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ARKANSAS COURT OF APPEALS

DIVISION III

No. CR-17-517

GIOVANNI VASQUEZ-SANCHEZ
APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered: December 6, 2017

APPEAL FROM THE WASHINGTON
COUNTY CIRCUIT COURT
[NO. 72CR-15-702]

HONORABLE MARK LINDSAY,
JUDGE

AFFIRMED

KENNETH S. HIXSON, Judge

Giovanni Vasquez-Sanchez appeals from the Washington County Circuit Court’s denial of his motion to transfer his case to the juvenile division of circuit court. Appellant argues on appeal that the trial court’s denial of his motion to transfer was clearly erroneous. We affirm.

Appellant was charged on April 13, 2015, by felony information with one count of accomplice to capital murder, a Class Y felony, and one count of accomplice to unlawful discharge of a firearm from a vehicle, a Class Y felony. The information alleged that the crimes occurred on or about April 11, 2015. The information further alleged that appellant and “others drove around in a vehicle, looking for someone to kill. When they reached the victim’s residence, an accomplice fired several shots at him, killing him[.]” Thereafter, appellant filed a motion to transfer to the juvenile division of circuit court on October 18, 2016. A hearing was held on February 22, 2017.

At the hearing, appellant presented the testimony of five witnesses. Jeane Mack, the director of the Juvenile Detention Center (JDC) in Fayetteville, Arkansas, testified that he was familiar with appellant, as appellant has been a resident at JDC more than one time. Mack testified that appellant never had an incident report or a disciplinary report filed against him.

Norma Orellana-Frisby testified that she is the chief juvenile probation officer for the Washington County Juvenile Court and that she had been appellant's probation officer in the past. Orellana-Frisby testified that appellant has had multiple separate contacts with the juvenile court system, dating back to 2011, including charges of assault, public intoxication, domestic battery in the third degree, shoplifting, and criminal trespass. Appellant had been placed on probation in some of those cases, in which he violated the terms and conditions of his probation, and some of those cases eventually were dismissed. Orellana-Frisby testified that during those contacts, appellant had received services. Furthermore, Orellana-Frisby testified that because appellant was almost twenty years old at the time of the hearing, the only services that could be offered through juvenile court that she knew of would be to provide probation supervision, an ankle monitor, and a referral to Decision Point. Additionally, if appellant was sentenced to Division of Youth Services, a correctional facility for youth, he could receive more intensive services there but only until he reached the age of twenty-one.

Brittany Thornton testified that she is a head family-in-need-of-services (FINS) officer for the Washington County Juvenile Court and was familiar with appellant, as appellant had an active FINS case from November 2013 to April 2014. Although Thornton

testified that she was not appellant's officer in that case, appellant's officer reported to her, but Thornton sat in at all of appellant's hearings. Thornton recalled that appellant was polite to the FINS staff and that he was placed in Jennifer Martinez's custody due to "turmoil in the home." Thornton additionally testified, however, that appellant was not compliant with all of his orders, including violations for picking up new charges and frequently running away. Appellant was placed on an ankle monitor on two separate occasions and ordered into the Juvenile Detention Center.

Appellant's sister, Michelle Villalpando, testified that appellant was never violent to her or to his friends. Villalpando testified that although appellant did not have a driver's license, appellant's father had asked appellant to take his girlfriend to work in his father's car the day of the shooting.

Jennifer Martinez testified that she was given custody of appellant for periods of time and that appellant had been dating her daughter. Martinez's daughter and appellant have a child together, and Martinez opined that appellant is a good father. Martinez admitted that appellant frequently ran away from her home when he was in her custody and that she had to report that to the court. Martinez further testified that appellant had been living with his parents when he was arrested for the instant charges.

The State offered the testimony of Detective Michael Hendrix. Detective Hendrix testified that he had responded to and investigated the shooting that led to appellant's instant charges. Detective Hendrix explained that he had previous involvement with appellant through appellant's activity with the Savage Locos street gang. On the day of the shooting, Detective Hendrix spoke with Eddie Rodriguez (Rodriguez) and Angel Torres (Torres),

who were standing in the driveway with the victim, Jimmy Rodriguez (Jimmy), at the time of the shooting. Rodriguez stated that appellant, who was known as “Shadow,” drove by slowly in a blue Ford Focus one time and then stopped the second time around.

According to Torres, appellant yelled out to the group, asking what gang they claimed, and Torres responded “BPM,” meaning Brown Pride Midgets. Jimmy responded “SD,” meaning Springdale Delinquents, and a brief argument followed. Rodriguez saw the passenger point a gun and fire three shots, striking Jimmy in the stomach. Rodriguez and Torres jumped behind a car that was parked in the driveway to avoid the gunfire. The car then drove away.

Detective Hendrix found the blue Ford Focus, which was registered to appellant’s father, at Jesus Lara’s house, which was about three blocks from where the shooting had occurred. Detective Hendrix interviewed the people at the home, including Vivianna Romero, whose boyfriend, Jose Delatorre, was also in the vehicle at the time of the shooting. Romero told Detective Hendrix that appellant brought the gun used in the shooting into the home and placed it on the living room table. Romero further stated that they took the gun and buried it on the south side of the home and that she heard appellant say that Rodolfo Martinez had shot Jimmy.

Lara, Romero’s brother, told Detective Hendrix that appellant, Delatorre, Martinez, and Jaime Manzano came into the home after the shooting. Appellant and Manzano asked Lara to hide the gun, and appellant told him that they had just done a drive-by and shot someone. Lara testified that they had grabbed a shovel from the garage, dug a hole on the south side of the home, and placed the gun in it. They then took the shovel and put it in

an upstairs closet, where Detective Hendrix later located the shovel after receiving permission to conduct a search.

Delatorre confirmed that appellant was driving the vehicle on the day of the shooting and that Martinez was sitting in the front passenger seat. Delatorre and Manzano were sitting in the backseat. Delatorre explained that they were out looking for another Wicked Brown Suspects gang member, Pascual Carbajal, to retaliate because Carbajal had beaten up Manzano days before the shooting. Therefore, Delatorre indicated that Jimmy was not the intended target and that Martinez was upset that he had shot him. Detective Hendrix later found appellant and Martinez in a home in Hartman, Arkansas.

It was based on this record that the trial court made its determination whether to transfer the case to juvenile court. On February 23, 2017, the trial court made written findings on all of the factors enumerated in Arkansas Code Annotated section 9-27-318(g) as follows:

- a. The offenses with which Defendant is charged are of the most serious nature, the highest classification of felonies, and offenses that require protection for society.
- b. That although defendant is alleged to be the driver in a drive-by shooting, the evidence indicates that it was premeditated, in that the perpetrators set about in a vehicle with a loaded weapon to seek revenge on a member of an opposing gang. That although the deceased victim in this case was not the person they were looking for, the Defendant allegedly drove the vehicle past the location where the shooting took place twice, pulled into the driveway, and exchanged conversation with the deceased and other members of the group prior to the shooting. The offense was aggressive, violent, premeditated and willful.
- c. That the offenses committed were against a person, and due to the death of the victim, one of the worst offenses that can be committed against a person, if not the worst.

d. That the Defendant was involved in the participation of the offense, as he drove the shooter and others to the location of the offense, provided the vehicle for their escape, and participated in the plan to bury the pistol which was used to commit the crime, and hide a shovel which was used to bury the pistol, and traveled with the alleged shooter to a hide out two counties away from Washington County.

e. That the testimony of witnesses and the exhibits received indicate that the Defendant had admitted to juvenile court officials as early as December of 2011 that he was involved with gangs both in California and Arkansas. (Defendant's Exhibit #1, Page 3 of 4, item 7) He further admitted in March of 2014 that he was using marijuana regularly and involved in gang activity in a discharge summary from Springwoods Behavioral Health. (Defendant's Exhibit #3, Page 1).

f. That the Juvenile Judge in Washington County, Arkansas saw signs of gang markings and relationship in her Order of Disposition entered on March 27, 2014, in that she noted he was to have no more tattoos and no gangs. (Defendant's Exhibit 2, Page 1).

g. That the Defendant was extremely involved in participation of the offense as has been previously noted in driving the vehicle, hiding the instrumentalities of crime, and fleeing with the alleged shooter.

h. That the Defendant has had extensive contact with the Juvenile Court prior to this incident, completed a Civilian Student Training Program, counseling, setting goals for himself, all to no avail by the date of the incident. (Exhibits #1, #2, #3, #4 and #5).

i. That the Defendant is able to plan a crime. (See above findings of fact).

j. That the Defendant acts like he wants to be an adult. He is the father of two children, now ages 4 and 1; he wants to drive a car, even though the testimony showed he had no driver's license, and as indicated by the birth of his children, wants to have a female companion and have a grown-up sexual relation with her.

k. That the Defendant was born on April 14, 1997. He will turn 20 on April 14, 2017. That the Division of Youth Services can only treat the Defendant until he turns 21. If he is given extended juvenile jurisdiction, then a Petition would have to be filed no later than six months before the Defendant turns 21.

l. That considering the Defendant's previous history, the alleged acts in this case, if they are found to be true by a finder of fact, by the time he gets through a jury trial in Juvenile Court, there would not be enough time to get the treatment he needs through these juvenile measures to rehabilitate him.

m. That although the Defendant was not acting alone in the alleged commission of the offenses, by driving the vehicle, he was legally as culpable as the shooter.

n. That there is no evidence that health problems or mental problems were a factor from the evidence received.

o. That there is no evidence that Defendant is of low intelligence, but there is evidence that he has been involved in gang activity and carrying out crimes against persons and property.

6. That the Court makes the following conclusions of law:

a. That the Defendant has failed to prove by clear and convincing evidence that this case should be transferred to Juvenile Court.

b. That the Defendant failed to prove by a preponderance of the evidence that an Extended Juvenile Jurisdiction Designation is warranted.

c. That the findings are based on the 10 factors listed in § 9-27-318 Ark. Code Ann. (2015 REPL.).

This appeal followed.

Under Arkansas law, a prosecuting attorney has discretion to charge a juvenile sixteen years of age or older in the criminal division of circuit court if the juvenile has engaged in conduct that, if committed by an adult, would be a felony. Ark. Code Ann. § 9-27-318(c)(1) (Repl. 2015). On the motion of the court or any party, the court in which the criminal charges have been filed shall conduct a hearing to determine whether to transfer the case to another division of circuit court having jurisdiction. Ark. Code Ann. § 9-27-318(e). The moving party bears the burden of proving that the case should be transferred to the juvenile division of circuit court. *Austin v. State*, 2017 Ark. App. 114, 515 S.W.3d 633; *Z.T. v. State*, 2015 Ark. App. 282. The trial court shall order the case transferred to another division of circuit court only upon a finding by clear and convincing evidence that

the case should be transferred. Ark. Code Ann. § 9-27-318(h)(2). Clear and convincing evidence is that degree of proof that will produce in the trier of fact a firm conviction as to the allegation sought to be established. *Z.T., supra*. We will not reverse a trial court's determination of whether to transfer a case unless the decision is clearly erroneous. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a firm conviction that a mistake has been committed. *Id.*

At a juvenile-transfer hearing, the trial court is required to consider all of the following factors:

(1) The seriousness of the alleged offense and whether the protection of society requires prosecution in the criminal division of circuit court;

(2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;

(3) Whether the offense was against a person or property, with greater weight being given to offenses against persons, especially if personal injury resulted;

(4) The culpability of the juvenile, including the level of planning and participation in the alleged offense;

(5) The previous history of the juvenile, including whether the juvenile had been adjudicated a juvenile offender and, if so, whether the offenses were against persons or property, and any other previous history of antisocial behavior or patterns of physical violence;

(6) The sophistication or maturity of the juvenile as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living, or desire to be treated as an adult;

(7) Whether there are facilities or programs available to the judge of the juvenile division of circuit court that are likely to rehabilitate the juvenile before the expiration of the juvenile's twenty-first birthday;

(8) Whether the juvenile acted alone or was part of a group in the commission of the alleged offense;

(9) Written reports and other materials relating to the juvenile's mental, physical, educational, and social history; and

(10) Any other factors deemed relevant by the judge.

Ark. Code Ann. § 9-27-318(g). Pursuant to Arkansas Code Annotated section 9-27-318(h)(1), a trial court shall make written findings on all of the factors set forth above. However, there is no requirement that proof be introduced against the juvenile on each factor, and the trial court is not obligated to give equal weight to each of these factors in determining whether a case should be transferred. *Kiser v. State*, 2016 Ark. App. 198, 487 S.W.3d 374.

Appellant contends that the trial court's denial of his motion to transfer was clearly erroneous. Appellant specifically argues that the trial court improperly interpreted the fact that appellant was part of a group to weigh against a transfer. Appellant contends that because he acted as part of a group and not by himself, that fact alone should weigh in favor of transferring to juvenile court. However, there is nothing in the record to establish that the trial court misapplied the eighth factor. Arkansas Code Annotated section 9-27-318(g)(8) simply requires the trial court to consider "[w]hether the juvenile acted alone or was part of a group in the commission of the alleged offense." Here, the trial court clearly considered this factor when it concluded "[t]hat although the Defendant was not acting alone in the alleged commission of the offenses, by driving the vehicle, he was legally as culpable as the shooter."

Moreover, appellant argues that the trial court's finding that "by driving the vehicle, he was legally as culpable as the shooter" is a misstatement of the law. Appellant explains that other factors must be present in addition to driving the vehicle in order for him to be held legally culpable because the "sole" act of driving the vehicle, without more information, does not satisfy the required elements. Under the facts of this case, the trial court did not find that appellant was culpable simply because he drove the vehicle. Instead, the trial court had already made findings that appellant "was extremely involved in participation of the offense as has been previously noted in driving the vehicle, hiding the instrumentalities of crime, and fleeing with the alleged shooter." Therefore, appellant's arguments are without merit.

Here, the trial court heard the evidence, weighed it, reached its decision, and enumerated its conclusions in an order. The trial court considered the evidence on all of the factors, as required by the statute, and it was free to use its discretion in the weight afforded to each factor. *Austin, supra*. As noted, the trial court is not required to give equal weight to each of the statutory factors; it can rely on any of the factors so long as it considered and made written findings with regard to all the factors. *Id.* The trial court did not ignore the evidence that appellant cited in support of his motion or that was presented at the hearing; it simply weighed the evidence differently than appellant desired. *See Brown v. State*, 2016 Ark. App. 254, 492 S.W.3d 126. Moreover, when reviewing the entire evidence, we cannot say with firm conviction that a mistake has been committed. Thus, we hold that the trial court properly considered all of the factors in section 9-27-318(g) and did not clearly err in denying the motion to transfer. Accordingly, we affirm.

Affirmed.

GLADWIN and GLOVER, JJ., agree.

McLemore Law, LTD, by: *Kent McLemore*, for appellant.

Leslie Rutledge, Att'y Gen., by: *Ashley Argo Priest*, Ass't Att'y Gen., for appellee.