COURT OF APPEALS
DECISION
DATED AND RELEASED

August 3, 1995

No. 95-0454

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN THE INTEREST OF BOBBY P.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

BOBBY P.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed*.

GARTZKE, P.J. Bobby P., born on August 10, 1978, appeals from the juvenile court's order waiving jurisdiction over him.[1] He asserts that the underlying delinquency petition was insufficient, evidence of a prior "not guilty" finding should not have been admitted, an evidentiary hearing should

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

have been held on prosecutive merit, he should have access to his own mug shots, and the grounds the court relied on for waiver are insufficient. We reject his contentions and affirm.

These proceedings arise out of a shooting incident in Madison, Wisconsin, on November 23, 1994, in which one man was seriously injured and three others escaped injury. The shooter was part of a group of several young black males who approached the victim and his friends to ask for marijuana. The shooter opened fire with a shotgun. Other firearms probably were also involved. The group involving the shooter then fled in a truck driven by Dawn Soberiski. According to the petition, one or more persons identified the juvenile as part of the group that included the shooter.

The delinquency petition[2] charges that on November 23, 1994, the juvenile intentionally, by use of a firearm, attempted to cause the death of another person, Antoin L. Bussey, as a party to the crime, contrary to §§ 939.32, 939.63, 939.05 and 940.01(1), STATS. The second charge alleges that the juvenile, by use of a dangerous weapon, a firearm, endangered another's safety, Robert R. Washington, under circumstances showing utter disregard for human life, as a party to the crime, contrary to §§ 939.05, 939.63 and 941.30(1), STATS. The third charge is that the juvenile, by use of a dangerous weapon, a firearm, endangered another's safety, Albert Cole, under circumstances showing utter disregard for human life, as a party to the crime, contrary to §§ 939.05, 939.63 and 941.30(1), STATS. The fourth charge is that the juvenile, by use a dangerous weapon, a firearm, endangered another's safety, Shurone V. Johnson, under circumstances showing utter disregard for human life, as a party to the crime, contrary to §§ 939.05, 939.63 and 941.30(1), STATS.

Our discussion tracks the three stages of the proceedings. In the first stage, the court found that the delinquency petition was sufficient. In the second, the court found that the matter has prosecutive merit. In the third, the court waived the juvenile into adult court.

A. Sufficiency of Delinquency Petition

[2] We refer to the second amended petition as the petition.

Section 48.255(1)(d), STATS., provides that if a petition initiating proceedings under ch. 48, STATS., alleges a violation of a criminal statute, the petition must contain the citation of the appropriate laws and "facts sufficient to establish probable cause that an offense has been committed and that the child named in the petition committed the offense." The sufficiency of the delinquency petition is critical to the court's competency to decide whether to waive jurisdiction over a juvenile. The court acquires that competency on the filing of a sufficient delinquency petition. ***In Interest of Michael J.L.***, 174 Wis.2d 131, 139-40, 496 N.W.2d 758, 761-62 (Ct. App. 1993).

1. The Factual Allegations

The following summary of the factual allegations in the petition relies heavily on the description in the State's brief.

The juvenile, Courtney M., and Eddie B. resided in the home of James C. and Theresa P. Theresa P. is the mother of the juvenile. According to Randy Dorsey, who had known them for two or three years, Bobby, Eddie, and Courtney are members of a gang known as the Vice Lords. Dawn Soberiski was a resident at 506 West Olin Avenue in Madison with roommates Duane Shulte and William Weber. Sometime in October 1994 Soberiski began a relationship with a male known as "Mack." Shortly thereafter some of his friends, known as "Chili," "Henry" and "Animal" and a black female named Molisa began to spend time in the Olin Avenue apartment. Henry, Chili, Animal and Mack represented themselves to be affiliated with the Insane Mafia Vice Lords.

On or about November 11, 1994, Mack reported to Henry and Chili that "the Folks are messing with `Tweety,'" who is Eddie. Mack said this was not right and they had to get back at the Folks. On or about November 20, 1994, Weber walked into Soberiski's bedroom, observed a sawed-off shotgun and a sawed-off rifle on the bed. He also saw a shotgun shell and a box with approximately 100 .22-caliber shells in it on a dresser.

Before November 23, 1994, three juveniles, whom Soberiski knew as Tweety, Bobby and Courtney, visited her apartment on a number of occasions. She positively identified a photograph of Eddie as "Tweety" and a

photograph of Courtney as an individual who had been at her apartment before, and she identified a photograph of the juvenile as being either "Courtney" or the brother of "Tweety." On or about November 22, 1994, Chili, Henry, Tweety, the juvenile, Courtney and Animal were at Soberiski's apartment drinking and smoking in her bedroom. When they came out of her bedroom they were loud and saying, "Mafia (this), Mafia (that)," "Folks must die," and "GD's must die."[3]

Tekea Stewart has known Courtney and the juvenile since August 6, 1994, and she has known Eddie for about three years. On November 23, 1994, the day of the shooting, Courtney picked her up from school. The juvenile was also in the vehicle. They drove to Darbo Drive at about 1:30 p.m., at which time the juvenile left the vehicle to visit his girlfriend. Eddie began talking with a group of boys outside and then began going back and forth to the car, telling Courtney that the boys were talking about how they got jumped on Allied Drive at gunpoint and how they wanted to go back there and shoot. Eddie got back into the car and started talking about guns and about who they could get guns from and how they should go in a big van with the Lords and go shoot Disciples on Allied Drive and Simpson Street. Upon leaving Darbo Drive, Stewart, the juvenile, Courtney and Eddie were in the car, and Eddie was talking about getting guns from some "hype" he knew and some girl. Stewart had previously seen Eddie, the juvenile, and Courtney with a gun between August and September 1994.

On November 23 Molisa Prince was at the Olin Avenue apartment with Dawn Soberiski, Duane, Will, Animal, Chili and Henry, when at about 5:30 p.m. three young black males, whom Prince identified by photograph as Eddie, the juvenile and Courtney, came into the apartment. Eddie, the juvenile and Courtney went into Soberiski's room where they talked to Henry and Chili and began to smoke marijuana and drink beer. Some time thereafter Soberiski left the apartment to visit her friend named Will, at his residence.

On November 23 Soberiski drove to William Dinkins's residence and arrived at about 7:00 p.m. A short time later she telephoned her apartment to speak to Molisa. A male got on the phone who asked "Soberiski to come and

[3] "GD's" refers to a gang known as the Gangster Disciples.

pick us up and take us to Somerset." She agreed to do so, after which she and Dinkins left his residence and drove to her apartment. There they waited and beeped the truck horn but no one came. Soberiski started into the building, when Henry, Chili, Courtney, the juvenile and Eddie started coming out. Molisa Prince observed Henry, Chili, Courtney, Eddie and the juvenile leave Soberiski's apartment at about 7:45 p.m. Henry and Chili got into the cab of the truck. Eddie, Courtney and the juvenile got into the truck bed. Chili sat on Dinkins's leg and was wearing a curly Afro wig and had a .22 rifle in his possession. Dinkins observed that the black male sitting near the door of the truck had a banana clip about a foot long. After entering the truck Chili told Soberiski that there was a change of plans and that he wanted her to go to Simpson Street. Chili gave Soberiski directions to 1717 Simpson and told her where to park. Upon arriving at that location, Eddie, Courtney, the juvenile, Henry and Chili got out of the truck while Soberiski and Dinkins remained in the cab with the motor running. Dinkins observed that after the five black males got out of the truck they began walking toward the "Hole" on West Broadway.

On November 23, some time before 9:00 p.m., Robert Washington was in the back parking lot at 1822 West Broadway playing dice with Antoin Bussey, Shurone Johnson and Albert Cole. A black male whom Washington knew as "Courtney" and whom he subsequently identified by photograph as Courtney M., walked up to them and asked for some "reefer." They told Courtney they had no reefer. Courtney walked back to a group of three or four other black males that he had been with who were standing between 1814 and 1822 West Broadway.

Shortly thereafter, another black male, whom Washington described as about six-feet tall, emerged from the group that Courtney was with and started walking towards Washington's group. One of Washington's group asked, "What's up?" at which time the black male who had approached stated to them, "GDK, that's what's up, nigger, GDK." The black male at the same time, used both hands in the symbol "pitch forks down," a put-down of the Gangster Disciples. Washington states that "GDK" means "Gangster Disciple Killer." The same black male then opened his coat, pulled out a sawed-off shotgun and pointed it at Washington's group. Washington saw Courtney had a handgun which Washington believed was a revolver. Washington, Cole and Johnson upon seeing the shotgun turned and began to run, after which they heard numerous gunshots. Cole stated that he recognized one of the individuals in

this group to be Courtney, but when shown a photo lineup which included photographs of Courtney and the juvenile, Cole selected the photograph of the juvenile as being part of the group which approached him and his friends at the time of the shooting.

At the time of the shooting, Derrick Gosha was in an apartment at 1822 West Broadway. He looked out of a window facing 1902 West Broadway and saw the juvenile and Eddie standing outside, between 1822 and 1902 West Broadway. At the same time Gosha saw a person known to him as K-Ron walking backwards out of the east entrance of 1902 West Broadway while firing a gun into the entrance. Gosha heard the juvenile and Eddie call to K-Ron, "Let's go."

Officer Montie reported that on November 23, at about 7:55 p.m., he was dispatched to 1902 West Broadway regarding the shooting. Shortly after arriving he saw Antoin Bussey laying in the middle of the ground-floor hallway at 1902 West Broadway with gunshot wounds. Detective Alix Olson subsequently made contact with Bussey at the hospital and saw that he had nine gunshot wounds, including four in the back.

William Dinkins believed that the five black males who left Soberiski's truck were gone for ten to fifteen minutes, after which they returned to the truck. At the time, he saw that one of the individuals who had been in the back of the truck was carrying what appeared to be a sawed-off shotgun. Chili and Henry again entered the cab of the truck while the juvenile, Courtney and Eddie again crawled into the back. Dinkins saw that the black males appeared to be very excited, talking loudly, laughing, and jittery. Dinkins heard the black male with the .22 rifle say he did not know how many times he shot him but he shot him a lot. Dinkins heard Soberiski tell them that if she had known what they were going to do, she would not have come and picked them up. When they arrived back at Soberiski's apartment, everybody got out in a hurry and ran upstairs, after which Dinkins and Soberiski returned to his residence.

At about 8:15 p.m. on November 23, Molisa Prince saw Chili, Henry, Courtney, Eddie and the juvenile return to Soberiski's apartment. She saw them immediately begin to switch their hats and jackets. Shortly after they

returned to the apartment, Courtney and the juvenile said that they were going to leave to go to Courtney's girlfriend's house. Eddie stayed in the apartment for a short time, but then said that he was going to leave in an attempt to catch up with Courtney and the juvenile. Prince was able to hear the sound of sirens going by the apartment, at which time Chili said, "I hope I got that mother-fucker."

At about 8:50 p.m. to 9:00 p.m. on November 23, Courtney and the juvenile arrived at Tekea Stewart's residence, followed by Eddie about five minutes later. Stewart saw that Eddie was "dressed funny" in that he was in all dark clothing and "He was wearing a wig, a curly wig, black with a hat, like a disguise." Stewart states that besides herself, Courtney, the juvenile and Eddie, the only other person in her apartment at that time was her sister, Billie Dixon. Dixon saw that Eddie looked nervous and started talking to the juvenile. Dixon heard Eddie say words to the effect "that `mob' shot that `mob' eight or nine times, and as the `mob' was shooting the `mob' said that he was dying." Dixon then accused the juvenile and Eddie of having done something, and they both denied doing anything. Dixon states that Eddie, Courtney and the juvenile left the residence at about 9:20 p.m.

Police investigators located twenty bullet casings at the scene of the shooting. An unidentified citizen picked up a .12-gauge shotgun shell in the parking lot of 1717 Simpson Street and gave it to the police. A police investigator reports that it appears that the suspects in the case started shooting from the terrace of 1822 West Broadway, moved in a westerly direction to the 1902 West Broadway driveway, then continued up into the 1902 West Broadway vestibule, after which they entered the hallway at 1902 West Broadway and remained in the immediate east end, with all the bullet holes starting from the east and traveling west.

The juvenile and Courtney went to Randy Dorsey, Jr.'s residence on November 24 at about 3:00 p.m. The juvenile told Dorsey that they were involved in the shooting on West Broadway the night before. Dorsey stated,

> Bobby was just saying that they had drove up on the side of the building and they had come around the corner and got into an argument with the people outside and as

> they were arguing Courtney was telling Bobby to move out of the way so that when Bobby moved, he just started shooting at the people who were sitting outside shooting dice.

2. Probable Cause

The principles that govern the sufficiency of criminal complaints apply to the sufficiency of a petition in a juvenile court proceeding. ***In Interest of L.A.T.***, 167 Wis.2d 276, 283, 481 N.W.2d 493, 496 (Ct. App. 1992). Whether the petition is sufficient is a question of law which we decide without deference to the juvenile court's ruling. ***Id***. at 282-83, 481 N.W.2d at 496. The petition must state with specificity reliable and credible information necessary to invoke the juvenile court's jurisdiction and to provide reasonable notice of the conduct or circumstances to be considered by the court. ***Id***. at 284, 481 N.W.2d at 497. When determining the sufficiency we may draw logical and fair inferences from the allegations. ***Id***.[4]

We need not tarry over the first requirement in § 48.255(1)(d), STATS., that the petition alleges facts sufficient to establish probable cause that a criminal offense has been committed. Nobody argues otherwise. The issue before us is whether the petition alleges facts sufficient to establish that the juvenile probably committed the offense. ***In Interest of P.A.K.***, 119 Wis.2d 871, 875, 350 N.W.2d 677, 680 (1984).

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[4] It is worth noting that § 48.255(1)(e), STATS., also requires the petition to set forth with specificity:

> If the child is alleged to come within the provisions of s. 48.13(1) to (11) or 48.14, reliable and credible information which forms the basis of the allegations necessary to invoke the jurisdiction of the court and to provide reasonable notice of the conduct or circumstances to be considered by the court together with a statement that the child is in need of supervision, services, care or rehabilitation.

The child is not alleged to come within the provisions of § 48.13(1) to (11) or § 48.14. The parties assume that the "reasonable and credible information" requirement applies here.

The elements of attempted first-degree intentional homicide, as applied in this case to a principal, are that the actor intended to cause the death of Antoin Bussey and that the actor's acts demonstrated unequivocally under all of the circumstances that he intended to and would have caused the death, except for the intervention of some other person or some other extraneous factor. WIS J I—CRIMINAL 580 and WIS J I—CRIMINAL 1010. The elements of first-degree "recklessly endangering safety," as applied in this case to a principal, include that the actor endangered the safety of another human being, that he did so by criminally reckless conduct which created an unreasonable and substantial risk of death or great bodily harm to another and that the actor was aware that his conduct created such a risk, and that the circumstances of the actor's conduct showed utter disregard for human life. WIS J I—CRIMINAL 1345.

No dispute exists that probable cause was shown as to the substantive offenses charged as applied to the shooters. Intent to kill is reasonably inferred from the fact that Antoin Bussey was shot nine times, including four shots in the back. The elements of first-degree recklessly endangering safety are reasonably inferred from the statements of Albert Cole and Shurone Johnson and the physical evidence recovered by a special investigator of the Madison Police Department. Cole stated that the individual with the shotgun pointed it at the chests of a group of men playing dice, Cole began to run and he heard between eighteen and twenty shots fired. Johnson said that the individual with the shotgun pointed it at him and his friends, and he therefore turned and began to run. He believes that the man with the shotgun shot once at them, after which Johnson heard eight to thirteen other shots. A police investigator states that twenty bullet casings were collected in the general area. The reasonable inference from the evidence is that a group of five black males began shooting indiscriminately at Antoin Bussey, Albert Cole, Robert Washington and Shurone Johnson.

The question remains whether sufficient facts are alleged to establish probable cause that the juvenile is a party to the substantive offenses charged. The petition does not allege that he was one of the shooters. However, § 939.05(1), STATS., provides,

> Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not

> directly commit it and although the person who directly committed it has not been convicted or has been convicted of some other degree of the crime or of some other crime based on the same act.

Section 939.05(2) provides in material part that a person is concerned in the commission of a crime if the person directly commits the crime or intentionally aids and abets its commission or is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it.

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, he knowingly either (a) renders aid to the person who commits the crime, or (b) is ready and willing to render aid, if needed, and the person who commits the crime knows of his willingness to aid him. ***State v. Charbarneau***, 82 Wis.2d 644, 651, 264 N.W.2d 227, 231 (1978).

Aiding and abetting requires "(1) some conduct (either verbal or overt), that as a matter of objective fact aids another person in the execution of a crime; and (2) conscience desire or intent that the conduct will in fact yield such assistance." ***State v. Rundle***, 176 Wis.2d 985, 1005, 500 N.W.2d 916, 924 (1993).

Conspiracy requires evidence supporting (1) an agreement among two or more persons to direct their conduct toward the realization of a criminal objective, and (2) each member of the conspiracy must individually consciously intend the realization of the particular criminal objective. ***State v. Hecht***, 116 Wis.2d 605, 624-25, 342 N.W.2d 721, 732 (1984). The existence of an agreement may be shown by circumstantial evidence. ***Id***. at 625, 342 N.W.2d at 732. The circumstantial evidence utilized in demonstrating an agreement need not indicate an express agreement among the parties. A mere tacit understanding is sufficient. ***Id***. Lack of a "stake in the venture" does not absolve one of liability as a party to the crime. ***Id***. at 627, 342 N.W.2d at 733.

Mere presence and ambivalent conduct at the scene of a crime are insufficient to charge a crime. ***State v. Haugen***, 52 Wis.2d 791, 796, 191 N.W.2d 12, 15 (1971). However, it is reasonable to infer from the allegations that an agreement existed, at least tacitly, between the juvenile, Henry, Chili, Eddie and Courtney to shoot and kill Gangster Disciples. It is also reasonable to infer that

the juvenile's conduct aided the shooters. Gosha's statement established the juvenile's presence and assistance at the shooting scene. The juvenile's saying "Let's go" supports a reasonable inference that he was acting as a look out and encouraging or advising the shooters to flee before they were caught. His participation in the jacket switching at Soberiski's apartment supports a reasonable inference that he continued to assist both himself and his accomplices in avoiding apprehension.

His presence at the shooting was not a coincidence. The trip to West Broadway on the night of November 23 had a purpose and the juvenile knew the purpose--to shoot Gangster Disciples. The allegations justify the inferences that the juvenile knew that the truck contained firearms when en route to West Broadway, that he knew when he left the truck with the others and walked with them toward the four men rolling dice that a shooting was about to take place, that he intended it to occur, and that before, during and after the shooting he was present to assist the shooters.

We conclude that the delinquency petition sets forth with specificity facts to establish probable cause that the juvenile committed the crimes alleged in the petition, as a party to the crimes.

3. Factual Reliability of Petition

The principles applicable in determining the factual reliability of a criminal complaint or in an affidavit supporting a search warrant apply to determining the factual reliability of a delinquency petition. Reliable means trustworthy or worthy of confidence. ***In Interest of J.G.***, 119 Wis.2d 748, 761, 350 N.W.2d 668, 675 (1984). Reliability is determined from the face of the petition.

The petitioner is Detective Grann. He states in the petition that he bases it on his own personal knowledge and on information and belief. He states he personally participated in the investigation, including a meeting with Dawn Soberiski and her attorney. He states he reviewed police reports by various Madison police officers. Nothing in the petition indicates that Grann is biased or prejudiced against the juvenile or that he is lying.

Grann's petition is based largely on hearsay--the contents of the officers' reports--and that is permitted if the petition contains something that shows that the information should be believed. ***Ruff v. State***, 65 Wis.2d 713, 719, 223 N.W.2d 446, 449 (1974).

The officers' reports, according to Grann, were made in the ordinary course of duty. Statements by officers in the ordinary course of duty are trustworthy.

The officers collected statements from the victims of the crime who of course were eyewitnesses. An eyewitness's statement relied on by the police is reliable. ***Anderson v. State***, 66 Wis.2d 233, 242, 223 N.W.2d 879, 883 (1974). "[D]irect personal observation attests to the reliability of the manner in which the citizen informer obtained his information." ***Loveday v. State***, 74 Wis.2d 503, 525, 247 N.W.2d 116, 128 (1976). Gosha appears to have been an ordinary citizen informer. Statements by ordinary citizens to the police that are believed by the police are reliable. *See* ***State v. Kerr***, 181 Wis.2d 372, 381, 511 N.W.2d 586, 589 (1994), *cert. denied*, 115 S. Ct. 2245 (1995) (police may assume information from ordinary citizen is credible).

The State concedes that Dawn Soberiski is not an ordinary citizen informer, and Grann does not suggest that she is. But she implicated herself in the charged crimes, in that she provided transportation to and from the crime scene, and the shooters and others who were with them, including the juvenile, congregated at her apartment before and after the shooting. Her statements were against her interest as an aider and abettor. Such statements to the police are reliable. ***P.A.K.***, 119 Wis.2d at 888, 350 N.W.2d at 686.

We conclude that the statements to the officers related in their reports upon which Grann relies are reliable.

B. Prosecutive Merit

Section 48.18(4), STATS., provides, "The judge shall determine whether the matter has prosecutive merit before proceeding to determine if it should waive its jurisdiction."

Even when prosecutive merit is contested, the State need not present, and the juvenile court need not consider, evidence in addition to the facts alleged in the delinquency petition. ***P.A.K.***, 119 Wis.2d at 877, 350 N.W.2d at 681. A full evidentiary hearing on prosecutive merit is not necessary. ***Id***. at 887, 350 N.W.2d at 685.

A determination of prosecutive merit is analogous to the determination of probable cause in a criminal proceeding. ***In Interest of T.R.B.***, 109 Wis.2d 179, 187, 325 N.W.2d 329, 333 (1982). "[A] finding of prosecutive merit must be based on a showing that reasonable grounds exist to believe that the juvenile has committed the violation of state criminal law charged" ***Id***. (footnote omitted). "This is the degree of probable cause required to bind over an adult for criminal trial." ***Id***. at 192, 325 N.W.2d at 335. Like a bindover at a preliminary hearing, a finding of prosecutive merit is not a finding of guilt. The judge in a preliminary hearing must determine the plausibility of a witness's story and whether, if the story is believed, it will support a bindover, and may not delve into the credibility of the witness. ***State v. Dunn***, 121 Wis.2d 389, 396-97, 359 N.W.2d 151, 154 (1984). The judge conducting a preliminary is not to choose between conflicting facts or inferences, or weigh the State's evidence against evidence favorable to the defendant. ***State v. Koch***, 175 Wis.2d 684, 704, 499 N.W.2d 152, 162 (1993). The same principles apply to determining prosecutive merit.

The juvenile requested an evidentiary hearing. Before conducting the hearing, the court required the juvenile to make an offer of proof regarding the testimony each witness the juvenile desired to call to support his challenge to prosecutive merit. We review the offer and the court's reasons for refusing (with a single exception) to hear the offered testimony.

The juvenile offered to prove that Albert Cole said Courtney was present at the shooting. When shown an array of photographs that included photographs of Courtney and the juvenile, Cole selected the juvenile's

photograph rather than Courtney's photograph as picturing one member of the group of black males that approached Cole prior to the shooting incident. The offer was insufficient to require an evidentiary hearing. The juvenile court properly concluded that the offer of proof went to the credibility of Cole's statement. The prosecutive-merit stage "is not a forum to examine the credibility of a witness." ***In Interest of T.M.J.***, 110 Wis.2d 7, 17, 327 N.W.2d 198, 204 (Ct. App. 1982).

The juvenile offered to prove that Robert Washington had known both Courtney and the juvenile for several years, but Washington identified only Courtney as being at the scene and not the juvenile. This, too, is a matter of credibility, subject to inquiry at a trial but not at the prosecutive-merit stage. ***Id***.

The juvenile offered to show that when his mother and stepfather spoke to Dawn Soberiski a few days after the shooting, she told them she had no idea who got into her truck. The offer went to Soberiski's credibility. The evidence is inadmissible at the prosecutive-merit stage. ***Id***.

The juvenile offered to show that Tekea Stewart would testify that she told the police that Eddie and Courtney talked about other boys talking about getting guns and going in a big van with Lords to shoot Disciples on Allied Drive and Simpson Street, and contrary to her statement, she did not say that Eddie and Courtney talked about themselves getting the guns. The offer raises a credibility issue as between Stewart and the reporting officer, an appropriate subject for inquiry at the trial, but not at the prosecutive-merit stage. ***Id***. The juvenile court correctly refused to hold an evidentiary hearing to allow the juvenile to present the evidence.

The juvenile offered to show that Derrick Gosha would testify he never told Detective Alix Olson that he saw the juvenile and Eddie at the scene of the shooting or that he heard them say to K-Ron, "Let's go," and further, that Olson had testified at the preliminary hearing regarding Eddie that Gosha said he heard Eddie say, "Let's go," but that Officer Olson did not offer any testimony regarding the juvenile's saying "Let's go." The proposed evidence raises a credibility issue as between the officer and Gosha. The evidence is not admissible at the prosecutive-merit stage. ***Id***.

The juvenile offered to show that Elizabeth Bell would testify that she was with the juvenile and Courtney when they went to the Randy Dorsey residence on November 24, the juvenile got out of the car and went to get Randy, and when he and Randy returned to the car "three seconds later" no discussion about a shooting took place in her presence. For that reason, the juvenile contends that Dorsey's statement to the police regarding a claimed discussion between him and the juvenile could not have taken place. The proposed testimony relates to the credibility of Dorsey. The juvenile also offered to show through Dorsey's testimony that the statement the police attributed to him did not accurately report what he said. This too goes to credibility. It is inadmissible on the prosecutive-merit issue. ***Id***.

The juvenile offered through a ten-year-old child, Anthony, to contradict what Soberiski and Dinkins had said to the police. Again, this goes to credibility and is inadmissible. ***Id***.

The court said, "The juvenile contends that Alix Olson would testify, who is a police officer, that she is misquoted in the petition. If in fact that is true, that testimony should be allowed because that directly conflicts with the basis for believing her testimony to be reliable." Olson is reported to have furnished statements made to her by Derrick Gosha regarding the juvenile's presence at the shooting. However, at no time during the balance of the hearing did the juvenile present the testimony of Detective Olson, even though the court ruled that the testimony was admissible, or request a continuance for that purpose.

We turn to the testimony the juvenile actually produced through witnesses regarding prosecutive merit. One such witness was Theresa P., the mother of the juvenile. Her testimony pertained to the juvenile's home detention during the fall semester of 1994. She testified that on November 23 she had left the home. She said she spoke to her son at home by telephone at about 2:00 p.m. But the shooting incident occurred well after that. According to Officer Montie, he was dispatched to the scene of the shooting at about 7:55 p.m. According to the statement by Dinkins, he and Soberiski left his residence a little after 7:00 p.m. and drove to her apartment, fifteen minutes later five black males got into the truck, Soberiski drove to Simpson Street and pulled her truck into the parking lot near 1717 Simpson Street, the males got out of the truck and began walking, were gone for ten to fifteen minutes and then returned to the truck. While they were driving back to Soberiski's apartment

the black male with the .22 rifle said he did not know how many times he "shot him, but he shot him a lot." Consequently, Theresa P.'s testimony fails to establish that the juvenile could not have been at the scene of the shooting. Moreover, her testimony is an attempt to provide an alibi for the juvenile, and, as such, it raises a credibility issue and does not affect the reliability of the petition.

The juvenile's mother's boyfriend, James C., who functions as the juvenile's stepfather, testified that he gets off work at 2:30 p.m., goes straight home, and should be there by 2:40 p.m. James C. did not testify that the juvenile was at home in the early evening hours of November 23. James's testimony does not affect the reliability issue.

We conclude that the testimony of Theresa P. and James C. failed to establish that the delinquency petition is unreliable.

The juvenile next contends that before the court found prosecutive merit, it should have held a ***Franks*** hearing. ***Franks v. Delaware***, 438 U.S. 154 (1978). The ***Franks*** court said,

> [W]e hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Id. at 155-56.

The juvenile failed to make the required "substantial preliminary showing." The closest the juvenile came to making an offer of proof that petitioner Grann or any officer reporting to him had made a false statement was his claim that Detective Alix Olson would testify that the petition misquoted her. As we have noted, the juvenile never called Detective Olson, even though the court ruled that Olson's testimony would be admissible, we add that such testimony as described in the offer, standing alone, would fail to establish that Grann made a false statement knowingly and intentionally, or with reckless disregard for the truth, regarding Olson's report.

We next turn to the juvenile's assertion that the court should have granted his motion to access his "mug shots" taken upon his detention for a prior delinquency in early November 1994 and mug shots taken of him shortly after the instant delinquency petition was filed later that same month. His counsel asserted that she needed the photographs to show to potential witnesses involved with the prosecutive-merit issues, and she needed both sets to show that the juvenile's appearance had not substantially altered between the beginning and end of November. The court denied the motion.

On appeal, the juvenile contends that he was entitled to the mug shots under § 48.293(2), STATS., which provides in relevant part:

> All records relating to a child which are relevant to the subject matter of a proceeding under this chapter shall be open to inspection by a guardian ad litem or counsel for any party, upon demand and upon presentation of releases where necessary, at least 48 hours before the proceeding. Persons entitled to inspect the records may obtain copies of the records with the permission of the custodian of the records or with permission of the court.... Sections 971.23 to 971.25 ... shall be applicable in all delinquency proceedings under this chapter ....

Sections 971.23 and 971.25, STATS., pertain to discovery in criminal cases.

We affirm the juvenile court's ruling. Section 48.293(2), STATS., permits discovery of "*social* reports and records relating to a juvenile." ***T.M.J.***, 110 Wis.2d at 14, 327 N.W.2d at 202 (emphasis added). The mug shots were taken during criminal investigations. While the statute allows use of the criminal discovery statutes "in all delinquency proceedings under this chapter," a delinquency proceeding is not pending unless and until the court declines to waive a juvenile into adult court. ***T.M.J.***, 110 Wis.2d at 11, 327 N.W.2d at 201. Section 48.293(2) provides for no criminal discovery before a waiver hearing is held. ***Id***.

Before the hearing the juvenile unsuccessfully moved the court to prevent the State from using the record from a prior delinquency proceeding against the juvenile in which a jury found the juvenile "not guilty." The issue is pertinent only to whether the juvenile court should have waived jurisdiction, the third stage of the proceeding.

We conclude that the juvenile court properly concluded that the matter has prosecutive merit. The court was therefore entitled to determine whether it should waive its jurisdiction.

C. Waiver

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 para. (a) through (d). Section 48.18(6), STATS., provides in substance that after considering the criteria under sub. (5), the judge shall state his or her finding with respect to the criteria and if the judge determines on the record that it is established by "clear and convincing evidence that it would be contrary to the best interests of the child or of 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 Interest of 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 of paramount consideration. ***Id***. The court has discretion as to the weight it affords each of the criteria under § 48.18(5). 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 960-61, 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. ***Id***. at 961, 471 N.W.2d at 501.

The court exercised its discretion on the basis of facts of record and gave the reasons for its decision. It first dealt with the factors listed in § 48.18(5), STATS. The court found that the juvenile is not mentally ill or developmentally disabled. He was acquitted on the only previous juvenile court delinquency petition that was filed. He has not previously been found delinquent. His motives, attitudes and physical and mental maturity and pattern of living are fairly average for a child of his age. The court described the offense charged against the juvenile as extraordinarily serious, one of the most serious of all offenses, and except for good luck the charge could have been murder. The act was premeditated, planned in advance, done in a group and against an apparently innocent victim, was not in self-defense, and no mitigating factors whatever are obvious. The crime was violent, aggressive, premeditated, wilful and serious.

The court found that the juvenile has an extremely strong family. The court was impressed by his mother and James C.,[5] and observed that they apparently had given Bobby everything they could give to a child. They provided not only a home but close supervision, responsibility and consequences "when he has screwed up." The family enrolled him at Bootstrap, made arrangements for him to have a tutor, and transferred his school. They attempted to try to meet his educational needs. They arranged counseling for him through Bootstrap. They twice moved so that the juvenile would not be exposed to the negative influences of gang behavior in Chicago.

In the juvenile court's view, the record shows a two-to-three year history where, although the juvenile was not in the court system, he had the benefit of everything the court system could have offered him. The court system can offer him nothing which he has not had, in the sense of a good home, a good school program and counseling. The court found that given the seriousness of his offenses and the time that would be available under juvenile

[5] This court, too, is impressed with the strong personalities of the juvenile's mother and James C. The record does not disclose whether James C. disclosed his military and post-discharge experiences to the juvenile.

court jurisdiction—about two-and-one-half years maximum—the time is insufficient to assure his rehabilitation and the safety of the public by dealing with him in juvenile court.

After noting that this is a terrible tragedy, the court stated it had no choice but to waive juvenile court jurisdiction. The court declared that clear and convincing evidence established it would be contrary to the juvenile's best interests and contrary to the interests of the public to retain jurisdiction. The court therefore waived jurisdiction.

We reject the claim that the evidence is insufficient for the court to waive jurisdiction. The court had found prosecutive merit, and we have sustained that finding. Contrary to the juvenile's contention, the court's findings are not contrary to the great weight of the evidence. The court did not give undue emphasis to the seriousness of the charges. While several persons who dealt with the juvenile testified to his potential to respond to treatment and that placement in the adult system would be harmful both to him and to the public, the ultimate decision in that regard is left to the juvenile court, and its decision on this record is reasonable.

The court emphasized the seriousness of the offense. We cannot say, however, that the court improperly emphasized that criterion over all others. It is by no means clear that the juvenile's best interest will be served by refusal to waive him into adult court. Indeed, the court found that waiver is in his best interest. He had the benefit of not only a good family but good experiences in the educational system. In spite of that, probable cause exists to believe he participated in a premeditated attempt to kill one person and in reckless endangerment of three other persons under circumstances showing an utter disregard for human life.

Section 48.18, STATS., does not require a finding against the juvenile on every criterion before waiver is warranted. The court has discretion regarding the weight it assigns to each criterion. It may find that the public's best interest outweighs all other factors and the juvenile's best interests. ***In Interest of B.B.***, 166 Wis.2d 202, 209-10, 479 N.W.2d 205, 207-08 (Ct. App. 1991).

This leaves one issue: whether the court should have granted the juvenile's motion to prevent the State from using a prior delinquency allegation

against the juvenile on which a jury found him not guilty. That the juvenile was found not guilty on the previous charges is immaterial. Just as a sentencing court may consider conduct for which an adult defendant has been acquitted, ***State v. Marhal***, 172 Wis.2d 491, 503, 493 N.W.2d 758, 764 (Ct. App. 1992), so may a juvenile court consider a juvenile's conduct which resulted in a not-guilty verdict.

When it admitted the acquittal evidence, the court declared it did not "think it is going to be persuasive one way or the other in my decision." When giving its reasons for waiver, the court simply noted that the juvenile had been "acquitted on the only previous juvenile court delinquency petition that was filed." Nothing in the court's waiver decision suggests that it drew inferences from the acquittal adverse to the juvenile. Consequently, admission of the evidence did not prejudice the juvenile.

D. Conclusion

We conclude that the juvenile court properly exercised its discretion. For that reason, we affirm the order waiving the juvenile court's jurisdiction over the juvenile.

By the Court.--Order affirmed.

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