fact. "Evidence tending to incriminate another must be confined to substantive facts and create more than a mere suspicion that such other person committed the offense." State v. Harrington, 349 N.W.2d 758, 761 (Iowa 1984) (citing State v. Stump, 119 N.W.2d 210, 214 (Iowa 1963)). The alleged threats of Stacey's father were so remote in time and their connection to the murder was so tenuous, we cannot say that the evidence created anything more than a "mere suspicion" that Stacey's father arranged for someone to kill Stacey.

In his appeal brief, Querrey argues Stacey's alleged statements are admissible under Rule 803(2), the "excited utterance" exception. Error was not preserved by Querrey on the rule 803(2) exception. Bratton v. Bond, 408 N.W.2d 39, 44 (Iowa 1987). Therefore, we will not consider it now.

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III. Introduction of Biographical Information.

Querrey's next claim is that he was denied effective assistance of counsel by his counsel's failure to object to testimony about Stacey's character and the effect of her death on her family.

Querrey points to the following testimony of Stacey's mother:

PROSECUTOR: Mrs. Halferty, if you could describe your daughter Stacey for the jury. A. She was quiet, loving, smart. I mean, she did well in school.

...

Q: If you could tell us what type of activities your daughter was involved in in high school. A. She was in, umm, softball, umm, girls basketball manager, boys basketball manager, cheerleading, drama, speech, umm, F.H.A., track, umm. She was also involved in, umm, 4-H. She was on the youth council at 4-H.

...

Q. Mrs. Halferty, I am handing you what's been marked as State's Exhibit 14. Could you identify that, please. A. That's Stacey. It's a picture of Stacey at her 16th birthday.

Q: Is that approximately the way that she looked on April 13th of 1991, as far as her build? A. Yeah, pretty close.

Querrey also points to the following testimony of Stacey's father:

Q. When you were in Osceola and first heard of Stacey's death, how did you feel? A. Like the world had dropped on top of me. I couldn't believe it. I got real angry.

Querrey now claims his counsel's failure to object to this testimony constituted ineffective assistance of counsel.

Our ultimate concern in claims of ineffective assistance is with the "fundamental fairness of the

proceeding whose result is being challenged.'" State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (quoting Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. Risdal, 404 N.W.2d at 131. The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. Id. at 131-32.

Biographical information concerning the victim of a crime should be received sparingly unless the victim's character is relevant to a particular issue in dispute. State v. Broughton, 450 N.W.2d 874, 877 (Iowa 1990). We find Querrey has failed to show he was prejudiced by this "rather innocuous biographical information." See Broughton 450 N.W.2d at 876. We therefore deny Querrey's ineffective assistance of counsel claim.

IV. Querrey's Sentence of Life Imprisonment.

Querrey's final claim is that the district court abused its discretion in sentencing Querrey to life imprisonment. We find no merit in this argument.

The sentence the trial court gave was within the statutory limits. Iowa Code § 902.1 (1991). While it may be argued the court may defer judgment under Iowa Code section 232.8(3) (1991), it is not required to. See State

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v. Greiman, 344 N.W.2d 249, 253 (Iowa 1984). The court found Querrey needed correctional assistance which could most effectively be provided in confinement. The court decided probation was unjustified given the seriousness of the offense and the need to protect the public. The court also noted that probation could only continue for five years, while there was no evidence how long it would take to rehabilitate Querrey.

We therefore find the trial court did not abuse its discretion in sentencing Querrey to life imprisonment.

AFFIRMED.

Schlegel, J., concurs; Sackett, J., specially concurs.

SACKETT, J. (specially concurring)

I specially concur

Eric William Querrey was twenty-six days beyond his fifteenth birthday when he allegedly shot and killed a sixteen-year-old friend, Stacey Halferty. He was charged and convicted of first-degree murder. The majority has affirmed orders transferring him from juvenile court to adult court. They have also affirmed his conviction of first-degree murder as well as affirming his sentence, the most severe sentence the Iowa courts can give, "life in prison without the possibility of parole."

Eric appeals contending (1) he should not have been transferred to adult court; (2) the district court should not have excluded evidence Stacey had told a minister she was sexually abused by her father because that evidence showed her father had a motive to kill her and supported Eric's testimony that she was killed by another man; and (3) the trial court abused its discretion in sentencing him. I feel I have no choice in applying our law but do concur with the majority that the trial court did not abuse its discretion in transferring the case to adult court. I also agree with the majority on the additional issues raised in Eric's brief. I write separately.

Stacey, a beautiful young girl, lost her life when she was shot in the back at close range. The perpetrator has been identified as Eric. Crimes committed by a child are as harmful as those same crimes when committed by adults. Stacey is no less dead because she was shot by a fifteen-year-old than if she had been shot by an adult. However, in our civilized society, we recognize children should not necessarily share the same responsibility for offenses that adults do. We recognize children's immaturity and lack of experience and judgment may justify them being held less culpable than adults for the same crimes. Our legislature has established a juvenile justice system intent on offering our young citizens rehabilitation and help and not just punishment.

Our legislature recognizes just putting child offenders in prison is not always the answer for society and the child.

A transfer of jurisdiction of a juvenile's offenses to adult court involves more than just a choice of forum--it involves a choice of jurisprudential philosophy that governs the nature and purpose of the proceeding, the severity of the punishment, and the long-term effect on the youth. In re M.D.N., 493 N.W.2d 680, 683 (N.D. 1992).

Eric contends the sole reason for the transfer was the severity of the crime. He contends that fact alone does not justify the transfer. I agree with Eric's position that the sole reason for the transfer was the severity of

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the crime. However, applying the dictates of State v. Greiman, 344 N.W.2d 249, 251-52 (Iowa 1984), I think the seriousness of the act is sufficient reason for the transfer.

I have reviewed the facts in the record de novo. While the statute vests discretion in the juvenile court in ruling on a waiver application, we are directed to review all the evidence on the waiver issue de novo to determine whether the court abused its discretion in ordering the waiver. See State v. Greiman, 344 N.W.2d 249, 251 (Iowa 1984).

Eric, at fifteen, was immature. He was small in stature and weight. He was below average in his academic progress. He was a freshman at a rural Iowa high school. There is no evidence he had a behavioral problem at school, at home or in the community before this event. He played baseball, was in football, and ran cross-country. He was a part of an intact, religious, supportive family and his parents cared about him and were concerned about his conduct. Eric's parents have been extremely supportive toward him during the proceedings and stand ready to assist him.

Eric was examined extensively by Psychologist John Garfield. Garfield also did extensive testing. Garfield found Eric did not fit the mold of the conventional stereotype of a child who typically runs afoul of the system. He found none of the characteristics that

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generally appear in children who do run afoul of the system in Eric. Rather, he found Eric compliant, cooperative. He found his behavior controlled and found him to be nonaggressive, nonassaultive and nonoppositional. These characteristics were confirmed in Eric's score on a MMPI test. On that test, there is a score that is typically elevated in children who are delinquent. Eric's score on that part of the test was not elevated, but was below the average for his age. He also found in the child none of the restless, easily bored, thrill-seeking craving of excitement pattern that generally goes with delinquent behavior. Garfield was of the opinion that in the nearly three years before Eric reached adulthood he could be rehabilitated and there was no benefit trying Eric as an adult.

Contrary testimony came from the Fifth District Juvenile Court Supervisor. His recommendation jurisdiction be waived was based primarily on the fact there was only thirty-three months until the child was adult. The supervisor had not conducted a personality inventory. He had only talked to Eric for thirty minutes. The supervisor has also indicated he has considered the fact that "at this stage Eric hasn't admitted his true responsibility in it and in my view that is step number one in rehabilitation." Eric is afforded the same protections in the juvenile system as he is in the adult system. See In re Gault, 387 U.S. 1, 30-31, 87 S. Ct. 1428, 1445, 18 L. Ed. 2d 527, 548

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(1967) (establishing a child's rights to constitution guarantees when charged with a crime). I do not consider Eric's failure to admit guilt as a proper factor to consider in refusing waiver or in rendering an opinion on the waiver issue and find the supervisor's opinion flawed because he gave so little time to consider Eric's situation. I give little credence to the testimony of the supervisor. He only spent about thirty minutes with Eric when Eric was in Meyer Hall in Des Moines. The supervisor had not even seen a personality inventory before giving his opinion.

The second witness for the state was a psychiatrist and child psychiatrist. He found Eric cooperative. He considered the seriousness of the offense. He also said "it did seem to be an isolated event". He said he did not find Eric could be rehabilitated in the system relying primarily on the expertise of the Juvenile Court Supervisor. He spent an hour and one-half with Eric and did no testing.

The testimony of the superintendent of the Iowa State Training School at Eldora seemed to contradict the testimony of the Juvenile Court Supervisor. The superintendent was of the opinion the boys' training school could accept Eric.

I clearly find Dr. Garfield's testimony to be more credible. I put little weight in the Juvenile Supervisor who did little but visit with the child for thirty minutes

while he was in a detention facility and, based on such a cursory examination, saw fit to recommend Eric to be tried as an adult for first-degree murder.

While I have given very serious consideration to the record, what happened to Stacey is all I find to support a transfer.

My de novo review convinces me that Eric, at the time of the incident, was an immature fifteen-year-old freshman child. He was low on the maturity scale, which is not unusual for young men. I seriously doubt Eric understood the seriousness of what happened, if he did shoot Stacey, and I would question if he actually had the capacity to form the mental intent to commit first-degree murder. He currently is not being helped because the facts of life in the adult criminal court system are that he not incriminate himself. While if he were in the juvenile court system, he could be working through these problems. He has a supportive family who stands ready to work with him. There was no evidence that would support a finding there is an indication he would be a future risk to society.

It causes me serious pain to vote with the majority and to commit this child to the bowels of our system; to make him a lifer. If Greiman is to be modified then our supreme court must do so.