

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 20, 2021

Sheila T. Reiff
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. 2021AP419
STATE OF WISCONSIN**

Cir. Ct. No. 2020JV663

**IN COURT OF APPEALS
DISTRICT I**

IN THE INTEREST OF X.S., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

APPELLANT,

v.

X.S.,

RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
BRITTANY C. GRAYSON, Judge. *Reversed and cause remanded with
directions.*

¶1 DUGAN, J.¹ The State appeals a nonfinal order of the juvenile court denying its petition for waiver of jurisdiction in which the State sought to have Xander² waived into adult court for criminal proceedings resulting from the shooting of eight people at Mayfair Mall. This court concludes that the juvenile court erroneously exercised its discretion because the record made by the juvenile court does not reflect that the court set forth a reasonable basis for its conclusions as to the statutory criteria for waiver when it denied the State’s petition for waiver of jurisdiction. Accordingly, the order of the juvenile court is reversed, and the cause is remanded with directions that the juvenile court conduct a new waiver hearing.³

BACKGROUND

¶2 The State filed a delinquency petition on November 24, 2020, charging Xander with eight counts of first-degree reckless injury, with use of a dangerous weapon, and one count of possession of a dangerous weapon by a person under eighteen. As alleged in the petition, Xander shot eight people at

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2019-20). All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

² For ease of reading and to protect confidentiality, we use a pseudonym when referring to the juvenile in this case.

³ In addition to arguing that this court should reverse the juvenile court’s order denying the State’s waiver petition, the State argues that this court should reverse a discovery order that the juvenile court entered on January 15, 2021. The State did not petition for leave to appeal this order, and consequently, the order is not properly before this court. Additionally, Xander argued in his response brief that this order is not properly before this court, and the State failed to raise any argument in its reply brief refuting Xander’s argument. The State has, therefore, also conceded the argument. See *United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (stating that the failure to refute a proposition asserted in a response brief may be taken as a concession). As a result, this court will not address the discovery order.

Mayfair Mall on November 20, 2020—Xander was fifteen years old at the time of the shooting. The petition was supported by statements from witnesses who were present at the time of the shooting.

¶3 One witness recalled seeing two males walking through the mall who “did not appear to be shopping, they were walking through the mall with purpose and appeared to be ‘looking for someone.’” This same witness said that one of the two males approached a group of four individuals on an escalator and the second male “remained back and reached for his waistband” and “she could see the handle of a handgun.” This second male who remained back “kept his hand on the handgun” as the other male approached the group and “punched the leading member of the group.” At this point, the witness recalled that the second male “pointed his gun at the group and began firing” and he “appeared to be targeting the group.”

¶4 Another witness recalled that “she heard a male begin yelling at a group of people on the descending escalator” and “thought it was a joke, until she observed the yelling subject punch one of the group members.” She recalled that a second male then took a “shooter’s stance” and began firing a gun.

¶5 In total, eight people were shot. Three of the individuals were part of the escalator group, one was the male who approached the escalator group, and there were four bystanders who did not appear to be associated with the two male individuals or the escalator group.

¶6 Immediately following the shooting, Xander’s father arranged to have Xander picked up by an Uber driver at a store near Mayfair Mall. Xander was arrested days later traveling in a car with Illinois license plates and carrying a suitcase. At the time of his arrest, Xander also had possession of the firearm that

was used in the shooting. The State later filed a Statement of Supplemental Information stating that, during the investigation following the shooting, police discovered text messages between Xander, his parents, and his sister, in which they devised a plan to help Xander flee to Florida via airplane and stay with his adult sister.

¶7 The State filed a petition for waiver of jurisdiction on November 25, 2020, and the juvenile court held a hearing addressing the State's waiver petition on February 16 and 25, 2020. Trial counsel did not contest the prosecutive merit of the case, and the State proceeded to call Xander's Human Service Worker from the Milwaukee County Division of Youth and Family Services to testify regarding Xander's multiple violations of his conditions of probation and lack of cooperation related to a prior delinquency adjudication. Trial counsel called a psychologist who was hired to evaluate Xander in connection with the waiver petition. In addition to the testimony, the parties submitted documentation from Xander's prior delinquency adjudication, Xander's parents and teachers, and other sources describing Xander's school performance, home life, prior shootings with which he was involved, and drug-related activities for the juvenile court's consideration during the waiver proceedings.

¶8 The juvenile court found that the State had not met its burden to show that it was contrary to Xander's best interests or the best interests of the public to hear the case and denied the State's petition. Prior to issuing its ruling, the juvenile court provided a detailed summary of the testimony that had been provided over the course of the hearing and listed the relevant factors under WIS. STAT. § 938.18(5) to be considered in evaluating a petition for waiver.

¶9 This court granted the State’s petition for leave to appeal. On appeal, the State argues that this court should reverse the juvenile court’s order denying the waiver petition because the juvenile court erroneously exercised its discretion.

DISCUSSION

¶10 The State argues that the juvenile court erroneously exercised its discretion for several reasons. This court agrees.⁴ The juvenile court erroneously exercised its discretion when it admitted and then relied on hearsay statements from Xander contained in the psychologist’s testimony and, in effect, allowed Xander to present an alternative version of events that contradicted the facts set forth in the delinquency petition. Further, the juvenile court erroneously exercised its discretion when it described the unique and dangerous nature of this shooting of eight people, including innocent bystanders, in a crowded mall but then merely stated that the juvenile court handles serious cases like this “all the time” and

⁴ In addition to the arguments discussed herein, this court also agrees with the State that the juvenile court generally summarized the testimony from the waiver hearing and then repeated which parts of the testimony the court found applied to each factor without assigning weight to the factors. The juvenile court is required “to state on the record its findings with respect to the criteria actually considered.” *G.B.K. v. State*, 126 Wis. 2d 253, 256-57, 376 N.W.2d 385 (Ct. App. 1985); *see also* WIS. STAT. § 938.18(6). A failure to set forth specific findings is an erroneous exercise of discretion. *See State v. Kraemer*, 156 Wis. 2d 761, 764, 457 N.W.2d 562 (Ct. App. 1990).

stated that the public interest is best served by allowing this case to proceed in juvenile court without further explanation.⁵

¶11 A hearing on a waiver petition has two parts. See *P.A.K. v. State*, 119 Wis. 2d 871, 875, 350 N.W.2d 677 (1984). The juvenile court must first determine whether the case has prosecutive merit.⁶ See *id.* at 873 (stating that in a contested juvenile waiver hearing the juvenile court “may rely on the delinquency and waiver petitions alone to determine” the issue of prosecutive merit); see also WIS. STAT. § 938.18(4). If it finds prosecutive merit, the juvenile court next considers the statutory criteria to determine whether to waive jurisdiction including:

(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

⁵ The State additionally argues that the juvenile court erroneously exercised its discretion by applying the wrong legal standard, and the State points to the juvenile court’s statement at the end of its ruling where the juvenile court said, “[T]he waiver petition is denied because it is in the best interest of the juvenile or the public for the circuit court with juvenile jurisdiction to hear this case.” On the other hand, the State also recognizes that “[s]uch a remand would not likely change the juvenile court’s waiver decision, but merely result in a correction of the form. It also would not address the more serious injury caused by the court’s decision and it would do nothing to correct the underlying errors.” This court also recognizes that the juvenile court stated the correct standard before making this statement. Consequently, this court does not find the State’s argument on this point persuasive and will not address it further.

⁶ In *P.A.K. v. State*, our supreme court explained that before considering the waiver criteria the juvenile court “must satisfy itself that the record establishes to a reasonable probability that the violation of the criminal law alleged has been committed and that the juvenile has probably committed it. This is the degree of probable cause required to bind over an adult for criminal trial.” *Id.*, 119 Wis. 2d 871, 875, 350 N.W.2d 677 (1984) (citation omitted).

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 system, and, where applicable, the mental health system and the suitability of the juvenile for placement in the serious juvenile offender program under s. 938.538 or the adult intensive sanctions program under s. 301.48.

(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.

WIS. STAT. § 938.18(5).

¶12 “After considering the criteria under sub. (5), the court shall state its finding with respect to the criteria on the record[.]” WIS. STAT. § 938.18(6); *see also State v. C.W.*, 142 Wis. 2d 763, 769, 419 N.W.2d 327 (Ct. App. 1987) (“[W]here evidence is properly before the juvenile court with respect to each of the criteria set forth in sec. 48.18(5), Stats., the court is required under sec. 48.18(6) to consider each of these criteria and set forth in the record specific findings with respect to the criteria.”). “[I]f the court determines on the record that there is clear and convincing evidence that it is contrary to the best interests of the juvenile or of the public to hear the case,” the court shall waive jurisdiction. WIS. STAT. § 938.18(6). The matter is then referred to the district attorney “for appropriate proceedings in the court of criminal jurisdiction.” *Id.*

¶13 The decision to waive jurisdiction under WIS. STAT. § 938.18 “is committed to the sound discretion of the juvenile court,” and this court will reverse the juvenile court’s decision “only if the court erroneously exercised its discretion.” *State v. Tyler T.*, 2012 WI 52, ¶24, 341 Wis. 2d 1, 814 N.W.2d 192. In determining whether the juvenile court erroneously exercised its discretion, this court considers whether “the record reflects that the juvenile court exercised its discretion and there was a reasonable basis for its decision.” *B.B. v. State*, 166 Wis. 2d 202, 207, 479 N.W.2d 205 (Ct. App. 1991). “The weight to be accorded each of the enumerated factors is discretionary with the [juvenile] court.” *G.B.K. v. State*, 126 Wis. 2d 253, 259, 376 N.W.2d 385 (Ct. App. 1985).

¶14 At the waiver hearing, the psychologist testified that Xander “came across as anxious” based on the information that Xander provided to the psychologist. The psychologist further testified that Xander was suffering from an episode of post-traumatic stress disorder (PTSD) during the shooting at Mayfair Mall based on Xander’s statement to him that the same individuals at the mall that day had shot at Xander and his friend at a park a month before the Mayfair Mall shooting occurred. The psychologist testified that Xander told him that he “felt threatened” that day at the mall and that Xander said that “when he shot – his eyes – he closed his eyes and shot.” He then testified that “what it tells me is that he – he was simply reacting.... [H]e wasn’t trying to – trying to hit someone.... [H]e was just reacting.”

¶15 In making its ruling, the juvenile court considered evidence of premeditation and impulsiveness when it analyzed the seriousness of the offense, and it found that “[i]t didn’t appear” that there was “any clear plan of action.” In reaching this finding, the juvenile court relied on the psychologist’s testimony saying:

[H]e did opine on or at least give some information about what he – from his interviews of [Xander] believed that he was experiencing in that moment or what he actually did. Opined – getting information that he essentially closed his eyes and fired into this group of people.... I have no reason to believe that [the psychologist] would offer up that kind of information and have it be untruthful, I guess to the [c]ourt.... [I]n considering the description of the way that the events unfolded I think you shed some light on our discussion about whether that act was premeditated, whether it was thought out, whether there was any clear, you know, objective when we talk about the allegations[.]

¶16 By contrast, the delinquency petition provides witness accounts stating that Xander “kept his hand on the handgun” in his waistband as the male Xander was with approached the group on the escalator, Xander “drew his handgun and pointed it at the ground, briefly,” and then “pointed his gun at the group and began firing.” One witness stated that Xander “appeared to be targeting the group,” and further recalled that “one of the members of the escalator group got up and attempted to run away.” The witness then described that “[t]he shooter turned his attention to this person and continued to shoot at the fleeing group member.” The witness also stated that she saw Xander and another male walking through the mall but they did not appear to be shopping, they were walking through the mall with purpose and appeared to be “looking for someone.” Another witness stated that Xander took a “‘shooter’s stance’ and [began] firing a gun.” The juvenile court indicated, however, that it was not going to rely on certain statements in the delinquency petition about what people might have thought because they were “allegations” that were “a little bit speculative.”

¶17 Additionally, when asked if he was aware of the statements by the witnesses in the amended delinquency petition, the psychologist stated that he could not recall what he had read in the delinquency petition. The psychologist also testified that he was not aware that a witness noticed Xander and another male

because they appeared to be looking for someone rather than shopping and that he had no recollection of a witness describing that Xander paused during the shooting to adjust his position and aim and shoot at one of the group members who was running away—in fact, the psychologist said he would be surprised by that information because Xander told him that he closed his eyes and shot.

¶18 The problem here is twofold. First, the juvenile court not only admitted but then relied on inadmissible hearsay. “[C]ommon law and statutory rules of evidence are not binding at a waiver hearing under [WIS. STAT. §] 938.18[.]” WIS. STAT. § 938.299(4)(b). The statute further provides that “[h]earsay evidence may be admitted if it has demonstrable circumstantial guarantees of trustworthiness.” *Id.* Xander’s alternative version of events to the psychologist that he felt threatened and just closed his eyes and shot, which the psychologist found consistent with someone overcome by fear and anxiety and suffering from an episode of PTSD, are self-serving statements that lack any demonstrable circumstantial guarantees of trustworthiness allowing for their admission under § 938.299(4)(b), much less their reliability.

¶19 Second, Xander’s description of the events of the shooting contradict the description of events alleged in the delinquency petition, and the juvenile court had previously accepted the facts as alleged in the delinquency petition as true for purposes of finding prosecutive merit. Accordingly, while it may have been permissible for the psychologist to rely on Xander’s statements to form his opinion that Xander was suffering from an episode of PTSD at the time of the shooting, it was not permissible to admit these statements at the waiver hearing, and it certainly was not permissible for the juvenile court to then consider them in analyzing whether waiver was appropriate. Instead, the juvenile court was to take

the facts of the offense as alleged in the delinquency petition, and based on those facts, exercise its discretion to determine if waiver was appropriate.

¶20 In this regard, this court finds *State v. Kleser* instructive. *State v. Kleser (Kleser I)*, 2009 WI App 43, 316 Wis. 2d 825, 768 N.W.2d 230, *aff'd in part rev'd in part, State v. Kleser (Kleser II)*, 2010 WI 88, 328 Wis. 2d 42, 786 N.W.2d 144. In *Kleser*, the trial court allowed a psychologist to testify at a reverse waiver hearing about “statements [the juvenile] made to her about the offenses, and her own opinions as to why [the juvenile] killed [the victim].” *Kleser I*, 316 Wis. 2d 825, ¶14. The trial court then relied on this testimony in reaching its decision to transfer jurisdiction to the juvenile court when it referenced that the juvenile killed the victim “out of rage and fear” and to “protect[] himself.” *Id.*, ¶¶16-17. The criminal complaint, however, alleged that the defendant acted intentionally, and the trial court’s finding “undermine[d] the intent element of first-degree intentional homicide.” *Id.*, ¶¶5, 30. Hence, this court concluded that the reverse waiver statute, WIS. STAT. § 970.032(2), “prohibits the admission of evidence contradicting the offenses charged in the criminal complaint and that [the psychologist’s] testimony of [the defendant’s] version of the offense was inadmissible hearsay.” *Id.*, ¶4. Thus, this court concluded that the trial court “erred in admitting both.” *Id.* Our supreme court reached the same conclusion. *Kleser II*, 328 Wis. 2d 42, ¶¶7-8 (concluding that the juvenile can offer “admissible evidence” to “supplement[] the facts used to establish probable cause” but “may not offer evidence ... for the purpose of contradicting the offense charged”).

¶21 While the present situation here involves a waiver of jurisdiction in the juvenile court, “the parallels are too obvious to ignore.” *See id.*, ¶¶73, 75 (recognizing that WIS. STAT. § 938.18, “which sets out the procedure for *waiver* of

a juvenile *into* adult court,” was “the model” for the reverse waiver statute). As is the case for a reverse waiver hearing, “[t]he facts, at this point, are those in the [delinquency petition] based on the finding the trial court has just made. Allowing the juvenile to challenge the facts of the offense in a [] waiver hearing after just stipulating to those facts would be absurd.” See *Kleser I*, 316 Wis. 2d 825, ¶28. Accordingly, because Xander did not contest the prosecutive merit of the delinquency petition, allowing a contradictory version of events through the testimony of the psychologist would be absurd. The juvenile court’s decision here to allow the psychologist to act as a conduit for Xander’s account of the facts of the offense and then rely on that testimony was error that requires a new waiver hearing. See *id.*, ¶41; see also *Kleser II*, 328 Wis. 2d 42, ¶8.

¶22 In addition to the above, the juvenile court erroneously exercised its discretion when it failed to appropriately explain what weight it was according to the seriousness of the offense under WIS. STAT. § 938.18(5)(b). In its ruling, the juvenile court began with a summary of the testimony from the waiver hearing. The juvenile court then began analyzing the waiver factors in WIS. STAT. § 938.18(5).

¶23 When the juvenile court considered the seriousness of the offense, it began by describing the nature of the offense saying, “[T]here’s no argument about the serious nature of this offense.... [T]here’s no dispute that this was an incredibly dangerous, serious, series of events. These allegations are incredibly serious.” The juvenile court recognized that there was a firearm involved and “it’s a miracle that there were ... no deaths or more incredibly serious injuries.” The juvenile court then continued:

This is a public place. There were, I don’t even know how many people, you know, in the mall or in the

area on this day. More people could have gotten injured. More people could have died. And so there's – there's no way to really underscore the serious nature of – of this offense and it's not in dispute by the [d]efense or by the [c]ourt.

In concluding, the juvenile court merely commented that “[w]e handle serious cases all the time in juvenile court.” The juvenile court then proceeded to deny the State’s petition for waiver because the State had not met its burden to show that it was contrary to Xander’s or the public’s best interests to hear the case.

¶24 In so doing, the juvenile court erroneously exercised its discretion because the record does not reflect that the juvenile court set forth a reasonable basis for its conclusion as to this statutory criteria—it merely stated that “[w]e handle serious cases all the time in juvenile court.” As the juvenile court recognized, it is a miracle that no one died and that there were not more people injured when Xander opened fire (or, as the State described, “empt[ied] the entire clip”) in a crowded public place, but then the juvenile court found that it was not contrary to the public’s best interest to hear the case in part because the juvenile court handles serious cases “all the time.” The seriousness of the offense in this matter “is certainly worthy of weight.” *See G.B.K.*, 126 Wis. 2d at 259-60. Indeed, the seriousness of the offense may, at times, deserve “giving heavy weight,” *see id.*, and the seriousness of the offense alone can justify waiver into adult court, *see B.B.*, 166 Wis. 2d at 209-10 (concluding that the juvenile court did not erroneously exercise its discretion by finding that the public’s interest was best served by waiver due to the serious nature of the offense). The juvenile court’s decision in this case “does not reflect a reasonable basis for the determination” given the manner in which the juvenile court described the unique and dangerous nature of this shooting during its ruling. *See J.A.L. v. State*, 162 Wis. 2d 940, 961, 471 N.W.2d 493 (1991).

¶25 While the juvenile court has discretion to assign weight to the factors listed in WIS. STAT. § 938.18(5), *see G.B.K.*, 126 Wis. 2d at 259, the reasoning must still reflect a reasonable basis for its determination. Here, the juvenile court failed to do so. It failed to set forth a reasonable basis for its determination—it merely stated that the juvenile court handles serious cases all the time. The court did not explain why it was not contrary to the best interest of the public that the case be heard by the juvenile court. Therefore, it erroneously exercised its discretion in its resulting decision to deny the State’s waiver petition as contrary to the public interest.

¶26 This court additionally notes that the juvenile court failed to state on the record how the juvenile system adequately protects the public under WIS. STAT. § 938.18(5)(c) given the serious nature of the offense and the juvenile court’s recognition that Xander was not complying with the terms of his previous delinquency adjudication.

¶27 In making its ruling, the juvenile court noted that Xander had already been placed in certain programs, such as Running Rebels, as a result of his prior delinquency adjudication and that the court “struggled with ... how schooling was a major issue.” The juvenile court continued that it “was definitely shocked to see that ... there’s no attendance at all for that semester.” The court indicated that it “just became increasingly concerned hearing things like ... he was selling drugs.... That, in conjunction with no school attendance at all.” In specifically considering the factor of the adequacy and suitability of the juvenile justice system, the court said, “What we have as far as prior treatment history is that he has a history of really of declining and not engaging in several treatment options that have been – that had been provided and offered[.]” Following this description of Xander’s prior performance in the juvenile justice system, the

juvenile court found that it “can’t accept the argument on its face that the amount of time left in the juvenile system would be inadequate[.]”

¶28 As was the case with the seriousness of the offense, the record made by the juvenile court detailing Xander’s failure to comply with the terms and conditions from his prior delinquency adjudication and the programs available to Xander in the juvenile system do not reflect a reasonable basis for a determination that the juvenile system can adequately protect the public interest and therefore evinces an erroneous exercise of discretion.

¶29 Lastly, this court also notes that the State argued at the waiver hearing that the time Xander had left in the juvenile justice system would result in Xander spending at most “six to nine months” at a facility and then Xander would be “back in the community.” The State also filed supplemental facts detailing the text messages exchanged between Xander and his family when, for example, his father arranged for Xander to take an Uber following the shooting and in which they devised a plan to help Xander flee to Florida via airplane and stay with his adult sister after the shooting. It would be appropriate to consider Xander’s age and the amount of time Xander has left in the juvenile justice system when analyzing the waiver criteria. *See G.B.K.*, 126 Wis. 2d at 260 (“It is not an abuse of discretion for a court to waive jurisdiction after giving heavy weight to the severity of the offense and the short period of time left in the juvenile system.”). It would likewise be appropriate to consider the supplemental facts provided by the State. *See Kleser II*, 328 Wis. 2d 42, ¶¶7-8.

CONCLUSION

¶30 In sum, this court concludes that the juvenile court erroneously exercised its discretion because the record made by the juvenile court does not

reflect that the court set forth a reasonable basis for its conclusions as to the statutory criteria for waiver when it denied the State's petition for waiver, and consequently, the juvenile court's order denying the State's petition is reversed and the cause is remanded with directions to the juvenile court to conduct a new waiver hearing.

By the Court.—Order reversed and cause remanded with directions.

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

