Juvenile Law Case Summaries

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Evidence was sufficient to support fitness finding and certification to criminal court for capital murder [Jimenez v. State] (02-1-28).

On February 14, 2002, the Corpus Christi Court of Appeal, in an appeal from a conviction for capital murder, upheld the juvenile court jury's finding that defendant was fit to proceed to certification hearing. The Court of Appeals also upheld the juvenile court's decision to certify defendant to criminal court for prosecution as an adult.

02-1-28. Jimenez v. State, UNPUBLISHED, No. 13-99-776-CR, 2002 WL 228794, 2002 Tex.App.Lexis ___ (Tex.App.-Corpus Christi 2/14/02) [Texas Juvenile Law (5th Edition 2000).

Facts: After the juvenile court waived jurisdiction and transferred the case to criminal district court, a jury convicted appellant, Michael Jimenez, of capital murder. The trial court automatically sentenced him to life imprisonment. Appellant raises twenty-three points of error, contending generally that: 1) the trial court erred in denying his motion for continuance; 2) the jury's finding that he was not unfit to proceed is against the great weight and preponderance of the evidence; 3) the juvenile court erred in certifying him to stand trial as an adult; 4) the evidence is legally and factually insufficient to support his conviction; 5) the trial court erred in admitting certain evidence and allowing certain testimony; and 6) the jury charge failed to correctly instruct the jury regarding the law of parties.

On the evening of January 20, 1998, Susan Malek was asleep in the bedroom of her mobile home in Bay City, Texas. Her two children, an eight-year-old daughter, Ashley, and a six-year-old son, Zachary, were asleep in the bed with her. Ashley testified she woke up because her mother was sitting up in bed, screaming, "Oh, God, help me please." Ashley saw two men, later identified as Jimenez and his brother, Kenneth Parr, [FN3] standing in the bedroom doorway. One of the men had a gun. Ashley testified that one of the men was tall and the other short; each wore a bandana mask. Ashley could tell by the way the men talked that they were black. She testified the men called each other "bro" and "cuz." The men ordered Malek and the children to lie face down on the floor. They asked Malek if there were any guns in the house; she said no. Ashley testified the men called Malek "bad names," including "bitch." She could hear the men going through her mother's musical jewelry box and loose change. At one point, Ashley testified the gun was up against her back. Malek begged the men not to hurt Ashley. One of the men told Malek to "spread [her] legs." Ashley heard her mother say, "No, no, not in front of my kids." Malek was sexually assaulted. [FN4] Ashley testified she heard two gunshots and knew her mother had been shot. The men left the bedroom, but returned a few minutes later and asked Ashley where the car keys were. She told them. She heard them trying to start the car. A few minutes later, one of the men came back to the bedroom and asked Ashley how to start the car. She told him, "[y]ou have to push the clutch thing in." After ten to twenty minutes had passed, Ashley got up and called her grandmother, Charlotte Brown. Charlotte's husband, Mike Brown, answered the phone. Ashley told him they had been robbed and that her mother had been shot. Mike and Charlotte arrived about ten minutes later. The house was in disarray; the television, VCR, and the children's Sega Saturn game were missing. The children came running out of Malek's bedroom. Charlotte and Mike entered the bedroom and found Malek dead, lying face-down on the floor, nude from the waist down.

FN3. In a separate trial, a jury convicted Parr of capital murder and he was sentenced to death.

FN4. Charlotte Brown, Malek's mother, testified that Zachary told her, "One of them stuck his wee-wee in Mommy's mouth." Ashley testified she did not witness the assault, but heard one of the men say, "If you bite it, I will shoot you." DNA analysis of vaginal, oral, and anal swabs from Malek's body were consistent with Parr's blood profile. The swabs revealed the presence of sperm in all three locations consistent with samples taken from Parr.

A jury found Jimenez was not unfit to proceed as a result of mental illness or retardation. [FN5] Following a certification hearing, the trial court certified Jimenez to stand trial as an adult and transferred the case to regular criminal court. A jury convicted Jimenez of capital murder and he was automatically sentenced to life imprisonment.

FN5. See Act of May 31, 1995, 74th Leg., R.S., ch. 262, § 47, 1995 Tex. Sess. Law Serv. 2545 (Vernon) (amended 1999) (current version at Tex. Fam.Code Ann. §§ 55.31, 55.32 (Vernon Supp.2002)). Because the 1999 amendments apply only to conduct occurring on or after September 1, 1999, the applicable version is that which was in effect at the time the conduct occurred.

Held: Affirmed.

Opinion Text: Fitness to Proceed

In his second point of error, Jimenez challenges the factual sufficiency of the jury's finding that he was fit to proceed. He contends the jury's finding is so contrary to the overwhelming weight and preponderance of the evidence that it is clearly wrong and manifestly unjust. The State contends Jimenez points only to evidence favorable to his position and ignores all contrary evidence. The State argues the record contains sufficient evidence to support the jury's finding.

In determining whether the evidence is sufficient to support a finding, an appellate court must consider and weigh all the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex.1986); In the Matter of J.P.O., 904 S.W.2d 695, 700 (Tex.App.-Corpus Christi 1995, writ denied); In the Matter of K.D.S., 808 S.W.2d 299, 302 (Tex.App.-Houston [1st Dist.] 1991, no writ). Only if the finding is so against the great weight and preponderance of the evidence as to be manifestly unjust may we set the finding aside. Cain, 709 S.W.2d at 176; J.P.O., 904 S.W.2d at 700; K.D.S., 808 S.W.2d at 302.

An appellant has a duty to show that the record supports his contentions and to point to the supporting places in the record. See Tex.R.App. P. 38.1(h); Hall v. Stephenson, 919 S.W.2d 454, 466 (Tex.App.-Fort Worth 1996, writ denied). It is not the duty of an appellate court to make an independent search of the record. Pratt v. State, 907 S.W.2d 38, 47 (Tex.App.-Dallas 1995, writ denied) (citing Fredonia State Bank v. General Am. Life Ins. Co., 881 S.W.2d 279, 283 (Tex.1994)).

Jimenez asserts that all three doctors who testified at his fitness hearing agreed that he suffered from an extreme behavioral disorder and that he is borderline mentally retarded. However, he provides no citations to the record in support of his contentions. The record reflects that Dr. Pearlman testified that in his opinion, Jimenez was not fit to proceed. Dr. Pearlman conceded, however, that some of Jimenez's conversations with other physicians and probation officers indicated that he had some understanding of the proceedings and some ability to assist and interact with authority figures. Dr. Milton Williams, a psychiatrist, testified that Jimenez was fit to proceed. Similarly, Dr. W.K. Joe, a psychologist, testified that in his opinion, Jimenez was fit to proceed and capable of assisting in his own defense.

The test for fitness to proceed is established in section 55.31 of the family code and provides, in pertinent part, that "[a] child ... who as a result of mental illness or mental retardation lacks capacity to understand the proceedings in juvenile court or to assist in the child's own defense is unfit to proceed ..." Tex. Fam.Code Ann. § 55.31(a) (Vernon Supp.2002). [FN8] Unfitness to proceed as a result of mental illness or mental retardation must be proved by a preponderance of the evidence. Tex. Fam.Code Ann. § 55 .32(d) (Vernon Supp.2002). It is within the province of the jury to weigh opinion evidence and the judgment of experts and decide which expert witness should be credited. Pratt, 907 S.W.2d at 47. We have reviewed the record and conclude that the jury's finding that Jimenez was fit to proceed was not so contrary to overwhelming weight of the evidence that it was clearly wrong and manifestly unjust. We overrule point of error two.

FN8. Although the applicable version of the statute is that which was in effect prior to the 1999 amendments, the amendments to paragraph (a) made no substantive changes. Thus, we cite to the current version of the statute.

Transfer

1) Ineffective assistance

In his third point of error, Jimenez challenges his transfer to criminal district court for adult prosecution. Specifically, he contends he was denied effective assistance of counsel at the certification hearing because he did not receive "notice regarding the sexual assault of the victim." The State responds that even if Jimenez's attorney did not know the State would refer to the sexual assault evidence at the certification hearing, Jimenez cannot show that he suffered any harm because even without the sexual assault evidence, the evidence of Jimenez's participation in the burglary and/or murder was sufficient to warrant certification.

We examine claims of ineffective assistance of counsel under the standard set out in Strickland v. Washington, 466 U.S. 668, 687 (1984). To prevail on such a claim, an appellant must first show his attorney's representation fell below an objective standard of reasonableness. See Jackson v. State, 877 S.W.2d 768, 771 (Tex.Crim.App.1994); Hernandez v. State, 726 S.W.2d 53, 55 (Tex .Crim.App.1986). The appellant must then show a reasonable probability that a different outcome would have resulted but for his attorney's unprofessional errors. Jackson, 877 S.W.2d at 771; Hernandez, 726 S.W.2d at 55. A reasonable probability is one sufficient to undermine confidence in the outcome. Jackson, 877 S.W.2d at 771; Hernandez, 726 S.W.2d at 55.

Although Jimenez asserts he was denied effective assistance of counsel because his attorney had no notice that the State would refer to the sexual assault during the certification hearing, he cites no authority in support of his contention. Accordingly, he has waived any complaint on this point. See Tex.R.App. P. 38.1(h).

Moreover, a juvenile court can transfer a case to criminal court if it determines there is probable cause to believe the juvenile committed the alleged offense and that either the seriousness of the crime or the child's background requires criminal prosecution. See Tex. Fam.Code Ann. § 54.02(a)(3) (Vernon Supp.2002). [FN9] Jimenez acknowledges that the State's burglary allegations met all the requirements of section 54.02 of the family code. Therefore, even if Jimenez's attorney lacked notice that the State would refer to the sexual assault at the certification hearing, Jimenez cannot show he suffered harm because the burglary allegations alone were sufficient to warrant certification. See Tex.R.App. P. 44.1. Jimenez cannot show a reasonable probability that but for his counsel's allegedly deficient performance, the result of the proceeding would have been different. See Jackson, 877 S.W.2d at 771. We conclude he was not deprived of effective assistance of counsel. We overrule the third point of error.

FN9. Although portions of section 54.02 were amended in 1999, subsection (a)(3) was unchanged. Thus, we cite to the current version.

2) Sufficiency of Evidence Supporting Certification

In his fifth, seventh, and eighth points of error, Jimenez challenges the sufficiency of the evidence supporting the trial court's order certifying him to stand trial as an adult. Specifically, in his fifth point, he contends the trial court erred in finding the State met its burden of probable cause for certification as an adult. In his seventh and eighth points, he challenges the factual and legal sufficiency of the evidence supporting his transfer to criminal court. We will address these points together.

In order to properly transfer a matter to a district court, a juvenile court must find two things. First, the court must find probable cause to believe the juvenile committed the offense or offenses alleged in the transfer petition. Second, the juvenile court must find that the welfare of the community requires criminal proceedings because of the seriousness of the offense alleged or because of the background of the juvenile. See Tex. Fam.Code Ann. § 54.02(a) (Vernon Supp.2002); In the Matter of D. D., 938 S.W.2d 172, 174-75 (Tex.App.-Fort Worth 1996, no pet.).

An appeal of a discretionary transfer order is a criminal matter governed by the code of criminal procedure and the rules of appellate procedure applicable to criminal cases. Tex.Code Crim. Proc. Ann. art. 44.47(c) (Vernon Supp.2002). Accordingly, the legal and factual sufficiency review applicable to criminal cases is applicable to our review of the juvenile court's transfer order.

When the legal sufficiency of the evidence supporting a transfer order is challenged, we view the evidence in the light most favorable to the trial court's findings to determine whether the trial court could have found probable cause that a crime was committed and that, because of the seriousness of the alleged offense or the background of the child, the welfare of the community requires criminal proceedings. See Tex. Fam.Code Ann. § 54.02(a)(3) (Vernon Supp.2002); Jackson v. Virginia, 443 U.S. 307, 318-19 (1979); Johnson v. State, 23 S.W.3d 1, 7 (Tex.2000).

When the factual sufficiency of a transfer is challenged, the reviewing court must consider all of the evidence to determine if the finding is so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust. See Clewis v. State, 922 S.W.2d 126, 135 (Tex.Crim.App.1996); In re D. D., 938 S.W.2d at 174.

Absent an abuse of discretion, an appellate court will not disturb a juvenile court's decision to certify a juvenile as an adult, waive jurisdiction, and transfer the juvenile to adult court. In the Matter of N.M.P., 969 S.W.2d 95, 98 (Tex.App.-Amarillo 1998, no pet.); D. D., 938 S.W.2d at 175; In the Matter of J.P .O., 904 S.W.2d 695, 698 (Tex.App.-Corpus Christi 1995, writ denied). We will uphold the trial court's findings unless we find the evidence too weak to support the findings, or the findings are so against the overwhelming weight of the evidence that they are manifestly unjust. Matter of C.C., 930 S.W.2d 929, 930 (Tex.App.-Austin 1996, no pet.); Matter of M.A., 935 S.W.2d 891, 895-96 (Tex.App.-San Antonio 1996, no writ).

Under section 54.02 of the family code, before certifying a juvenile as an adult, the juvenile court must determine whether probable cause exists to believe the child committed the offenses alleged in the transfer petition. See Tex. Fam.Code Ann. § 54.02(a)(3) (Vernon Supp.2002). Probable cause is shown by facts and circumstances sufficient to warrant a prudent person to believe the child committed the offense. In the Matter of D.I.N., 930 S .W.2d 253, 255 (Tex.App.-Houston [14th Dist.] 1996, no writ); In the Matter of J.P.O., 904 S.W.2d 695, 700 (Tex.App.-Corpus Christi 1995, writ denied). The probable cause standard of proof embraces a practical, common sense approach rather than the more technical standards applied in the burdens of proof of either beyond a reasonable doubt or a preponderance of the evidence. J.P.O., 904 S.W.2d at 700.

In making the determination required by section 54.02, the trial court shall consider, among other matters:

(1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
(2) the sophistication and maturity of the child;
(3) the record and previous history of the child; and
(4) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.

Tex. Fam.Code Ann. § 54.02(f) (Vernon Supp.2002).

While the trial court must consider all of these factors before transferring the case to district court, it is not required to find that each factor is established by the evidence. In re D. D., 938 S.W.2d at 176; J.P.O., 904 S.W.2d at 703 (Butts, J., concurring). The trial court is not required to give each factor equal weight so long as each is considered. In re J.J., 916 S.W .2d 532, 535 (Tex.App.-Dallas 1995, no writ).

We first address Jimenez's contention that the State failed to meet its burden of showing probable cause to believe he committed the alleged offenses. More specifically, he contends that "[t]he only evidence of a crime committed by Jimenez was that he may have been connected to a burglary."

A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both. Tex. Pen.Code Ann. § 7.01(a) (Vernon 1994).

Section 7.02 provides:

(a) A person is criminally responsible for an offense committed by the conduct of another if: ... (2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids or attempts to aid the other person to commit the offense ...

(b) If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

Tex. Pen.Code Ann. § 7.02(a)(2), (b) (Vernon 1994). Rosillo v. State, 953 S.W.2d 808, 812 (Tex.App.-Corpus Christi 1997, pet. ref'd).

The evidence is sufficient to support a conviction under the law of parties where the actor is physically present at the commission of the offense and encourages the commission of the offense either by words or other agreement. Ransom v. State, 920 S.W.2d 288, 302 (Tex.Crim.App.1994); Rosillo, 953 S.W.2d at 814. The evidence must show that, at the time of the offense, the parties were acting together, each contributing to their common purpose. See Burdine v. State, 719 S.W.2d 309, 315 (Tex.Crim.App.1986). In determining whether a defendant participated in an offense as a party, the court may examine the events occurring before, during, and after the commission of the offense, and may rely on actions of the defendant that show an understanding and common design to commit the offense. Ransom, 920 S.W.2d at 302; Rosillo, 953 S.W.2d at 814. Participation in an enterprise may be inferred from the circumstances and need not be shown by direct evidence. Rosillo, 953 S.W.2d at 814. Circumstantial evidence may be sufficient to show that one is a party to the offense. Id.

At the hearing on the motion for discretionary transfer, the State presented evidence that Jimenez is relatively sophisticated, knowledgeable about the legal system, manipulative, and "streetwise ." Dr. Williams testified that Jimenez's history regarding his assignment to various rehabilitative facilities was "pretty bleak." Marc Bittner, a juvenile probation officer, testified that Jimenez's juvenile referral record included two felonies and eight misdemeanors. Bittner also testified that Jimenez was not likely to be rehabilitated by utilizing any of the available services because he had been assigned to various programs and had never successfully completed any of them. Bittner further testified that the public would not be adequately protected by maintaining Jimenez in the juvenile system. Tommy Lytle, a police officer, testified that according to Jimenez's girlfriend, Jimenez admitted he participated in the burglary and knew Malek had been shot. The officer also testified that the stolen property had been recovered from an apartment where Jimenez and Parr often spent the night and that eyewitnesses had observed Jimenez carrying the stolen property. Conflicting evidence was presented as to whether Jimenez told his girlfriend that he was present when Malek was shot.

The trial judge appropriately considered the factors set forth in subsections (a) and (f) of section 54.02, and made the following findings of fact:

Jimenez was at least 15 years of age at the time of the offense;
no adjudication hearing had been conducted concerning the offenses;
the offense involved injury and death to a person;

probable cause existed to believe that Jimenez committed the offenses;
evidence existed upon which the grand jury of Matagorda County, Texas would probably return an indictment against Jimenez if the district attorney so requested;
Jimenez was sufficiently sophisticated and mature to assist his attorney in his defense;
the offense was committed in an aggressive and premeditated manner;
there was no likelihood of the reasonable rehabilitation of Jimenez through procedures, services, and facilities currently available to the juvenile court; and
because of the nature of the offenses, the welfare of the community required criminal proceedings.

Viewing the evidence in the light most favorable to the prosecution, we conclude the trial court did not abuse its discretion in finding probable cause existed to believe appellant committed the alleged offenses. We overrule Jimenez's fifth point of error.

In his seventh point, Jimenez argues the evidence is factually insufficient to support the following findings: 1) that he probably committed the offenses of murder and sexual assault; 2) that he was sophisticated or mature enough; 3) that the offense was committed in a premeditated manner; 4) that he could not have been rehabilitated by the use of procedures and services; and 5) that the welfare of the community is best served by trying him as an adult. In his eighth point, he challenges the legal sufficiency of the evidence supporting the same findings.

Jimenez does not challenge the sufficiency of the evidence linking him to the offense of burglary. This Court has noted that a "burglary of a home in the middle of the night while the residents are at home asleep is a serious offense." J.P.O., 904 S.W.2d at 702. With regard to the offenses of murder and sexual assault, a juvenile court may make the certification finding of probable cause based on the law of parties; a showing of personal commission of the offense by the respondent is not required. See In the Matter of A .A., 929 S.W.2d 649, 655 (Tex.App.-San Antonio 1996, no writ).

The trial court is not required to make an affirmative finding on each of the section 54.02(f) factors. In the Matter of M.A., 935 S.W.2d 891, 896 (Tex.App.-San Antonio 1996, no writ). We have already determined that the trial court did not err in finding the first component required by section 54.02(a)(3): that there was probable cause to believe Jimenez committed the alleged offenses. See Tex. Fam.Code Ann. § 54.02(a)(3) (Vernon Supp.2002). The second component of subsection (a)(3) requires only a finding that either the seriousness of the offense or the background of the child requires criminal prosecution to protect the welfare of the community. Id. A trial court does not abuse its discretion by finding the community's welfare required transfer due to the seriousness of the crime alone, despite the child's background. See D.D., 938 S.W.2d at 177; Matter of M.A., 935 S.W.2d at 895-97.

Here, the trial court stated that its decision to waive jurisdiction was based, inter alia, on the following findings: that there is probable cause to believe Jimenez committed the offense of capital murder, a serious offense involving injury and death to a person; that Jimenez is sufficiently sophisticated and mature to understand adult criminal proceedings; that he is mature enough to assist in the preparation of his defense; that Jimenez has had numerous prior dealings with the juvenile system; that there are no prospects of adequate protection of the public; and that there is no likelihood of rehabilitation by utilization of available facilities.

After reviewing all the evidence, we conclude that the evidence supports the trial court's findings. We hold that the order waiving jurisdiction and transferring the cause to the district court for criminal proceedings is not so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust. See Clewis, 922 S.W.2d at 135. We hold the evidence is legally and factually sufficient to support the juvenile court's order. The court did not abuse its discretion in ordering the transfer to the district court. Jimenez's seventh and eighth points are overruled.

3) Sexual Assault Testimony

In his fourth point of error, Jimenez argues the trial court erred in overruling his relevance objection to the admittance of testimony regarding the sexual assault of Malek. Although Jimenez fails to specifically state that his complaint refers to testimony admitted at the certification hearing, he argues that "[a]ny evidence offered of a sexual assault was more prejudicial to the determination of whether to waive the juvenile court's jurisdiction." Accordingly, we read this point as referring to the admittance of testimony regarding the sexual assault at the certification hearing.

Jimenez has failed to provide any references to the record in support of this point. He has therefore waived any error. See Tex.R.App. P. 38.1(h). The record also reflects that although Jimenez objected on the basis of lack of notice to testimony by Officer Susan Maxwell regarding the sexual assault of Malek, he failed to timely object on the basis of lack of notice to similar testimony offered by Officer Tommy Lytle regarding the sexual assault. An objection to allegedly inadmissible evidence should be made at the earliest opportunity, or as soon as the ground of objection becomes apparent. Johnson v. State, 803 S.W.2d 272, 291 (Tex.Crim.App.1990), overruled on other grounds by Heitman v. State, 815 S.W.2d 681 (Tex.Crim.App.1991). One must object every time allegedly inadmissible evidence is offered or be in peril of waiving the objection. Braughton v. State, 749 S.W.2d 528, 531 (Tex.App.-Corpus Christi 1988, pet. ref'd).

Even if Jimenez had not waived any error, his argument is without merit. This Court has noted:

> No consistent rules regarding the admissibility of evidence have been developed for a transfer hearing, and juvenile courts often consider evidence that would be inadmissable at an adjudication hearing. Strict rules of evidence are not applied in transfer proceedings because the weight of the evidence is judged by whether it would support an indictment for the offense, and, a grand jury, when considering an indictment, is permitted to receive evidence that would be inadmissable at an adjudication hearing or trial.

J.P.O., 904 S.W.2d at 699 (citations omitted). We hold that the trial court did not err by allowing the testimony regarding the sexual assault of Malek. We overrule Jimenez's fourth point.

4) Bittner's Testimony

In his sixth point, Jimenez contends the juvenile court erred in admitting the testimony of Marc Bittner, a juvenile probation officer, regarding the services and facilities available for Jimenez's rehabilitation. Jimenez argues that Bittner was not qualified to testify because he did not investigate the available services and facilities. Jimenez also argues there was no evidence to support the court's findings regarding available services.

As noted above, strict rules of evidence are not applicable in transfer proceedings. Id. The record reflects that: 1) Bittner testified that he has been a probation officer for three years; 2) he is familiar with Jimenez's juvenile history and the services available through the juvenile justice system; and 3) it is unlikely that Jimenez could be rehabilitated by utilizing available services because he had previously been referred to a number of different types of programs and had never successfully completed one. We hold the trial court did not err in admitting Bittner's testimony. We overrule Jimenez's sixth point of error.

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