Fetal Alcohol Spectrum Disorder: A Review of Minnesota Case Law

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ABSTRACT

Fetal Alcohol Spectrum Disorder (FASD) is a term used to describe a wide range of effects that can occur in individuals who have been exposed to alcohol prenatally. For example, individuals with FASD may exhibit intellectual disabilities, neurological or brain abnormalities, and behavioral or learning problems. It is often undiagnosed, underdiagnosed, or misdiagnosed, especially in adults. Individuals with FASD have higher rates of incarceration and arrest than those without FASD. Estimates indicate that a significant number of individuals diagnosed with FASD will end up involved in the criminal justice system. Therefore, it is important for criminal justice, forensic mental health, and legal professionals to be familiar with the case law regarding those with FASD.
Review of Minnesota Case Law

Fetal Alcohol Spectrum Disorder (FASD) is an umbrella term used to describe a variety of neurodevelopmental disorders that result from more than minimal prenatal alcohol exposure. This disorder is now understood to impact as many as 5% of the general population. Because of the damage caused by prenatal alcohol exposure, impacted individuals commonly experience significant difficulties in multiple areas of functioning (May et al., 2018). These difficulties result in very high rates of problematic outcomes, including high rates of incarceration and other contacts with the legal system (e.g., being a victim of a crime) (Brown, Carter, Haun, Wartnik, & Zapf, 2019; Pei, Leung, Jampolsky, & Alsbury, 2016; Streissguth, Barr, Kogan, & Bookstein, 1996; Thiel et al., 2011). FASD may result in low intellectual functioning, impaired information processing abilities, memory deficits, poor problem solving, impulsivity, and difficulty understanding cause and effect. All of these problems are more likely to result in contact with the legal system. However, because so few professionals receive training specific to FASD, and so many of these symptoms and negative outcomes are also commonly found in other diagnoses, adults involved in the criminal justice system are often not accurately diagnosed with FASD prior to their legal involvement.

In the American justice system, there are laws derived from the legislature by statutes, and there are laws created by the appellate and supreme courts as they review district court decisions and case outcomes (referred to as “case law”). Generally, for case law to be created in the criminal justice system, a defendant must be convicted or adjudicated delinquent of a crime, and then appeal that finding to the higher courts. Furthermore, for case law to be created regarding FASD specifically, the defendant would have to allege that FASD substantially affected his or her rights or otherwise affected the decision of the district court leading to his or her conviction. As a result, case law on FASD is very limited.

Generally speaking, in the adult criminal legal system, FASD has presented to the courts in three ways:

1. The defendant has FASD and seeks to admit evidence of their FASD to argue that they should not be found guilty.

2. The defendant has FASD, has been convicted of a crime, and seeks to admit evidence of their FASD to receive a reduced sentence.

3. A witness at trial has FASD, and the defendant seeks to admit evidence of this diagnosis to argue that the witness is not truthful or lacks an accurate memory.

In the juvenile delinquency system, a fourth issue has presented more frequently of late:

4. The juvenile defendant has FASD and has been accused of a serious crime where the State is seeking to try the juvenile as an adult through a process called certification. The juvenile seeks to admit evidence of their FASD to argue against certification, in order to keep their case in the juvenile court system.
Part 1: Adults

In the eyes of the law, FASD raises many of the same questions and legal issues as autism and other developmental and social disorders. Accordingly, much of the FASD case law in Minnesota is guided by a case that involved a defendant with autism, not FASD. That case is *State of Minnesota v. Anderson* (2010), a Minnesota Supreme Court case discussed in detail below.

**CASE 1, MENTAL ILLNESS DEFENSE: STATE OF MINNESOTA V. ANDERSON, 789 N.W.2D 227 (2010)**

Mr. Anderson was convicted of first-degree murder after he posted an ad online for a babysitter. When the babysitter arrived at Mr. Anderson's house, he shot her in the back, placed her body in the trunk of her own car, and drove the vehicle to a park. In a Mirandized interview after arrest, Mr. Anderson told police he shot the victim because “a friend thought it would be funny.” At trial, Mr. Anderson moved to admit evidence that he had Asperger's syndrome, a disorder now considered as part of the autism spectrum disorders, and also considered a neurodevelopmental disorder. He argued there were three reasons for his request. First, he wanted the jury to be aware of his condition in order to explain any unusual mannerisms he displayed while testifying. Second, Mr. Anderson wanted to suggest to the jury that because his brain worked differently than the average person’s, he did not have the ability to premeditate or understand cause and effect. Third, he wanted the evidence admitted to show his state of function prior to the crime. The court denied all three of these arguments, finding first that Mr. Anderson did not actually exhibit any odd mannerisms at any point prior to trial. Second, there was no evidence that Anderson had been diagnosed with Asperger’s syndrome before the crime. Third, the evidence was likely to confuse the jury since Mr. Anderson had not raised a formal mental illness defense. Such a defense would require him to show that he was so disabled that he either did not understand what he was doing or he did not understand that his actions were wrong. Relating these findings to FASD, another neurodevelopmental disorder that causes a range of impairments, it would be likely that the courts would similarly consider the level of impairment the person experiences to determine applicability of the diagnosis to legal findings.

Although a defendant has a constitutional right to a fair trial and may present evidence that explains his actions, the right is not unlimited. Under the Minnesota Rules of Evidence, expert testimony may be admitted if it is helpful to the jury in understanding the evidence or facts at issue (see Rule 702). The court may also exclude evidence under Rule 403 if it is substantially likely to confuse or mislead the jury.

Minnesota law does not recognize gradations of sanity – legally, the defendant is either sane or not sane, and there is no such defense as “diminished responsibility” (*State of Minnesota v. Provost*, 1992). Because Anderson could not meet the level of evidence needed to prove a mental illness defense (i.e., to prove that he was not sane), the district court found that the evidence was likely to confuse the jury, and so it did not allow the evidence.
Mr. Anderson also tried to argue that his Asperger’s syndrome prevented him from understanding cause and effect, but this kind of argument has been rejected before. Issues like premeditation and intent are questions for the trier of fact, who must look at all of the evidence surrounding the case and draw an inference about the defendant’s state of mind when the defendant committed the act, which may be influenced by a mental health disorder such as Asperger’s or FASD. If Mr. Anderson had raised a mental illness defense, the evidence would have been admitted in a bifurcated trial (Minn. R. P. 20.02, subd. 6(2)). This means that the jury would first decide if Mr. Anderson was factually guilty of the murder, and if so, they would then decide separately whether Mr. Anderson was not sane at the time that he committed the murder.

“We viewed psychiatric testimony on the existence and effects of a mental illness as minimally relevant and having little probative value, because the question at the guilt phase is not whether a defendant had the capacity to form intent or premeditation, but whether in fact the defendant had formed intent and premeditated” (State of Minnesota v. Provost, 1992).

Minnesota Statutes § 611.026 provides: No person shall be tried, sentenced, or punished for any crime while mentally ill or mentally deficient so as to be incapable of understanding the proceedings or making a defense; but the person shall not be excused from criminal liability except upon proof that at the time of committing the alleged criminal act the person was laboring under such a defect of reason, from one of these causes, as not to know the nature of the act, or that it was wrong.

Even if a defendant has not raised a mental illness defense, evidence of their mental illness may be admissible in one of two situations. One situation is in the rare case that the mental illness directly prevents someone from forming intent or premeditation to commit the offense. Or, in the second situation, the defendant has a significant history of mental illness and the trier of fact must be educated about the mental illness in order to explain the defendant’s actions and behaviors before the crime occurred. Because Mr. Anderson could not show that his Asperger’s syndrome prevented him from premeditating or intending to kill the babysitter, the first requirement was not met. Moreover, because Mr. Anderson was not diagnosed with Asperger’s syndrome until after his arrest, and his medical records showed no clear symptoms of Asperger’s syndrome (in fact, Mr. Anderson had explicitly denied mental health concerns in his medical records), the court found that the second requirement did not apply either. In summary, neurodevelopmental disorders such as FASD may be considered as part of a mental illness defense, but the disorders must reach a threshold of impairment that satisfies the requirements of the law.

**CASE 2, REDUCED CULPABILITY: STATE OF MINNESOTA V. FARDAN, 773 N.W.2D 303 (MINN. 2009)**

In a similar case that is specific to FASD, Mr. Fardan, with three other co-defendants, kidnapped two strangers, burglarized their apartment, shot the couple, and sexually assaulted a third person who was home during the burglary. Mr. Fardan was arrested five days after the crime and was interrogated after receiving a Miranda warning, during which time he confessed to his participation. At trial, Mr. Fardan attempted to introduce evidence of his FASD
diagnosis in order to suggest that he did not understand his Miranda rights at the time of his confession, and that his FASD made him less culpable due to peer pressure from his co-defendants.

The court found that Mr. Fardan had enough intelligence to understand his Miranda warning, as he had average to low average academic and cognitive skills. As with Anderson, the district court did not allow evidence of FASD to be admitted, on the grounds that it was not relevant to the question of guilt or innocence, and was likely to confuse the jury. Of particular note, Mr. Fardan's only evidence of FASD was a psychiatric report that diagnosed him with FASD and ADHD. The court, reaching its decision in 2009, noted:

The supreme court has recognized an exception for a defendant with “a past history of mental illness” that “helps explain 'the whole man' as he was before the events of the crime.” Id. But Mr. Fardan does not have “a past history of mental illness,” at least not one that is evidenced by the report on which he relies. The report places the [FASD] diagnosis on Axis III and indicates an Axis I diagnosis of ADHD and no Axis II diagnosis. Axis III is used to describe general medical conditions that may affect the mental conditions reported on Axes I and II. Am. Psychiatric Ass’n, Diagnostic & Statistical Manual of Mental Disorders, 27–29 (4th ed. Text Revision 2000). And it is on Axes I and II that one finds the disorders usually relied upon by criminal defendants to evade culpability. Compare id. at 28–29 (listing schizophrenia on Axis I and schizoid personality disorder on Axis II) with Koskela, 536 N.W.2d at 629–30 (discussing proposed evidence of schizoid personality disorder), and State of Minnesota v. Provost, 490 N.W.2d 93, 97 n. 1 (1992) (noting proffered diagnosis of schizophrenia).

Fortunately, when the Diagnostic & Statistical Manual of Mental Disorders (DSM) was updated in 2013, it included diagnoses that can represent the various FASDs so that those with impairments related to prenatal alcohol exposure can be recognized as having both a medical disorder and a mental health disorder. This recognition as a neurodevelopmental disorder in the DSM-5 may assist courts in determining the appropriateness for consideration in future legal proceedings and how FASD may influence individuals' behaviors.

CASE 3, REDUCED SENTENCE: STATE OF MINNESOTA V. FREEBERG, WL 6272705 (MINN. APP. 2017)1.

FASD may also be argued as a sentencing consideration, even if it does not directly pertain to a defendant’s guilt or innocence. Mr. Freeberg was convicted of multiple domestic-violence related felonies, including terrorist threats, domestic assault by strangulation, and violation of a restraining order. During sentencing, Mr. Freeberg argued that he should receive a significant departure from the presumptive sentence because of his FASD diagnosis. The district court denied the motion and imposed the sentence. The court noted the following:

1Freeberg is an unpublished case, meaning that its decision is not binding on any other courts, although it may still be argued for persuasive value.
For mental illness to mitigate against imposing consecutive sentences, “a defendant’s impairment must be ‘extreme’ to the point that it deprives the defendant of control over his actions.” State of Minnesota v. McLaughlin, 725 N.W.2d 703, 716 (2007). But the record contains no evidence that [Mr.] Freeberg’s fetal alcohol syndrome is severe enough to deprive him of control over his actions. See State of Minnesota v. Fardan, 773 N.W.2d 303, 322–23 (2009) (determining defendant’s fetal alcohol syndrome did not constitute mitigating factor in sentencing). And, [Mr.] Freeberg’s past life experiences, which included abuse against him, also do not show that the district court abused its sentencing discretion because any mistreatment of [Mr.] Freeberg was not perpetrated by the victims of his crimes. See State of Minnesota v. Hennum, 441 N.W.2d 793, 801 (1989) (emphasizing that appellate court’s “reduction of district court’s sentence” is rarely appropriate, and reducing defendant’s sentence only because victim had physically and mentally abused defendant throughout their relationship).

CASE 4, COMPETENCY TO TESTIFY: STATE OF MINNESOTA V. GOLDENSTEIN, 505 N.W.2d 332 (MINN. APP. 1993)

Generally speaking, expert witnesses are not permitted to testify about the credibility of a specific witness, i.e., they cannot offer an opinion on whether a certain witness is telling the truth. However, in special circumstances, experts may testify about common behavior patterns associated with a psychological condition, such as Battered Person’s Syndrome, or to explain why child victims of sexual assault often delay reporting. In State of Minnesota v. Goldenstein (1993), Mr. Goldenstein was convicted of sexually abusing three foster children in his care who had FASD. Mr. Goldenstein attempted to call an expert to testify about the effect of FASD on the children’s behavior and ability to accurately recall events. The district court denied this motion, because the proposed expert could not definitively diagnose the children as having FASD. However, the Court of Appeals agreed with Mr. Goldenstein that the testimony should have been admitted, and reversed the conviction. Importantly, there was substantial evidence from other sources that the children had FASD, including prior medical records. This case helps elucidate the various impacts FASD can have for those involved in the criminal justice system and how important it is for professionals to understand the need to be knowledgeable about the consequences of the disorder.

Part 2: Juveniles

In Minnesota, juvenile courts have original jurisdiction over offenses alleged to be committed by children under age 18. Juvenile cases are confidential at the district court level, and even at the appellate level, cases are subject to higher privacy protections. Most juvenile case law pertains to the issue of certification, or proceeding with a case in adult court rather than juvenile court.

THE CERTIFICATION PROCESS

The State may seek certification when the juvenile has committed a particularly serious offense that implicates public safety. If the child is 16 or 17 and the case involved a firearm, or if the crime would involve a presumptive commitment to prison if done by an adult, there is a presumption that the case will be certified. If any of those factors are not met, the State may still argue for certification if retaining the case in juvenile court would not serve public safety (Minn. Stat. § 260B.125, subd. 2(6)).
To determine whether to certify a case to adult court, the juvenile court considers six factors:

1. the seriousness of the offense in terms of public safety,
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;
5. the adequacy of the punishment or programming available in the juvenile justice system; and
6. the dispositional options available for the child.

FASD evidence is generally introduced under the second factor, as evidence that the juvenile is less culpable. A fact that would be considered a mitigating factor under the Minnesota Sentencing Guidelines if the crime were committed by an adult, may be considered by the district court in weighing the juvenile’s culpability. As it pertains to FASD, this includes:

- The offender played a minor or passive role in the crime or participated under circumstances of coercion or duress.
- The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. The impairment must be “extreme” to the point of depriving the juvenile of control over his actions (State of Minnesota v. McLaughlin, 725 N.W.2d 703, 2007).


15-year-old A.J.F. was certified to stand trial as an adult on counts of first-degree murder, first-degree aggravated robbery, second-degree assault, kidnapping, first-degree burglary, and first-degree criminal sexual conduct. A.J.F. argued that the factors did not support certification to adult court, and particularly argued that his FASD and ADHD diagnoses made him less culpable than the average 15-year-old, because it made him more impulsive and susceptible to peer pressure. However, none of the experts who testified at the certification hearing believed that A.J.F. was so disabled by his FASD that it should be considered a mitigating factor. A.J.F. argued that the district court should “expand its traditional definition of culpability” to include of A.J.F’s age and disabilities, but this would contradict clear law that the district court may only consider those mitigating factors which are recognized by the Minnesota Sentencing Guidelines for adults.

17-year-old L.L.K. was certified to stand trial as an adult for first-degree aggravated robbery and attempted first-degree criminal sexual conduct after he allegedly cornered, detained, and robbed a woman in her car, and then attempted to force her to perform oral sex on him at gunpoint. L.L.K. appealed the certification, arguing that he operates at a second-to-fourth-grade level of intelligence and has untreated ADHD and FASD, and that these factors should mitigate his culpability. But because L.L.K. could not show that his diagnoses created an “extreme deprivation of control over his actions,” the Court of Appeals upheld the certification.


17-year-old J.R.L. was certified to stand trial as an adult on charges of first-degree aggravated robbery. As with L.L.K., J.R.L. argued that his FASD should have been considered a mitigating factor. This argument was again denied on the grounds that J.R.L. could not show that FASD created an “extreme” impairment to the point that he had no control over his actions, and the certification was upheld.


17-year-old J.R.T., was certified to adult court for second-degree murder charges after he and three other juveniles chased a blind man down the street, pushed, punched, and kicked him, and then beat him to death with his own cane. Notably, the murder happened in front of multiple witnesses who tried to intervene. J.R.T. continued assaulting the victim even after a witness yelled at him to stop and his co-defendants fled. J.R.T. appealed his certification, arguing that he “lacked substantial capacity for judgment” because of his diagnoses of major depression, FASD, and conduct disorder. However, J.R.T. never offered any evidence to the district court about how these conditions affected his judgment. The district court indicated that it was willing to hear such evidence, but none was offered. Accordingly, the certification was upheld.

In summary, FASD may be a factor in juvenile cases and may be considered as a factor influencing case outcomes. However, specific information about the impact of FASD on the individual juvenile is important for the court to consider the diagnoses as contributing to an extreme impairment. As described in these cases, such information is often lacking either due to a paucity of knowledge and experience with the disorder, or lesser impairment than required by the law to be considered a mitigating factor.
Conclusion

The above described cases indicate that knowledge of FASD and the variety of impairments it can have on individuals in the criminal justice systems is essential for professionals working within those systems. While FASD may be a consideration for the court, evidence of extreme impairment must be provided in order for the disorder to be a mitigating factor or a factor to deny certification. Additionally, impairments associated with FASD should be considered by criminal justice professionals when working with witnesses involved in a case. A significant understanding of the disorder and associated impairments is essential for those working with clients suspected of experiencing, or diagnosed with, FASD and who are involved in the court system.

In summary:

• FASD has been addressed in Minnesota case law when a defendant wants to admit evidence of their FASD to create a defense at trial, to argue for a reduced sentence, to cast doubt on the competency of a witness, or to challenge a court's decision to send a juvenile case to adult court.

• Generally, it is difficult for both juvenile and adult defendants to meet the legal thresholds needed to admit evidence of their FASD at trial or sentencing.

• To present evidence of FASD at trial, a defendant must show their FASD so impaired their thinking they did not understand what they were doing, or that they did not understand their actions were wrong.

• For a defendant to receive a lesser sentence because of FASD, they must show that their FASD created such an extreme influence on their thinking and behavior that it basically deprived them of control over their actions.

• However, where a witness at trial has FASD, courts have allowed evidence about the witness's FASD and expert testimony about the effect that FASD has on memory and perception.

• In juvenile cases involving certification to adult court, FASD is more widely recognized by the court and there is more case law governing the admission of evidence of FASD than for adult offenders.

• Nonetheless, FASD is not a defense to certification, and as with adult sentencing cases, unless the juvenile shows their FASD created an extreme deprivation of control over their actions, courts generally cannot retain a case in juvenile court solely because the juvenile has FASD.
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