

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 4, 2012**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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

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

**Appeal No. 2012AP1696**

**Cir. Ct. No. 2012JV576**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**v.**

**GILBERT C.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
STEPHANIE G. ROTHSTEIN, Judge. *Affirmed.*

¶1 CURLEY, P.J.<sup>1</sup> Gilbert C. appeals the order waiving juvenile jurisdiction. Gilbert argues that the trial court erred in waiving juvenile

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2009-10).

jurisdiction because the evidence before it was insufficient to establish a reasonable basis for its decision. He also argues that, given the evidence that was adduced at the waiver hearing, the trial court's decision to waive him into adult court was unreasonable. This court disagrees with Gilbert C. and affirms the trial court's order.

### **BACKGROUND**

¶2 The State filed an amended delinquency petition against sixteen-year-old Gilbert C. on May 14, 2012. The petition alleged four counts against Gilbert C.: (1) armed robbery with the threat of force; (2) recklessly endangering safety; (3) attempted armed robbery with the threat of force—all as party to a crime—contrary to WIS. STAT. §§ 943.32(1)(b) & (2), 941.30(1), 939.32 & 939.05; and (4) possession of a dangerous weapon by a minor, contrary to WIS. STAT. § 948.60(2)(a) (2009-10).<sup>2</sup> The first count related to an incident on May 5, 2012, where Gilbert C. and another individual allegedly approached a fifty-three-year-old woman and robbed her at gunpoint. According to the amended delinquency petition, Gilbert C. pointed a gun at the woman, demanded money, and then directed his accomplice to search her pockets. Gilbert C.'s accomplice complied, taking the woman's food stamps, cell phone, and \$50 in cash. The remaining three counts derived from an incident on May 8, 2012, where Gilbert C. allegedly shot a man in the shoulder after attempting to rob him. According to the amended delinquency petition, Gilbert C., who was again accompanied by another individual, pointed a gun at the man and ordered the man out of his parked car.

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

The victim reported that he refused to leave his car because he thought that Gilbert C. and his accomplice were going to rob him of his money or take his car. Gilbert then shot the man.

¶3 The same day it filed the delinquency petition, the State also petitioned for waiver of juvenile jurisdiction. The petition alleged that: Gilbert C. would be seventeen years old on November 6, 2012; he had been referred to Children's Court in connection with at least two other delinquency matters; he was not mentally ill; there was prosecutive merit to the charges in the May 14, 2012 petition and the offenses were committed in a violent and aggressive manner; Gilbert C.'s motives and attitudes were similar to those of adults in the criminal court system; and, given the limited amount of time that Gilbert C. would be under the jurisdiction of Children's Court, the Children's Court system was unsuitable.

¶4 The trial court held a hearing regarding the State's waiver of jurisdiction petition on July 18, 2012. In addition to the facts alleged in the amended delinquency petition, the trial court considered testimony of Probation Intake Specialist Andrea Lewis, court-appointed psychologist Dr. Brooke Lundbohm, and Wisconsin Department of Juvenile Corrections Liaison Officer Michelle Glover.

¶5 Lewis—who reviewed Gilbert C.'s school records, psychological evaluation, police reports, and Dr. Lundbohm's report, and who also met personally with Gilbert C. approximately three times—testified that, in her opinion, Gilbert C. should be waived into adult court. She said that her opinion was based on the seriousness of the alleged offenses. She also explained that Gilbert C. was referred to her regarding other delinquent matters, including: a 2009 charge of operating an automobile without the owner's consent that was not

issued; a referral from 2007 when Gilbert C. was arrested for possession of marijuana with intent to deliver; and a hit and run in 2010 that was dismissed. Lewis further explained that Gilbert C.'s mother had reported that at one point Gilbert C. had run away from home for six months, although Gilbert C. had said it was only for a couple of weeks. Lewis also testified that while Gilbert C. was a bit short for his age, he looked like a sixteen-year-old, and that while he lacked insight into his psychological and behavioral functioning, there was no reason to believe that Gilbert C. was not at an age-appropriate maturity level.

¶6 Dr. Lundbohm, who was asked by the court to evaluate Gilbert C., provided no opinion regarding whether Gilbert C. should be waived into adult court. She testified that she did not do so because her understanding is that the decision involves several factors outside of the realm of her expertise.

¶7 Dr. Lundbohm testified that Gilbert has behavioral issues and limited intellectual functioning, but no mental illness. She explained that Gilbert C. scored very low on the intelligence tests she administered, but thought that this was an underestimate of Gilbert C.'s true intellectual capacities based on the fact that she observed him "impulsively respond to questioning without checking his work." She testified that Gilbert could read and write at a fourth-grade level and had mid-fifth-grade-level mathematical skills. Dr. Lundbohm explained that she believed that Gilbert C.'s "below average intellect makes him vulnerable to peer influence." She also explained that Gilbert C. "tends to respond to situations very concretely without much consideration of the potential long-term consequences that could flow from his decisions."

¶8 Dr. Lundbohm also testified that Gilbert C. had "a long history of disruptive behavior ... with antisocial attitudes and patterns," and suggested

treatment should “focus[] upon establishing empathy towards others” that would “explain to him the potential consequences of his actions.” Dr. Lundbohm reviewed a list of programs available at Lincoln Hills and testified that a number of them would be “adequate and appropriate” for Gilbert C. She testified that she was also familiar with the resources available to Gilbert C. in the adult criminal court system, and explained that there are similar services available, particularly at the Racine Youthful Offender Correctional Facility—a facility that focuses on the needs and treatment of younger adult offenders. However, Dr. Lundbohm’s experience was that “Lincoln Hills School is more aggressive in meeting the needs of the offenders whereas an individual in the adult system needs to take on the responsibility in seeking out services.” She expressed concern about Gilbert C. understanding that he is in need of treatment and seeking it out.

¶9 As for Glover, she read Gilbert C.’s psychological evaluation, but otherwise was not very familiar with Gilbert C.’s case. Her testimony primarily consisted of listing programs that Gilbert C. would probably be referred to should he stay in the juvenile system.

¶10 Following the hearing, testimony, and counsels’ arguments, the trial court ordered Gilbert C. waived from juvenile jurisdiction. The trial court based its decision on several factors.

¶11 The court first noted that Gilbert C. was the appropriate age and that the alleged offenses were appropriate for waiver under Chapter 938. The court also noted that the charges had prosecutive merit, saying: “there is a reasonable probability that these crimes have been committed and ... there’s a reasonable probability that Gilbert C. ... committed the crimes as alleged.”

¶12 The trial court next considered whether there was clear and convincing evidence to support the position that waiver served best the interest of the public or Gilbert C.

¶13 The trial court noted that Gilbert C. evinced no mental illness and no developmental disability, but did have low intellectual functioning, although it was possible, given Gilbert C.’s lack of effort on the tests Dr. Lundbohm gave, and his “guarded and defensive” demeanor and lack of candor during his interview with her, that Gilbert C. deliberately sought to interfere with an accurate assessment of his true abilities. The trial court explained:

[F]rankly, it’s difficult based on this record to determine whether his intellectual delays and the low testing are the result of his lack of effort, his complete failure to attend school at all, or his natural organic limitations. How much is responsible for what? It’s not easy to tell.

¶14 The trial court also considered Gilbert C.’s antisocial behavior and poor empathy, which was noted by Dr. Lundbohm and evidenced by Gilbert C.’s record of contacts with the criminal justice system, truancy, and running away from home. The trial court explained:

A very good argument can be made that those personal characteristics of Gilbert [C.] increase the level of danger to our community at his—potentially at his hands....

[H]e’s not amenable to being influenced by others who are prosocial apparently. He’s not acting and trying to emulate the behavior of people who are responsible in our community. He is apparently acting or alleged to be acting to emulate the behavior of those who are the most dangerous in our community which again is a predictor of continued antisocial issues in the Court’s estimation.

¶15 The trial court additionally considered the “adequacy and suitability of resources between the juvenile system and the adult system.” The court noted that it personally visited the Racine facility this year and stated that “the Racine Youthful Offender [program] also offers educational programs, psychological programming, cognitive programming that is similar in nature and basically equivalent to [the] programming [that] is offered at Lincoln Hills.”

¶16 After considering these and other factors, the trial court waived juvenile jurisdiction:

The Court finds that the adequacy and suitability of resources in the adult system do meet Gilbert [C.]’s projected needs if he is found delinquent or guilty of this offense and that [the] criteria for waiver really has been met, that there is in his case, given his age and the timing of this offense as having been within six months of his [seventeenth] birthday, that all of the criteria for waiver in this matter have been met. And the Court does find that these offenses were committed against the persons of another. They were committed in a manner [that was] violent, aggressive, premeditated and willful. And frankly, there are many adult offenders who commit offenses in a similar manner.

Gilbert C. now appeals.

### ANALYSIS

¶17 On appeal, Gilbert C. argues that the trial court erred in waiving juvenile jurisdiction because the evidence before it was insufficient to establish a reasonable basis for its decision. He also argues that, given the evidence before the trial court at his waiver hearing, the trial court’s decision was unreasonable.

¶18 WISCONSIN STAT. § 938.18(5) provides that, once prosecutive merit—which is not at issue in this case—is found, the court shall base its decision whether to waive jurisdiction on the following criteria:

(a) The personality of the juvenile, including whether the juvenile has a mental illness or developmental disability, the juvenile’s physical and mental maturity, and the juvenile’s pattern of living, prior treatment history, and apparent potential for responding to future treatment.

(am) The prior record of the juvenile, including whether the court has previously waived its jurisdiction over the juvenile, whether the juvenile 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 juvenile’s motives and attitudes, and the juvenile’s prior offenses.

(b) The type and seriousness of the offense, including whether it was against persons or property and the extent to which it was committed in a violent, aggressive, premeditated or willful manner.

(c) The adequacy and suitability of facilities, services and procedures available for treatment of the juvenile and protection of the public within the juvenile justice system, and, where applicable, the mental health system and the suitability of the juvenile for placement in the serious juvenile offender program ... or the adult intensive sanctions program....

(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 the court of criminal jurisdiction.

*See id.*

¶19 Waiver of juvenile jurisdiction under WIS. STAT. § 938.18 is within the trial court’s sound discretion. *Elmer J.K. v. State*, 224 Wis. 2d 372, 383, 591 N.W.2d 176 (Ct. App. 1999), *superseded by statute on other grounds*, WIS. STAT. ch. 938. This court reviews the trial court’s decision for a misuse of discretion,



looking for any reason to sustain the trial court's discretionary decision, and reversing a waiver determination only if: (1) the record does not reflect a reasonable basis for the trial court's decision, or (2) the basis of the trial court's rationale is not found in the record. *Id.*

¶20 In this case, there is both a reasonable basis for the trial court's decision in the record, and the trial court did base its reasons for waiving jurisdiction on facts found in the record. *See id.* As noted, the trial court considered Gilbert C.'s personality and prior record, relying on Dr. Lundbohm's report and testimony. Indeed, the trial court noted that while Gilbert C. did have low intellectual functioning, it was possible, given Gilbert C.'s lack of effort on the tests Dr. Lundbohm gave and his "guarded and defensive" demeanor and lack of candor during his interview with her, that Gilbert C. deliberately sought to interfere with an accurate assessment of his true abilities. The trial court further considered Gilbert C.'s antisocial behavior and poor empathy—noted by Dr. Lundbohm and also evidenced by Gilbert C.'s record of contacts with the criminal justice system, truancy, and running away from home. Moreover, the trial court also considered the "adequacy and suitability of resources between the juvenile system and the adult system," relying on the testimony of witnesses at the hearing as well as the court's personal knowledge of available resources. The trial court also considered Gilbert C.'s age, including the fact that the alleged offenses were committed within six months of Gilbert C.'s seventeenth birthday. Finally, the trial court considered the violent nature of the offenses, noting "[t]hey were committed in a manner [that was] violent, aggressive, premeditated and willful. And frankly, there are many adult offenders who commit offenses in a similar manner."

¶21 Gilbert C. makes several arguments concerning the weight and credibility of the evidence in this case, including that because the record does not conclusively establish that Gilbert was in fact the instigator—and not simply “along for the ride”—he should be tried as a juvenile. Similarly, Gilbert C. argues that it was unfair for the trial court to rely on information from sources such as the police reports and Dr. Lunbohm’s report to conclude that Gilbert C. had not accepted responsibility for the crime because he did not have an opportunity to “reasonably challenge and clarify” those sources. Gilbert C. states that “it was unreasonable for the court ... to assume the infallibility of the victims’ recollection and powers of observation in order to justify waiver.” However, the weight and credibility of the evidence regarding Gilbert C.’s role in the alleged crimes is not for the appellate court to evaluate, but for the fact-finder. *See State v. Poellinger*, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). This court’s role is simply to determine whether the record reflects a reasonable basis for the trial court’s discretionary decision, and in this case the court concludes that does. *See Elmer J.K.*, 224 Wis. 2d at 383.

¶22 Finally, Gilbert C. also argues that the trial court erred in determining that the adult system would adequately meet his treatment needs because the juvenile system would better meet his needs. Again, this argument asks this court to reweigh the evidence supporting and opposing waiver, which it will not do. *See id.*

¶23 Accordingly, based on the evidence and the applicable law, this court concludes that the trial court considered and applied the criteria under WIS. STAT. § 938.18(5), and reasonably determined on the record that it was established by clear and convincing evidence that waiver would be in the best interests of Gilbert C. and the public. *See id.*; *see also Elmer J.K.*, 224 Wis. 2d at 383. Thus,

this court concludes that the trial court did not erroneously exercise its discretion by waiving juvenile jurisdiction.

*By the Court.*—Order affirmed.

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

