COURT OF APPEALS
DECISION
DATED AND FILED

August 14, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0846 **Cir. Ct. No. 02-JV-12**

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

IN THE INTEREST OF CARLOS C.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

CARLOS C.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

¶1 NETTESHEIM, P.J.[1] Carlos C. appeals from a juvenile court order waiving juvenile jurisdiction over a petition alleging second-degree sexual assault

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

contrary to WIS. STAT. § 940.225(2)(b), false imprisonment contrary to WIS. STAT. § 940.30, and second-degree sexual assault of a child contrary to WIS. STAT. § 948.02(2). Carlos was charged as a party to all the crimes pursuant to WIS. STAT. § 939.05.

¶2 On appeal, Carlos makes the following arguments: (1) the juvenile court erred in finding prosecutive merit on the charges of second-degree sexual assault causing injury and false imprisonment, (2) the waiver petition failed to provide adequate notice of the facts that the State relied upon in seeking waiver, (3) the State failed to present sufficient evidence supporting the waiver criteria set forth in WIS. STAT. § 938.18(5), and (4) the juvenile court erroneously exercised its discretion in waiving juvenile jurisdiction. We reject these arguments. We affirm the waiver order.

FACTS

¶3 We take the facts principally from the delinquency petition. S.A.B. is a juvenile female born on April 16, 1986. S.A.B. reported to Officer Lori Domino of the Village of Bloomfield Police Department and Paula Hocking, a child abuse and neglect investigator with the Walworth County Department of Human Services, that she went to a friend's house on January 25, 2002, to stay overnight. During the evening, a party occurred at which alcohol and marijuana were present. At approximately 10:00 p.m., two males, Cesario G. and Fidel T., asked S.A.B. to go into a room with them to smoke marijuana. When she entered the room, Cesario and Fidel asked S.A.B. to engage in sexual intercourse or to perform oral sex on them. S.A.B. told them "no." Fidel then pinned S.A.B. down on the bed while Cesario pulled her pants down. Both Fidel and Cesario touched

S.A.B.'s breasts and vagina without her permission. Cesario bit S.A.B.'s breast, causing her pain. Eventually, Cesario and Fidel left the room.

¶4 After S.A.B. left the bedroom, an unknown male grabbed her by the waist and brought her back into the room, now occupied by other persons. One of these persons pushed S.A.B. down on the bed and would not let her leave. During this episode, S.A.B.'s bra was ripped off and her pants and underwear were pulled down. Several males were touching her private parts without her permission and one of them inserted his penis into her vagina. She told him to stop because it was hurting her, but she was too tired to fight anymore. At some point, all the males left the room. S.A.B. knew three of the males involved.[2]

¶5 While S.A.B. was alone in the bedroom, Carlos entered the room. He asked her to have sex and she told him "no" and to leave her alone. Carlos then pulled her pants down and put his penis inside of her without her permission, causing her pain.

¶6 Officer Kennedy of the Bloomfield police department interviewed Carlos and some of the other males involved in the incident. Carlos told Kennedy that he knew what had occurred in the bedroom with S.A.B. before he entered the room. He stated that S.A.B. consented to have sex with him.

¶7 Jane Sparks, a nurse, performed a physical examination on S.A.B. on January 29, 2002. She observed a bruise on S.A.B.'s breast and also determined

[2] S.A.B. did not know all the people by name, but she was later able to identify some of them by looking at a yearbook provided by the police.

that S.A.B.'s hymen was torn. Sparks described the injury as "fresh, having occurred in the past approximately four days."

¶8 Chief Steve Cole of the Bloomfield police department reported that S.A.B.'s bra and underwear were recovered and that the condition of these articles was consistent with S.A.B.'s allegation that they were ripped off her body.

DISCUSSION

Prosecutive Merit

¶9 Carlos first argues that the juvenile court erred by determining that the juvenile petition established prosecutive merit. He contends that the petition lacked sufficient facts to show that he committed any of the charged offenses as a party to the crimes. He also contends that the petition failed to establish sufficient guarantees of trustworthiness. We disagree.

¶10 WISCONSIN STAT. § 938.18(4)(a) provides that "[t]he court shall determine whether the matter has prosecutive merit before proceeding to determine if it should waive jurisdiction." The juvenile court may determine whether the matter has prosecutive merit solely on the basis of the delinquency and waiver petitions if the petitions contain adequate and detailed information concerning the juvenile's alleged violations of state criminal law and demonstrate a guarantee of trustworthiness. ***P.A.K. v. State***, 119 Wis. 2d 871, 886, 350 N.W.2d 677 (1984).

¶11 The determination of prosecutive merit is functionally similar to the determination of probable cause at a preliminary hearing. ***T.R.B. v. State***, 109 Wis. 2d 179, 190, 325 N.W.2d 329 (1982). The determination of probable cause at a preliminary hearing is a screening device to assure that the accused has not

been prosecuted too hastily, or maliciously, and that there exists a substantial basis for bringing prosecution. ***State v. Blalock***, 150 Wis. 2d 688, 697, 442 N.W.2d 514 (Ct. App. 1989). The court must decide whether facts and reasonable inferences drawn therefrom support the conclusion that the defendant probably committed the offense. ***Id***. A judge conducting a preliminary hearing is not to choose between conflicting facts or inferences, or weigh the State's evidence against the evidence favorable to the defendant. ***State v. Koch***, 175 Wis. 2d 684, 704, 499 N.W.2d 152 (1993).

¶12 Carlos argues that the juvenile court erred in finding prosecutive merit because the delinquency petition did not set forth sufficient facts to support the charges of party to the crimes of second-degree sexual assault and false imprisonment.

¶13 The same principles which govern the sufficiency of criminal complaints apply to the sufficiency of juvenile petitions. ***Sheboygan County v. D.T.***, 167 Wis. 2d 276, 283, 481 N.W.2d 493 (Ct. App. 1992). Whether a petition is sufficient is a question of law that we decide without deference to the juvenile court's ruling. ***Id***. at 282-83. The test for sufficiency is whether the complaint, or in this case the delinquency petition, was minimally adequate in setting forth the essential facts establishing probable cause. ***State v. Adams***, 152 Wis. 2d 68, 73, 447 N.W.2d 90 (Ct. App. 1989). We evaluate the adequacy of a complaint from the standpoint of common sense rather than in a hypertechnical manner. ***Id***.

¶14 A person is guilty of second-degree sexual assault if he or she "[h]as sexual contact or sexual intercourse with another person without consent of that person and causes injury ...." WIS. STAT. § 940.225(2)(b). Pursuant to WIS. STAT. § 939.05(2), a person is a party to the crime if that person "(a) [d]irectly

commits the crime; or (b) [i]ntentionally aids and abets the commission of 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 or she knowingly either: (1) assists the person who commits the crime, or (2) is ready and willing to assist and the person who commits the crime knows of the willingness to assist. WIS JI—CRIMINAL 400.

¶15 In reference to the charge of second-degree sexual assault as a party to a crime, Carlos argues that the facts set forth in the petition do not support the allegation that he directly caused any of the injuries or that he aided and abetted the commission of the crime which caused S.A.B.'s injuries. The delinquency petition alleges that S.A.B. suffered a bruise on her breast and that her hymen was torn. Carlos argues that the bruise on S.A.B.'s breast was the result of Cesario biting her breast. He further argues that because he was not the only individual to have sex with S.A.B., or otherwise manipulate her vaginal area in a way that could have potentially caused injury, the petition is insufficient to establish that he caused the alleged injuries. Additionally, Carlos asserts that the State's reliance on the allegation in the petition that he "knew what was going on in that room" is inconclusive in proving that he knew or believed that individuals in the room were committing the crime or were intending to commit the crime, and that the individuals in the room knew of Carlos' willingness to assist.

¶16 The fact that the State chose to charge Carlos as a party to the crimes rather than as the sole actor makes this a close question. We concede that one reasonable inference to draw from the allegations is that Carlos and the other persons who assaulted S.A.B. were not acting in the capacity of parties to the crimes. However, this allowance does not necessarily resolve this issue in Carlos' favor. Rather, we must look to whether the facts also allow for a reasonable

inference supporting the allegation that Carlos was a party to the crimes. Again, we are not free to choose between conflicting facts or inferences, nor are we free to weigh the State's evidence against the evidence favorable to the defendant. ***Koch***, 175 Wis. 2d at 704.

¶17 The facts of this case show that within a relatively short period of time, different males, either in groups or individually, serially sexually assaulted S.A.B. All of the males attended the same party and the assaults occurred in the same room. Carlos admitted that he knew what had transpired between S.A.B. and the other males before he entered the room and had sexual intercourse with S.A.B. One reasonable inference from these facts is that all the males were acting in concert and were ready and willing to either sexually assault S.A.B. or to assist others in such activity. We hold that the petition demonstrated prosecutive merit that Carlos acted in the capacity of a party to a crime.

¶18 Carlos also argues that the injuries were caused by the earlier acts of the other males, not by his conduct. But here again, there are competing reasonable inferences. One reasonable inference is that Carlos' conduct alone, or in conjunction with the prior acts, caused S.A.B.'s torn hymen. The same is true regarding Carlos' contention that the sexual intercourse with S.A.B. was consensual. The petition recites both Carlos' and S.A.B.'s competing versions of the event. We look to the version that supports the charge, assuming it is reasonable and trustworthy. S.A.B.'s version, which states that the sexual intercourse was nonconsensual, satisfies this test.

¶19 In summary, the facts alleged in the petition are minimally adequate to support a reasonable inference that all the actors were bent on the goal of the sexual assault of S.A.B. and that they were ready and willing to assist each other

to that end. The resolution of any competing inferences must await the trial forum. *See* ***id.***

¶20 We also reject Carlos' argument that the delinquency petition did not set forth adequate facts to support the charge of false imprisonment as a party to a crime contrary to WIS. STAT. §§ 940.30 and 939.05. A person is guilty of false imprisonment if he or she "intentionally confines or restrains another without the person's consent and with knowledge that he or she has no lawful authority to do so." Section 940.30. The very nature of nonconsensual sexual intercourse implicitly carries with it a reasonable inference that the actor confined or constrained the victim against the victim's will. As discussed above, the finding of prosecutive merit is not a finding of guilt; rather, it is a finding that there exists a substantial basis for bringing prosecution. *See* ***Blalock***, 150 Wis. 2d at 697. The facts set forth in the delinquency petition also provide sufficient support for this charge.

Factual Reliability of the Petition

¶21 Next, Carlos argues that the juvenile court erred in finding prosecutive merit on the first two charges in the delinquency petition because the petition lacked the guarantees of trustworthiness. In addition to containing sufficient information concerning the juvenile's alleged violation of state criminal law, the delinquency and waiver petitions must also have "demonstrable circumstantial guarantees of trustworthiness" for the court to determine that the matter has prosecutive merit. ***P.A.K.***, 119 Wis. 2d at 887.

¶22 The delinquency petition in this case is primarily based upon S.A.B.'s statements to the police regarding the events. Carlos argues that no evidence as to S.A.B.'s credibility was presented at the waiver hearing and that

such evidence cannot be ascertained by reading the petition. Therefore, he contends that without a demonstrated guarantee of trustworthiness, the court should not have found prosecutive merit based on the petition. We disagree.

¶23 "A citizen who purports to be a victim of or to have witnessed a crime is a reliable informant even though his reliability has not theretofore been proved or tested." ***State v. Cheers***, 102 Wis. 2d 367, 395, 306 N.W.2d 676 (1981) (emphasis omitted) (quoting ***State v. Paszek***, 50 Wis. 2d 619, 631, 184 N.W.2d 836 (1971)). "The reliability [of a victim] should be evaluated from the nature of his report, his opportunity to hear and see the matters reported, and the extent to which it can be verified by independent police investigation." ***State v. Doyle***, 96 Wis. 2d 272, 287, 291 N.W.2d 545 (1980), *overruled on other grounds by* ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991) (quoting ***State v. Knudson***, 51 Wis. 2d 270, 277, 187 N.W.2d 321 (1971)). Here, S.A.B. was the victim of the alleged incidents. She gave a detailed report of the incidents to a police officer. Furthermore, the delinquency petition contains evidence from Carlos, Sparks, and Cole that, to varying degrees, corroborates S.A.B.'s statements. The petition well establishes S.A.B.'s trustworthiness.

Sufficiency of the Waiver Petition

¶24 WISCONSIN STAT. § 938.18(2) requires that a waiver petition "shall contain a brief statement of the facts supporting the request for waiver." Carlos argues that the waiver petition failed to satisfy this requirement and therefore he was not provided the proper notice contemplated by the statute. As stated previously, the sufficiency of a petition is a question of law that we review without deference to the juvenile court's ruling. ***D.T.***, 167 Wis. 2d at 282-83.

¶25 The Wisconsin Supreme Court addressed WIS. STAT. § 938.18(2) in ***J.V.R. v. State***, 127 Wis. 2d 192, 378 N.W.2d 266 (1985).[3] The court stated that § 938.18(2) contains a nonexhaustive list of factors to guide the juvenile court when exercising its discretion in making a waiver decision and that the section "operates to provide the juvenile with notice of the facts upon which the state will rely in seeking waiver." ***J.V.R.*** at 201. In finding the ***J.V.R.*** waiver petition insufficient, the court held that a waiver petition that merely refers to the factors contained in § 938.18(2) does not provide such notice and is therefore inadequate. ***J.V.R.***, 127 Wis. 2d at 201-02.

¶26 Unlike the petition in ***J.V.R.***, the waiver petition in this case did not just refer to the factors set forth in WIS. STAT. § 938.18(2). The petition set forth Carlos' birth date and identified the charges pending against him. It stated that Carlos is not mentally ill or developmentally disabled. The petition incorporated by reference a summary report written by Carlos' caseworker, Renee Kopplin, which detailed Carlos' pattern of living, his prior offenses, and his prior treatment history. Kopplin's summary report also questioned Carlos' potential for responding to future treatment. The petition also addressed the seriousness of the current offense by incorporating the delinquency petition. In addition, the petition observed that the current offense occurred while Carlos was on supervision and involved the consumption of alcohol and controlled substances. The petition further alluded to Carlos' failure to follow through on recommended AODA treatment. The petition also stated that, consistent with protecting the rights of the victim, it would be desirable for Carlos to join the other co-actors in adult court.

[3] At the time of the decision in ***J.V.R. v. State***, 127 Wis. 2d 192, 378 N.W.2d 266 (1985), the language of WIS. STAT. § 938.18(2) was contained in WIS. STAT. § 48.18(2).

Finally, the petition stated that based on the application of the criteria in § 938.18, waiver would be in the best interest of both the juvenile and the public.

¶27 Carlos points out additional facts that could have been alleged in the petition to support the waiver request. However, we properly look to what is included in the petition, not to what could have been. Consequently, we are satisfied that the facts provided within the four corners of the waiver petition gave sufficient notice of the facts the State intended to use in seeking to waive Carlos into adult court.

Sufficiency of the Evidence

¶28 Carlos next argues that the State failed to present sufficient evidence supporting the waiver criteria in WIS. STAT. § 938.18(5). The waiver decision is discretionary. ***B.B. v. State***, 166 Wis. 2d 202, 207, 479 N.W.2d 205 (Ct. App. 1991). However, the decision to waive is to be made only after the court carefully considers the criteria set forth in § 938.18(5), makes findings with respect to the criteria on the record, and determines on the record that it is established by clear and convincing evidence that it would be contrary to the best interests of the juvenile or of the public for the court to retain jurisdiction. *See* § 938.18(6).

¶29 At the waiver hearing, the State presented three witnesses in support of the waiver criteria set forth in WIS. STAT. § 938.18(5): Leslie Mollet and Kopplin of the Walworth County Department of Human Services, and Domino of the Village of Bloomfield Police Department.

¶30 Kopplin testified as to the contents of her reports regarding waiver and detailing her supervision of Carlos during the previous years. These reports were based on her own personal information and records from Human Services.

Based on her knowledge of Carlos, and through an assessment at ARO Counseling, Kopplin testified that Carlos did not have any mental illness or developmental disabilities and that he was both physically and mentally mature. She further testified as to the services Carlos had been offered through the juvenile system and his unwillingness to follow through with treatment. She also discussed Carlos' continued use of alcohol and drugs and his minimization of his involvement in wrongful acts. Kopplin recommended corrections in the event Carlos was not waived, but stated that she felt waiver was more appropriate based on Carlos' failure to respond to juvenile supervision and his lack of motivation to follow through with treatment.

¶31 Domino testified as to the extent of Carlos' involvement in the current matter, her knowledge regarding drug and alcohol use during the incident, and her knowledge regarding Carlos' suspected gang affiliation based on her investigation and training.

¶32 Mollet, a social worker with the Walworth County Department of Human Services, testified that she had reviewed Carlos' file before the waiver hearing and that she was familiar with the programs at the correctional facilities that would be available to Carlos if convicted in the instant case as a juvenile. Based upon her review of Carlos' history in the juvenile system and the fact that he does not accept responsibility for his acts, she recommended waiver to the adult court.

¶33 We uphold the juvenile court's ruling that the State met its burden to show by clear and convincing evidence that the criteria set forth in WIS. STAT. § 938.18(5) weighed in favor of waiver. Kopplin presented ample evidence regarding Carlos' personality and prior record, including her assessment that he is

unlikely to respond to future treatment. Domino presented evidence as to the type and seriousness of the current offense, the role that drugs and alcohol played in the incident, and Carlos' potential gang involvement. Mollet, although not having personally interviewed Carlos, reviewed his files and discussed the case with Kopplin. Mollet had twenty-five years of experience as a social worker with special expertise in juvenile corrections cases. She was familiar with the programs at both juvenile correctional facilities. Mollet's opinion as to the suitability of the facilities and services available to Carlos in the juvenile system sufficiently addressed that criterion.

¶34 In summary, the evidence was sufficient to support a waiver finding.

The Waiver Ruling

¶35 Waiver of juvenile jurisdiction under WIS. STAT. § 938.18 lies within the sound discretion of the juvenile court. ***B.B.***, 166 Wis. 2d at 207. We will uphold a discretionary determination if the record reflects that the juvenile court exercised its discretion and there was a reasonable basis for the decision. ***Id.*** at 207. We will reverse a juvenile court's waiver determination if and only if the record does not reflect a reasonable basis for the determination or a statement of the relevant facts or reasons motivating the determination is not carefully delineated in the record. ***J.A.L. v. State***, 162 Wis. 2d 940, 961, 471 N.W.2d 493 (1991).

¶36 The paramount consideration in determining waiver is the best interests of the child, ***State v. C.W.***, 142 Wis. 2d 763, 767, 419 N.W.2d 327 (Ct. App. 1987). However, the court may still order waiver in the proper exercise of its discretion even where the juvenile court has determined that waiver is not in the best interest of the child. ***B.B.***, 166 Wis. 2d at 209. It is within the juvenile

court's discretion as to the weight it affords each of the factors under WIS. STAT. § 938.18(5). ***J.A.L***, 162 Wis. 2d at 960. In the exercise of its discretion, a court may reach a conclusion that another court might not reach, but the decision must be one that a reasonable court could arrive at by considering the relevant law, the facts, and a process of logical reasoning. ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

¶37 Carlos argues that the juvenile court failed to properly apply the statutory factors for waiver and improperly relied on the fact that it could not provide a harsh enough sentence for Carlos. We disagree.

¶38 In granting the waiver petition, the juvenile court applied the criteria of WIS. STAT. § 938.18(5) and articulated its reasoning on the record. First, the court addressed Carlos' history and pattern within the juvenile system. The court noted that Carlos has had three official contacts with the system and numerous other incidents. Commenting on Carlos' personality, attitudes and potential for responding to future treatment, the court stated:

> During the period of time when he was here, various programs were tried to address interests of his education, alcohol and drug abuse, counseling, anger management, impulse control, no contact with gangs. And just about on every one of those counts he showed lack of motivation to utilize the facilities available through the juvenile system to rehabilitate…. They tried sanctions, secure, and also tried electronic monitoring. But when he was not on electronic monitoring, he went right back to his way of life, and then got into this very, very serious offense.

¶39 Next, the juvenile court addressed the suitability of the facilities available to Carlos within the juvenile system. The court stated:

> And I agree that the court does not have to try every last effort to utilize everything that the juvenile system has to offer when it would appear from his past conduct that that

> alternative is not going to be of avail. In fact, it would be a way for him to again escape responsibility for what he did here, and I think the only way for him to face that responsibility for this type of action is in the adult system. And that is just for his own good, interest.

Contrary to Carlos' assertion, the juvenile court was stating an opinion that the juvenile system could not provide a harsh enough sentence; rather, the court was stating, based on Carlos' history within the juvenile system, that the services offered within the juvenile system could not adequately address Carlos' needs.

¶40 The juvenile court also noted the public interest in the seriousness of such an offense and acknowledged that the rest of the parties are being tried in adult court. The court said, "And equal treatment for the victim and for the parties involved is another reason for the court exercising its discretion here in finding that waiver is appropriate."

¶41 In summary, the juvenile court addressed the evidence in light of each relevant statutory factor. On appeal, we look to whether the court's reasons for granting waiver are sufficient and whether the evidence supports those reasons. They are. We uphold the court's discretionary ruling.

By the Court.—Order affirmed.

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