

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 31, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1096

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE INTEREST OF SHOUA Y., A
PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

SHOUA Y.,

Respondent-Appellant.

APPEAL from an order of the circuit court for La Crosse County:
DENNIS G. MONTABON, Judge. *Affirmed.*

VERGERONT, J.¹ Shoua Y., a juvenile, appeals from an order waiving juvenile court jurisdiction over him. He contends the trial court erroneously exercised its discretion in: (1) determining that there was prosecutive merit because it failed to make an evaluation of the State's evidence

¹ This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS.

with respect to reliability, and (2) ruling that the waiver was in the best interests of Shoua and the public. We conclude the trial court properly exercised its discretion on both points and we affirm.

Shoua's date of birth is August 15, 1979. The delinquency petition, filed on March 5, 1995, charged him with one count of attempted first-degree intentional homicide in violation of §§ 939.32(1) and 940.01(1), STATS., with enhancements for gang activity, use of a dangerous weapon and concealed identity, and six counts of recklessly endangering safety in violation of § 941.30(1), STATS., with enhancements for gang activity, use of a dangerous weapon, and concealed identity. The charges grew out of a shooting incident on October 28, 1995, that took place in a church parking lot after a dance.

At the beginning of the hearing on the State's petition for waiver to adult court, Shoua's attorney stated that he disputed prosecutive merit. The court reserved a decision on that issue and the hearing proceeded. The state presented as witnesses two social workers with the La Crosse Department of Social Services, Wilham Herber and James Fox, who had worked with Shoua, and two detectives, Robert Muth and Marion Byerson, who had investigated the October 28, 1995 incident. Louis Stamps, psychologist, testified on behalf of Shoua,² as did the director of the La Crosse Area Hmong Mutual Assistance Association, Dennis Tucker. At the conclusion of the testimony, the court determined that the petition had prosecutive merit and that waiver of juvenile court jurisdiction was in the best interests of Shoua and the public. Shoua challenges both these conclusions.

In order to be the basis for a finding of prosecutive merit, the petition must contain adequate and detailed information of the juvenile's alleged violation of state criminal law and have demonstrable guarantees of trustworthiness. *In re P.A.K.*, 119 Wis.2d 871, 887, 350 N.W.2d 677, 685 (1984). Hearsay evidence may be considered if it has demonstrable guarantees of trustworthiness. *Id.* at 885, 350 N.W.2d at 685. Prosecutive merit involves the same standard as probable cause in the preliminary hearing stage in an adult

² Stamps evaluated Shoua shortly before the hearing. He administered tests, for a total of two hours; interviewed him for two hours; and talked to Tucker and to Shoua's high school Chinese language teacher.

criminal proceeding--a reasonable probability that the alleged crime has been committed and that the juvenile has probably committed it. *Id.* at 884, 350 N.W.2d at 684.

The trial court may determine prosecutive merit based solely on the petition, even if prosecutive merit is contested. *Id.* at 877, 350 N.W.2d at 681. The court may, in its discretion, permit either the State or the juvenile to present evidence on prosecutive merit. *Id.* at 883, 886, 350 N.W.2d at 683, 685. In limited circumstances, before the court may properly find prosecutive merit, it is required to hold an evidentiary hearing at which it may be necessary for the State to present evidence in addition to the petition. *See In re J.G.*, 119 Wis.2d 748, 763-64, 350 N.W.2d 668, 676 (1984) (upon a challenge by juvenile to prosecutive merit and a showing that his or her confession is unreliable, if remainder of petition is not sufficient to show prosecutive merit, state must prove at hearing that confession is reliable by preponderance of evidence). In this case, the court permitted the State to present evidence on prosecutive merit, Shoua had the same opportunity. His counsel cross-examined the State's witnesses on prosecutive merit, but Shoua did not present witnesses on this issue.

Shoua's challenge to the court's determination on prosecutive merit appears to be twofold--that the court did not evaluate the reliability of the State's evidence and that the evidence, in particular, the statement of K.L. that Shoua was the shooter, was not reliable.

The testimony of Muth and Byerson at the hearing both repeated and supplemented the reports they made which were described in the petition. The pertinent allegations in the petition and pertinent portions of the officers' testimony are as follows.

Houa Lee initially stated to another officer that he and his friends were surrounded in the church parking lot by approximately thirty other Asian males who called them names. Lee is a member of the Imperial Gangsters (IG) gang. One male Asian, known to Houa Lee as L.X. and another male Asian, whom Houa Lee believed to be approximately fourteen-sixteen years old and who was wearing dark clothing and a bandanna around his mouth, walked toward Houa Lee and his friends. L.X. ordered the masked person to shoot at

Houa Lee. The masked person removed a handgun from the front of his pants, shot toward Houa Lee, and began to run away. L.X. yelled for him to stop and shoot again, which the masked person did, as Houa Lee and three of his friends were attempting to drive off.

Three days later, Lee met with Muth and Byerson. He gave them a statement essentially consistent with his first description of the event. He stated that he observed the shooter prior to the shooting, before he brought his mask up. Lee was shown photographs of persons taken at the Tiny Men Crew (TMC) gang house the previous day and immediately identified one individual as the shooter. Houa had heard that the shooter was "S.T." The photograph picked out by Lee was identified by a Green Bay police officer as Yeng Kong, a known TMC member from the Green Bay area, with an alias of S.T.

Muth and Byerson also spoke to a young female, C.X., who had been at the dance with TMC gang members. She stated that K.L. had told her at the dance that he had a gun because IG members were present. She was in a stolen vehicle in the parking lot of the church with K.L. when she heard gun shots. Just after the shooting, K.L. entered the car and said "China just shot the I.G.'s." China is Shoua's street name. Two other occupants of the car and K.L. stated that K.L. made this statement.

When Muth and Byerson first spoke with K.L., he would not provide any information other than that after the dance he went to the car in which C.X., his girlfriend, was sitting. At a later interview with K.L., he was given a proposed agreement with the La Crosse County District Attorney's office that he would not be prosecuted for complicity in the shooting provided that he was not the shooter and that he was truthful and complete about the incident. After being advised of his *Miranda* rights, K.L. admitted he had a .22 revolver at the dance and was afraid he would be picked up with the weapon in his possession so he threw it in the river. He said during the shooting he was sitting on the door frame of the car in which C.X. was sitting, watching the events. Five days earlier, he and Shoua had discussed who would do the shooting. K.L. said he wanted to because he had been beaten up by the I.G.s. Shoua said that he wanted to do it. K.L. observed Shoua switch coats with a deaf mute to disguise his identity, saw him cover his face with a bandanna and wear a black stocking cap pulled to the top of his eyebrows. He saw Shoua pull out his "nine" and fire into the I.G.'s car. After the first round, the weapon

jammed and Shoua had to clear it and he fired again. It jammed again and he cleared it again. K.L. believed this happened four times and approximately four rounds were fired, with the gun malfunctioning. Just prior to the shooting, Shoua told K.L. he had to dig something up and after that, but before the shooting, K.L. saw Shoua with the 9mm used in the shooting.

Byerson contacted the deaf mute, T.L., who indicated that Shoua did obtain his jacket while in the parking lot after the dance and returned it to him several hours after the shooting.

According to Muth, a ballistics examination conducted by the Wisconsin Crime Laboratory concluded that there were no indications of misfires on the two live rounds located at the shooting, which would make the fact that the bullets were on the ground consistent with a malfunctioning semi-automatic gun. Muth obtained fingerprints of various suspects, including Shoua. The crime lab determined that a latent fingerprint found on one of the spent rounds on the ground at the shooting was made by Shoua's left middle finger. The placement of the fingerprint on the round was consistent with a person pulling back the slide and leaving a fingerprint while trying to clear a jammed round.

Muth again interviewed Lee, who admitted he was not positive of his identification of the shooter and it was possible Shoua could be the shooter, contrary to earlier statements he made that he was sure Shoua was not the shooter.

Shoua has admitted to Byerson in the past that he is a member of the TMC gang. There have been prior shootings involving a feud between the TMC and IG gangs. On June 24, 1995, TMC gang members fired at IG gang members. The crime lab report concluded that the shell casings recovered from the June 24 shooting and the shells and bullets recovered at the October 28 shooting were all fired from the same 9mm firearm. Chai Thao was charged with reckless endangerment as a result of the June 24 shooting. Shoua and Koua Yang were present at that shooting. Shoua told the officers that Chai Thao "probably ditched it" referring to the subsequent burial of that weapon for safe keeping. Chai Thao and Koua Yang were in custody since the June 25 shooting. Earlier on October 28, Shoua had been involved in a confrontation

with IG gang members over his sister in which IG gang members shot at a vehicle Shoua was in.

At the conclusion of the testimony at the waiver hearing, the court stated: "[T]he court finds as follows: The prosecutive merit has been found." It also stated: "I realize there is a dispute as to whether or not he [Shoua] is the shooter by reason of what I would call the initial victim in this case apparently identified someone else initially in this matter. That's ultimately for a jury to determine. I think there is very substantial evidence against him when I'm considering the fingerprint also on the shell casing." The court does not explain this finding any further. According to Shoua, we must reverse because the court did not specifically make a finding on the reliability of the statements made by K.L. that Shoua was the shooter. We do not agree.

As a general rule, even though a trial court does not make a specific finding, we may assume by implication that its finding was in favor of its ruling, *see State v. Hubanks*, 173 Wis.2d 1, 27, 496 N.W.2d 96, 105 (Ct. App. 1992), and we may affirm the trial court if it reached a result that the evidence would sustain had a specific finding been made. *See Moonen v. Moonen*, 39 Wis.2d 640, 646, 159 N.W.2d 720, 723 (1968). The trial court's conclusion here that there was prosecutive merit and its comments explaining that conclusion imply a determination that the State's exercise was sufficiently reliable to establish prosecutive merit.

Shoua relies on language in *J.G.* which states that, even without a specific assertion or offer of proof by the juvenile of unreliability, the court must "demonstrate the proper exercise of discretion by making an evaluation of the state's evidence in respect to reliability, for only reliable evidence will sustain a finding of prosecutive merit." *J.G.*, 119 Wis.2d at 762, 350 N.W.2d at 675-76. We are not persuaded that this language does anything more than impose on the trial court the obligation to evaluate the reliability of the State's evidence. It is implicit in the trial court's comments and conclusion here that it did evaluate the reliability of the State's evidence. In the absence of any authority other than *J.G.*, we decline to hold that it is reversible error simply because a trial court does not expressly refer to the "reliability" of the State's evidence.

We now address whether the trial court's implicit determination of reliability was proper. Shoua contends it was not because (1) others were identified as the shooter and (2) K.L. had reasons to be untruthful in his statements to the police. Shoua is not challenging the reliability of the officers' testimony at the hearing or reports of officers contained in the petition to the extent they relate what the officers were told or observed. See *P.A.K.*, 119 Wis.2d at 888, 350 N.W.2d at 686 (information based on personal observations of police officers made while acting in their official capacity is ordinarily considered trustworthy).

The conflicting identifications of the shooter are not sufficient to render the petition lacking in prosecutive merit.³ The prosecutive merit stage is not a forum to challenge the credibility of witnesses or to resolve disputes and inconsistencies; that is not what is meant by a "reliability determination" at the prosecutive merit stage. *In re T.M.J.*, 110 Wis.2d 7, 17, 327 N.W.2d 198, 204 (Ct. App. 1982). As at the preliminary examination, the court's role is to ascertain the plausibility of a witness's story and whether, if believed, it shows probable cause to believe the person charged committed the crime. See *State v. Dunn*, 121 Wis.2d 389, 397, 359 N.W.2d 151, 154 (1984). The court at this stage is not to determine credibility, to choose between conflicting facts or inferences, or weigh the State's evidence against the evidence favorable to the accused. See *id.* at 397-98, 359 N.W.2d at 155. The trial court was correct when it stated that it was ultimately for the jury to decide which of the conflicting identifications was accurate.

In deciding whether K.L.'s statements are reliable, we look to the petition and the officers' testimony to determine whether there are demonstrable circumstantial guarantees of trustworthiness. As we have just stated, this analysis does not involve a determination of K.L.'s credibility.

³ In addition to Lee's initial identification of S.T., Youa Lor told Muth and Byerson that someone named "Sonny" was the shooter but she later told them that she made up the name, she lied and could not give a reason why she lied. As a result, she was charged with obstructing justice. Yeng Kong, from the Green Bay area, thought K.L. was the shooter because he said K.L. bragged that he did it. However, others present when the statement was supposedly made stated that that was not what K.L. said.

The underlying circumstances of K.L.'s knowledge were his presence at and planning of the events to which he referred. While the agreement with the district attorney's office may provide K.L. with a motive to identify Shoua as the shooter rather than admitting that he was, that does not explain many of the details that K.L. provided in his account, such as that initially he insisted that he be the shooter and that he had a firearm at the dance. These are statements against K.L.'s interest and are not reasonably motivated by a desire to implicate Shoua. Moreover, K.L.'s account of the shooting is independently corroborated by other evidence. T.L. confirmed that Shoua took his jacket just before the shooting and gave it back afterward. While there may be innocent explanations for Shoua taking the jacket, certainly one reasonable inference is, as K.L. stated, that Shoua wanted to disguise himself. The evidence of Shoua's fingerprints on the spent round are also independent evidence that corroborates K.L.'s identification of Shoua as the shooter. While Muth, a firearms instructor, acknowledged on cross-examination that "it could be possible" that the print is consistent with someone picking up the spent cartridge by the back end off the ground, it is still, at the least, reasonable to infer from the evidence that the print was made as Muth testified on direct--by removing the casing from a misfire.

We also note that the others in the vehicle agreed that K.L., immediately after the shooting, made the statement, "China shot an IG." K.L.'s motive to implicate someone else as the shooter after the district attorney proposed an agreement does not explain why he described Shoua as the shooter to friends or acquaintances immediately after the shooting occurred.

We hold that the trial court did not err when it tacitly concluded that the petition and testimony demonstrated that K.L.'s statements had circumstantially guarantees of trustworthiness sufficient, together with other reliable evidence, to constitute prosecutive merit.

We now consider Shoua's claim that the court erroneously exercised its discretion by concluding that it was in the best interests of Shoua and the public to waive him to adult court. Section 48.18(5), STATS., provides that if prosecutive merit is found, the judge shall base the decision whether to waive jurisdiction on the criteria stated in paragraphs a through d.⁴ Section

⁴ Section 48.18(5), STATS., provides:

48.18(6) provides that after considering the criteria under subsec. (5), the judge will state his or her finding with respect to the criteria and if the judge determines that it is established by clear and convincing evidence that it would be contrary to the best interests of the child or the public to hear the case, the judge shall enter an order waiving jurisdiction.

Waiver of jurisdiction under §48.18, STATS., is within the discretion of the juvenile court. *In re J.A.L.*, 162 Wis.2d 940, 960, 471 N.W.2d 493, 501 (1991). The court is to regard the best interest of the child as the

(..continued)

If prosecutive merit is found, the judge, after taking relevant testimony which the district attorney shall present and considering other relevant evidence, shall base its decision whether to waive jurisdiction on the following criteria:

- (a) The personality and prior record of the child, including whether the child is mentally ill or developmentally disabled, whether the court has previously waived its jurisdiction over the child, whether the child has been previously convicted following a waiver of the court's jurisdiction or has been previously found delinquent, whether such conviction or delinquency involved the infliction of serious bodily injury, the child's motives and attitudes, the child's physical and mental maturity, the child's pattern of living, prior offenses, prior treatment history and apparent potential for responding to future treatment.
- (b) The type and seriousness of the offense, including whether it was against persons or property, the extent to which it was committed in a violent, aggressive, premeditated or wilful manner, and its prosecutive merit.
- (c) The adequacy and suitability of facilities, services and procedures available for treatment of the child and protection of the public within the juvenile justice system, and, where applicable, the mental health system.
- (d) The desirability of trial and disposition of the entire offense in one court if the juvenile was allegedly associated in the offense with persons who will be charged with a crime in circuit court.

paramount consideration. *Id.* The court has discretion as to the weight it affords each of the criteria under § 48.18(5). *Id.* We look to the record to see whether discretion was exercised, and if it has been, we look for reasons to sustain the court's decision. *Id.* at 961, 471 N.W.2d at 501. We will reverse a juvenile court's waiver determination if and only if the record does not reflect a reasonable basis for its determination, or the court does not state relevant facts or reasons motivating the decision.

The trial court made these findings with respect to the criteria for waiver. The court found that Shoua was now about sixteen years and eight months of age and there was no evidence that he was mentally ill, developmentally disabled or anything interfering with his normal development. He was physically and mentally mature for his age. He had a prior adjudication of delinquency and some prior record. He had not been previously waived for jurisdiction but a waiver petition had been filed and withdrawn. His pattern of living recently, was that he was out of the home on his own either on the run or failing to abide by previous dispositional orders. The facts alleged in the petition and in the testimony at the hearing show that the offense was a serious one. It was a violent, aggressive, premeditated and willful crime and was done for revenge or for some purported wrong done by another. With respect to treatment, the court stated, "I can see that there isn't any or he hasn't--the proper way to say it is he hasn't availed himself of any prior treatment.... The indications are from what we know that in my opinion any future treatment would not be successful in that he chooses to run rather than accept treatment...." Shoua appears to want to continue gang membership and live a gang lifestyle.

The record supports the trial court's findings. Shoua was adjudicated delinquent on September 5, 1995, based on charges of possession of a stolen firearm and possession of a dangerous weapon by a child. On October 6, 1995, he was placed on formal supervision for those offenses. Herber testified that there had been other referrals to the juvenile justice system including one for disorderly conduct (involving an incident where a shot was fired through a car) with gang enhancement and obstructing an officer with gang enhancement. Although the social worker requested the filing of a petition, that was not pursued by the district attorney's office. There was also a referral for felony theft and criminal damage to property but there is no indication on the record of the outcome of that referral. A petition for operating a motor vehicle without the owner's consent was filed on July 4, 1995; it was dismissed with leave for the

State to refile but the State did not refile. There were also two municipal citations on November 19, 1994, for operating without a license and failure to stop for a stop sign which were disposed of with a monetary fine. Herber testified that Shoua ran away to California while he was trying to find a treatment foster home out of the community because Shoua was concerned about gang retaliation. Herber made very clear to Shoua that he intended to help him get out of the gang and avoid further gang involvement and continue in school and get into college. But, in Herber's view, Shoua was not motivated to get out of the gangs. Herber felt the only thing in the juvenile system at all appropriate for Shoua would be Lincoln Hills, but because of the short period of time until Shoua's eighteenth birthday and the seriousness of the offense, he questioned whether Lincoln Hills was appropriate.

In October of 1995, Herber contacted school officials who indicated that Shoua was doing quite well in school. He had no indication from his contacts with Shoua or others that Shoua had any mental illness or disability or developmental disability problems or that he needed psychological counseling. Shoua's mental and physical development was appropriate for his age.

Fox had also worked with Shoua in his prior contacts with the juvenile system. Fox had talked to Herber, to Tucker and had reviewed his file. Fox was also of the view that Shoua should be waived into adult court because of the seriousness of the offense, its willfulness and premeditation. While acknowledging that Shoua's past history with the juvenile justice system was fairly recent, because of his involvement with guns and weapons and the length of time Fox had to work with him and what was available, Fox did not think that the juvenile system would provide rehabilitation for him.

Byerson and Muth also opined that Shoua should be waived into the adult system. Byerson cited Shoua's involvement with guns and gangs and the attitude toward potential victims that Shoua had expressed to Byerson. Muth also mentioned Shoua's gang involvement, his pride in being a gang member and his lack of concern, expressed in a conversation, that the shootings between the gangs might result in a younger brother or sister getting hit by a bullet.

Shoua's challenge to the trial court's finding on waiver is based in part on evidence in the record that either contradicts the testimony of Herber, Fox and the detectives or presents a more positive picture of Shoua. Tucker testified that he had known Shoua for approximately eight years and Shoua had always been polite and cooperative with him. Dr. Stamps testified that Shoua was an immature adolescent. He testified that Shoua had been subject to physical abuse by his parents and needed counseling. The average length of time for counseling someone with a history of abuse and difficulty of adjusting would be in the neighborhood of a year, Dr. Stamps said, but if Shoua were involved in the incidents alleged and had a long history of "this kind of thing" it is possible it would take longer than that. In Dr. Stamps's opinion, the treatment Shoua needed could be provided at Lincoln Hills, and Shoua should remain in the juvenile system. Everyone agreed that Shoua had done well in school, at least until that year.

The trial court could properly credit Herber's and Fox's testimony rather than Tucker's and Stamps's where there was a conflict. While Dr. Stamps testified that Shoua was in need of treatment that could be provided at Lincoln Hills, Herber's testimony supports the trial court's finding that Shoua had not availed himself of prior treatment and for that reason future treatment would not likely be successful. Dr. Stamps did not testify that Shoua was motivated to make use of treatment. The relatively short period of Shoua's involvement with the juvenile justice system and his prior grades at school may militate against a waiver. But the court need not resolve all the statutory criteria against the juvenile to order waiver. *In re G.B.K.*, 126 Wis.2d 253, 256, 376 N.W.2d 385, 388 (Ct. App. 1985). The weight assigned to each factor is within the trial court's discretion. *In re J.A.L.*, 162 Wis.2d at 960, 471 N.W.2d at 501. It is not an erroneous exercise of discretion for the court to give heavy weight to the severity of the offense, *In re G.B.K.*, 126 Wis.2d at 260, 376 N.W.2d at 389, as the court did here.

The trial court termination has a reasonable basis in the record and the court stated the reasons motivating its decision, addressing with sufficient specificity the pertinent criteria set forth in § 48.18(5), STATS. We therefore conclude it did not erroneously exercise its discretion in waiving jurisdiction.

By the Court. — Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.