**Affirmed and Memorandum Opinion filed December 6, 2016.**

**In The**

# Fourteenth Court of Appeals

**NO. 14-16-00475-CV**

**IN THE MATTER OF E.Y.**

**On Appeal from the 314th District Court**
**Harris County, Texas**
**Trial Court Cause No. 2015-04350J**

## M E M O R A N D U M  O P I N I O N

Appellant E.Y. is a juvenile charged with capital murder. *See* Tex. Penal Code Ann. § 19.03(a)(2). Appellant was 16 years old at the time of the alleged offense. Appellant challenges the order granting the State's petition for the juvenile court to waive jurisdiction and transfer the case to criminal district court. *See* Tex. Fam. Code Ann. §§ 54.02, 56.01. In two issues, appellant contends the juvenile court abused its discretion by waiving jurisdiction and transferring the case to the criminal court because (1) the evidence is legally and factually insufficient to

support the probable-cause finding, and (2) the evidence is legally and factually insufficient to support the section 54.02(f) findings. We affirm.

## TRIAL COURT'S JURISDICTION

We first address an issue raised on our own motion as to whether the trial court had jurisdiction to transfer the case where the original record on appeal failed to include the State's amended petition seeking to certify appellant as an adult as well as various summons, or citations of service.

Section 54.02(b) provides that the petition and notice requirements of Sections 53.04, 53.05, 53.06, and 53.07 of the Family Code are mandatory, and the summons must state that the hearing is for the purpose of considering discretionary transfer to criminal court. Tex. Fam. Code Ann. § 54.02(b). Both the juvenile named in the petition and his parent must be served with the summons. *Id.* § 53.06(a). A trial court lacks jurisdiction over a juvenile when the record lacks an affirmative showing that a petition was served. *State v. C.J.F.*, 183 S.W.3d 841, 851 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (citing *In re M.D.R.*, 113 S.W.3d 552, 553 (Tex. App.—Texarkana 2003, no pet.)); *see also Ex parte Rodriguez*, 466 S.W.3d 846, 849 (Tex. Crim. App. 2015) (noting that failure to comply with notice requirements of Texas Family Code § 54.02(b) deprives juvenile court of jurisdiction to transfer the case); Tex. Fam. Code Ann. §§ 53.04, 53.06, and 53.07.

Subsequent to this court's query, the State filed a supplemental clerk's record containing its amended petition. The citation of service offered as an exhibit during the hearing demonstrates that appellant was served with a copy of this petition. The citation expressly states that the hearing is for the purpose of considering discretionary transfer to criminal district court. Tex. Fam. Code Ann. § 54.02(b). We note that the citation references a November 18, 2015 transfer

hearing, not the March 2016 hearing at issue here. There is no evidence in the record that appellant was served again with a summons for the later hearing date. However, once a juvenile is served with an original petition and summons, jurisdiction vests with the juvenile court. *See C.J.F.*, 183 S.W.3d at 851. The failure to serve the juvenile with a subsequent summons does not deprive the juvenile court of jurisdiction. *In the Matter of R.M.*, 648 S.W.2d 406, 407 (Tex. App.—San Antonio 1983, no writ) (holding that once jurisdiction attached, the juvenile court was not required to order that juvenile be served with new summons every time the case was reset). Finally, the absence of any evidence demonstrating that at least one of appellant's parents was served with summons did not divest the trial court of jurisdiction because appellant's parents waived service of summons through their voluntary appearance at the transfer hearing. *See* Tex. Fam. Code Ann. § 53.06(e).

Accordingly, we conclude the trial court had jurisdiction to consider discretionary transfer of appellant to criminal district court.[1]

## FACTUAL AND PROCEDURAL BACKGROUND

The State instituted this case in July 2015 by filing a petition alleging appellant engaged in delinquent conduct by committing the offense of capital murder. The State filed an amended petition on November 10, 2015, seeking certification of appellant as an adult. The State simultaneously filed a petition against appellant's juvenile co-actor, D.B., alleging the same offense. The trial court conducted a joint hearing on the State's transfer petitions over the course of two days in March 2016. *See* Tex. Fam. Code Ann. § 54.02(c). The State presented testimony from Sergeant Mark Holbrook of the Houston Police Department and Uche Chibueze, the psychologist who performed appellant's certification

[1] On November 18, 2016, the State filed a motion requesting an extension of time in which to brief this jurisdictional issue. The motion is denied as moot.

evaluation. Appellant presented testimony from Anthony Brice, an officer with the Harris County Juvenile Justice Department. Appellant's co-actor offered testimony from Charles Marler, a private investigator. Over 100 exhibits were admitted into evidence, including video recordings and photographs from surveillance cameras, as well as recorded statements by appellant and D.B.

At the conclusion of the hearing, the trial court orally announced it would waive jurisdiction and transfer appellant's case to district court. The trial court later signed an order specifically stating the reasons for waiver. *See* Tex. Fam. Code Ann. § 54.02(h). This appeal timely followed. *Id.* § 56.01(c)(1)(A).

## I. The Investigation

The State called Sergeant Holbrook as its first witness. Holbrook was assigned to investigate the homicide of complainant Kenneth Flemings, who was shot in the head while sitting in his car outside the convenience store he owned. Relying on surveillance footage taken from cameras located outside the convenience store and a bar across the street, the police ultimately identified appellant, D.B., and their adult co-defendant, Jalen Coby, as suspects. During the hearing, Holbrook provided the following relevant testimony.

Approximately a week prior to the shooting, Coby had an altercation with Flemings outside the convenience store following a disturbance on the property. Flemings, displaying his licensed handgun, ordered Coby to leave his property. Coby threatened Flemings that he would return in a week or two, stating something to the effect of, "You're not the only one with a gun, mother f******." Neither appellant nor D.B. were present at the time of this altercation.

Subsequently, surveillance footage showed D.B. entering Flemings' store at approximately 8:51 p.m. on May 29, 2015. D.B. approached Flemings at the counter and then left without appearing to purchase anything.

The store closed at 9:00 p.m. At approximately 9:30 p.m., Flemings and his wife Camtu Nguyen left the store and walked to their separate vehicles. Nguyen was carrying an envelope containing the store's cash from that day. As they walked to their vehicles, a neighborhood resident stopped to warn Flemings and Nguyen to be careful because she had seen "some kids hanging around who looked suspicious" and were putting t-shirts over their heads. After Flemings got into his vehicle, Coby approached the driver's side of the vehicle and shot Flemings in the head. Flemings slumped over the center console and began to bleed profusely. At the time of the shooting, appellant and D.B. were hiding in or near some bushes approximately 40 or 50 feet away. Within seconds of the shooting, appellant and D.B. approached the car. D.B. also had a gun.

Surveillance footage showed Coby pointing and appearing to direct appellant and D.B. as they approached the vehicle. D.B. opened the door of the vehicle. Appellant then reached inside, sticking most of his body into the vehicle. The video does not show what appellant was doing inside the vehicle nor does it show whether appellant took anything. Appellant and his codefendants fled the scene when a neighbor came outside and fired a warning shot. As they were fleeing, someone yelled, "Kill the bitch, too." Several days after the shooting a witness recovered Flemings' wallet a couple of blocks away, in the vicinity of Coby's house. The wallet contained Flemings' driver's license but no cash.

Flemings was transported to the hospital, where he later died. The autopsy report listed the cause of death as a gunshot wound of the head and the manner of death as a homicide. The presence of stippling around the wound indicated that the barrel of the firearm was within two feet of Flemings when he was shot. The bullet was consistent with a .380 caliber semi-automatic handgun.

During the subsequent investigation, police interviewed appellant, D.B., and

Coby. D.B. told Holbrook he was affiliated with the 103 street gang. When Holbrook showed D.B. the surveillance video of him going into the store prior to the offense. D.B. said he was there to buy candy or cigars. D.B. indicated he was aware of Coby's prior altercation with Flemings. After initially denying involvement, D.B. further admitted to being present at the time Flemings was shot, allowing that he opened the car door and looked inside the vehicle. Holbrook later learned that a close friend of D.B. had been caught recently with a .380 handgun and that the gun was a ballistic match to the one used in the shooting.

Appellant initially denied being present for the shooting but eventually admitted to being one of the persons who walked up to Flemings' car. He also admitted to being the one who put most of his body inside the car. Appellant told Holbrook that Coby was out there "ramped up" that night and that he was "gonna get that guy." Holbrook testified that he and his partner believed appellant told the truth during his interview.

Coby eventually turned himself into police and submitted to a custodial interrogation. Coby very quickly admitted to participating in the shooting and that he fired the weapon. Coby said someone else gave him the gun and that he believed it was unloaded. According to Coby, he went to confront Flemings and when Flemings reached for his own gun, Coby attempted to scare him by shooting what he thought was an unloaded weapon.

Based upon his review of the evidence, Holbrook believed that appellant, D.B., and Coby were acting together.

## II. Expert Testimony

The State called Uche Chibueze, who is board certified in clinical psychology, as its only expert witness. Chibueze conducted a psychological evaluation of appellant prior to the transfer hearing, and her report was admitted

into evidence. Her findings were based on the results of multiple assessment tests as well as an interview with appellant. Chibueze provided the following relevant testimony.

Appellant has no documented history of psychiatric issues or involvement with Child Protective Services but was suspended from school several times for being disruptive and not following instructions. There is no documentation or testimony that appellant is a member of a gang.

According to the Wechsler Adult Intelligence Scale, appellant has a below-average full-scale IQ of 83, but does not meet the criteria for a diagnosis of intellectually disabled. Chibueze testified that appellant has a learning disability which has been documented in school and was reflected in testing.

Chibueze also performed the Jesness Inventory Revised, which is a self-report test for assessing a juvenile's emotional and personality traits. Chibueze's report noted that appellant's responses indicated he was responding in "an overly defensive manner" to make himself look more positive and, therefore, his scores on the Jesness should be interpreted with caution. Chibueze further stated that appellant comes out in the conformist sub-group, which suggests individuals with similar traits have a slightly lower risk of reoffending.

According to Chibueze's report, her review of the index offense indicated appellant was aware Coby planned to kill Flemings but continued to participate. There were also indications that the shooting was strategically planned. However, appellant's results from the Risk Sophistication Treatment Inventory (RSTI)—which measures risk for dangerousness, sophistication and maturity, and treatment amenability—were in the low range for criminal and intellectual-based sophistication when the index offense was not included in the consideration. Once the index offense is factored into the assessment, appellant's scores increase to the

middle, or average, range. The RSTI also indicated appellant's maturity was in the high range based on evidence of emotional maturity as well as some autonomy. However, Chibueze testified that in light of the RSTI, cognitive assessment, and the narrative assessment of appellant's level of maturity, appellant exhibits an average level of maturity in comparison to most individuals his age. The RSTI further demonstrated that appellant's overall level of treatment amenability falls in the high, or above average, range.

Finally, Chibueze performed a Structured Assessment of Violence Risk in Youth (SAVRY), which measures the likelihood of a juvenile reoffending in a violent manner. Chibueze testified that 18 of the 24 risk factors considered by this assessment are completely absent for appellant and that appellant exhibits four of the six protective factors that can improve his potential for rehabilitation. Appellant's risk assessment places him in the low range for reoffending, with or without consideration of the index offense.

Chibueze testified that the alleged offense was "very uncharacteristic" for appellant. Chibueze acknowledged that because of appellant's age, he would have a more limited amount of time in the juvenile system but stated that the amount of time necessary for rehabilitation depends on the level of intervention that is required for the individual. Chibueze conceded that she could not say with certainty that the approximately two-year time frame, from the date of the hearing, in which appellant could receive rehabilitative services as a juvenile would be enough time.

## III. Additional Witnesses

During the hearing, appellant's co-actor, D.B. called Charles Marler, a private investigator, to the stand. Marler, who had previously worked for the Federal Bureau of Investigation as an investigative specialist, was hired to

investigate the case. Like Holbrook, Marler reviewed the surveillance videos and photographs and spoke with D.B. Based on his investigation, Marler believed that neither appellant nor D.B. was involved in the shooting of Flemings. Marler testified that an envelope— which he believed contained the cash from the store— was found in Flemings' car but not taken because no robbery was intended. Marler further testified that appellant and D.B. both believed they were Coby's backup for a "beat down" of Flemings following his altercation with Coby.

Appellant called Anthony Brice as his sole witness. Brice was employed as a supervisor and detention officer at the Juvenile Justice Center. Brice testified that, for the past nine months, he worked with appellant twice a week following appellant's detention. According to Brice, appellant has a calm demeanor. Although appellant interacts with other juveniles, he tends to have more interaction with adults. Brice stated that appellant is a "quiet kid" and respectful of the staff. Brice was unaware of appellant being written up for any negative behavior while in detention and testified that appellant did not engage in fights or brag about the offense which he is alleged to have committed. Brice expressed his belief that appellant could be rehabilitated. However, Brice was unfamiliar with the details of the offense charged or with appellant's background prior to detention.

## LEGAL STANDARDS

### I. Standards for Waiver of Juvenile Jurisdiction

Texas juvenile courts have exclusive, original jurisdiction over cases involving what otherwise would be criminal conduct by children 10 years of age or older but under 17 years of age. Tex. Fam. Code Ann. §§ 51.02(2)(a), 51.03(a)(1), 51.04(a). If a juvenile court determines after an evidentiary hearing that certain requirements are satisfied, it may waive its jurisdiction and transfer a child to the district court for criminal proceedings. *Id.* § 54.02(a), (c).

In the seminal Texas case on juvenile transfer, the Court of Criminal Appeals wrote:

> The transfer of a juvenile offender from juvenile court to criminal court for prosecution as an adult should be regarded as the exception, not the rule; the operative principle is that, whenever feasible, children and adolescents below a certain age should be "protected and rehabilitated rather than subjected to the harshness of the criminal system[.]" Because the waiver of juvenile-court jurisdiction means the loss of that protected status, in *Kent v. United States*, the United States Supreme Court characterized the statutory transfer proceedings . . . as "critically important," and held that any statutory mechanism for waiving juvenile-court jurisdiction must at least "measure up to the essentials of due process and fair treatment."

*Moon v. State*, 451 S.W.3d 28, 36 (Tex. Crim. App. 2014) (quoting *Kent v. United States*, 383 U.S. 541, 560–62, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966)).

The statutory requirements for waiver of jurisdiction and transfer are as follows:

(1) the child is alleged to have violated a penal law of the grade of felony;

(2) the child was:

  (A) 14 years of age or older at the time he is alleged to have committed the offense, if the offense is a capital felony, an aggravated controlled substance felony, or a felony of the first degree, and no adjudication hearing has been conducted concerning that offense; or

  (B) 15 years of age or older at the time he is alleged to have committed the offense, if the offense is a felony of the second or third degree or a state jail felony, and no adjudication hearing has been conducted concerning that offense; and

(3) after a full investigation and a hearing, the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged and that because of the seriousness of the offense alleged or the background of the child the welfare of the community requires criminal proceedings.

Tex. Fam. Code Ann. § 54.02(a).

In making the determination required by section 54.02(a)(3), the juvenile 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). Any combination of these criteria may suffice to support a waiver of jurisdiction; not every criterion need weigh in favor of transfer. *Moon*, 451 S.W.3d at 47 & n.78. "The trial court is bound only to consider these . . . factors in deciding whether to waive jurisdiction. The court need not find that each factor is established by the evidence." *In re D.L.N.*, 930 S.W.2d 253, 258 (Tex. App.—Houston [14th Dist.] 1996, no writ); *see also Moon*, 451 S.W.3d at 47.

If the juvenile court decides to waive jurisdiction, it must make findings of fact and specify its reasons for waiver in a written order. *See* Tex. Fam. Code Ann. § 54.02(h). The juvenile court is obligated to "show its work." *Moon*, 451 S.W.3d at 49.

## II. Appellate Review

Our review of a transfer order is two-pronged. First, we review the juvenile court's specific findings of fact concerning the section 54.02(f) factors under a "traditional sufficiency of the evidence review." *Moon*, 451 S.W.3d at 47. Under a legal sufficiency challenge, we credit evidence favorable to the challenged finding

and disregard contrary evidence unless a reasonable fact finder could not reject the evidence. *Moon v. State*, 410 S.W.3d 366, 371 (Tex. App.—Houston [1st Dist.] 2013), *aff'd*, 451 S.W.3d 28 (Tex. Crim. App. 2014). If more than a scintilla of evidence supports the finding, the no-evidence challenge fails. *Moon*, 410 S.W.3d at 371. Under a factual sufficiency challenge, we consider all the evidence presented to determine if the court's findings are against the great weight and preponderance of the evidence so as to be clearly wrong or unjust. *Id.* Our review of the sufficiency of the evidence to establish facts relevant to waiver is limited to those facts the juvenile court expressly relied upon in its transfer order. *Moon*, 451 S.W.3d at 50.

Second, we review the juvenile court's ultimate waiver decision for an abuse of discretion. *Id.* at 47. That is, in reviewing the juvenile court's conclusion that the seriousness of the offense alleged and/or the background of the juvenile called for criminal proceedings for the welfare of the community, we ask, in light of our own analysis of the sufficiency of the evidence to support the section 54.02(f) factors and any other relevant evidence, whether the juvenile court acted without reference to guiding rules or principles. *Id.* A juvenile court abuses its discretion when its decision to transfer is essentially arbitrary, given the evidence upon which it was based. *Id.* By contrast, a waiver decision representing "a reasonably principled application of the legislative criteria" generally will pass muster under this standard of review. *Id.* at 49. "[A] juvenile court that shows its work should rarely be reversed." *Id.*

## ANALYSIS

## I. Probable Cause that Appellant Committed Offense Alleged

In his first issue, appellant challenges the sufficiency of the evidence to support the trial court's finding of probable cause to believe he committed the offense of capital murder. Tex. Fam. Code Ann. § 54.02(a)(3).

### A. Review of probable cause determination

"Probable cause" is defined as sufficient facts and circumstances to warrant a prudent person to believe the suspect committed or was committing the offense. *In re D.L.N.*, 930 S.W.2d 253, 356 (Tex. App.—Houston [14th Dist.] 1996, no writ). 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. *Id.*; *In re J.G.*, 495 S.W.3d 354, 373–74 (Tex. App.—Houston [1st Dist.] 2016, pet. filed) (finding probable cause that juvenile who was a party to the offense committed murder). Probable cause is based on probabilities; it requires more than mere suspicion but less evidence than that needed to support a conviction or support a finding by a preponderance of the evidence. *Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997).

### B. Application

A person commits capital murder if the person intentionally causes the death of an individual in the course of committing or attempting to commit robbery. *See* Tex. Penal Code §§ 19.02(b), 19.03(a)(2). A person commits the offense of robbery if, in the course of committing theft and with intent to obtain or maintain control of the property, he intentionally, knowingly, or recklessly causes bodily injury to another. *Id.* § 29.02. Whether the robbery is successful and

property is actually obtained is irrelevant because "[i]n the course of committing theft" includes conduct that occurs in an attempt to commit theft. *Id.* § 29.01; *White v. State,* 671 S.W.2d 40, 41–43 (Tex. Crim. App. 1984).

Under the law of parties, a person may be convicted as a party to an offense if the offense is committed by his own conduct or by the conduct of another for which he is criminally responsible. Tex. Pen. Code Ann. § 7.01(a). A person is criminally responsible for an offense committed by the conduct of another if, 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. Tex. Pen. Code Ann. § 7.02(a)(2).

To determine whether an individual is a party to an offense, a reviewing court may look to events before, during, and after the commission of the offense. *Gross v. State,* 380 S.W.3d 181, 186 (Tex. Crim. App. 2012). "There must be sufficient evidence of an understanding and common design to commit the offense." *Id.* Evidence may be direct or circumstantial. *See id.* Each fact need not point directly to the defendant's guilt, as long as the cumulative effect of the facts is sufficient to support the conviction under the law of parties. *Id.* However, the mere presence of a person at the scene of a crime, or even flight therefrom, without more, is insufficient to support a conviction as a party to the offense. *Id.*

As an initial matter, appellant argues the order must be reversed because it does not contain case-specific findings of fact to support the probable-cause determination. We disagree. The holding in *Moon* that the court must make specific findings of fact in its order focused on the section 54.02(f) factors and any other relevant historical facts relied upon to determine whether the seriousness of the offense alleged or the background of the juvenile warrants transfer. *See Moon*, 451 S.W.3d at 50; *see also In re S.G.R.*, 496 S.W.3d 235, 238–39 (Tex. App.—

Houston [1st Dist.] 2016, no pet.) (juvenile court must enter written order stating specific reasons for waiver and its findings if it decides to waive jurisdiction based on consideration of section 54.02(f) criteria). Although the trial court's order must contain a finding that there is probable cause to believe the juvenile committed the offense alleged, we hold that the absence of additional specific findings of fact relative to probable cause does not warrant reversal.

Appellant also contends there is no evidence that appellant assisted Coby in carrying out a coordinated scheme to kill and rob Flemings. It is undisputed that Coby shot Flemings. At a minimum, the State presented evidence at the hearing that appellant was with Coby at the time of the offense; that appellant hid in nearby bushes, attempting to cover his face with a shirt; that appellant approached Flemings' vehicle after Coby shot Flemings; that appellant entered the vehicle and appeared to do something inside the vehicle; that appellant ran from the scene; and that Flemings' wallet was later recovered a couple of blocks away. The State thus presented sufficient evidence that probable cause existed that appellant, under the law of parties, committed the alleged offense of capital murder. *See J.G.*, 495 S.W.3d at 374 (citing *In re C.C.,* 930 S.W.2d 929, 933 (Tex. App.—Austin 1996, no pet.) ("Probable cause exists where there are sufficient facts and circumstances to warrant a prudent person to believe the suspect committed the offense.")*; see also Matter of B.C.B.*, No. 05–16–00207–CV, 2016 WL 3165595, at *3 (Tex. App.—Dallas 2016, pet. denied) (mem. op.) (transfer hearing is comparable to a criminal probable cause hearing and the court need not resolve evidentiary conflicts beyond a reasonable doubt).

Considering the totality of the circumstances in the light most favorable to the juvenile court's order, we conclude the evidence is legally sufficient to support the court's implied determination that a prudent person would be justified in

believing appellant committed the charged offense. We overrule appellant's first issue.

## II. Section 54.02(f) Factors

In his second issue, appellant asserts the trial court abused its discretion in waiving its exclusive juvenile jurisdiction and transferring the case to district court because the evidence is legally and factually insufficient to support the court's section 54.02(f) findings.

The trial court determined that, because of the seriousness of the offense alleged and appellant's background, the welfare of the community requires criminal rather than juvenile proceedings. *See* Tex. Fam. Code Ann. § 54.02(a)(3). The court is obligated to consider the factors set forth in section 54.02(f) to make the determination required under section 54.02(a)(3). Not every factor in section 54.02(f) need weigh in favor of transfer. *Moon*, 451 S.W.3d at 47. Any combination of the criteria may suffice to support the juvenile court's waiver of jurisdiction. *Id.* at 47 & n.78.

The trial court concluded that three of the section 52.04(f) factors weigh in favor of transfer and entered an order containing specific findings of fact in support of the decision to waive its jurisdiction.

### A. Sufficiency of the evidence

#### 1. Offense against person or property

The trial court found that appellant is accused of an offense against a person, that aspects of the alleged offense as well as appellant's alleged participation are particularly egregious and aggravating, and, therefore, this factor gives greater weight in favor of discretionary transfer. *See* Tex. Fam. Code Ann. § 54.02(f)(1) (offenses against the person are afforded greater weight in favor of transfer).

Specifically, the court relied upon the surveillance videos and photographs to find that appellant was part of a coordinated plan to murder and rob Flemings. The court found that appellant actively participated in the offenses. The court observed appellant on video recordings rummaging through Flemings' vehicle as Flemings lay dying, supporting the court's conclusion that appellant was attempting to steal. The fact that Flemings' wallet "inexplicably appeared" several blocks away after appellant ran away from the vehicle also supported the court's finding. Based on the recording, as well as additional evidence presented during the hearing—including testimony and the autopsy report—the court found that appellant assisted his co-actors in committing the alleged offense and made additional efforts to personally benefit from the killing by stealing from Flemings as he bled to death.

Pointing to the testimony of Marler and the absence of other evidence, appellant argues the evidence does not establish that he was involved in the planning of the offense, that he assisted Coby and D.B. in committing the offense, or that he took anything from the vehicle after the shooting. Considering all of the evidence admitted at the hearing, there is more than a scintilla of evidence to support the court's finding that the alleged offense was committed against a person under particularly egregious and aggravating circumstances. The great weight and preponderance of the evidence is not to the contrary. Accordingly, the evidence is legally and factually sufficient to support the court's finding that this factor weighed in favor of transfer.

### 2. Sophistication and maturity of appellant

The trial court found that appellant's levels of sophistication and maturity fell in the high range and weighed in favor of certification. In support of its decision, the court made numerous findings[2], which we outline as follows:

1. The result of the Perceptual Reasoning Index showed appellant had a score of 90, which ranked him at the 25th percentile and placed him in the average range.
2. The Perceptual Reasoning Index represented appellant's ability to reason using visual stimuli and was a measure of visual processing and fluid reasoning.
3. The Perceptual Reasoning Index is a measure of a person's ability to problem solve and reason.
4. It is significant that appellant's score on the Processing Score Index was 102, which ranked him in the 55th percentile and fell in the average range.
5. The Processing Score index is a measure of appellant's processing speed and represents his ability to fluently and automatically perform cognitive tasks.
6. Appellant has a full scale IQ of 83, and was diagnosed with a specific learning disorder.
7. Appellant's overall IQ score is less persuasive than the important sub-test scoring on the Processing Score Index because it is not clear from the testing that it took into account appellant's diagnosed learning disabilities in reading and writing.
8. The overall IQ score heavily weighs appellant's vocabulary knowledge, which would certainly be significantly impacted by his diagnosed learning disabilities.
9. Appellant has been disruptive in school, not followed instructions, and been argumentative with teachers.

[2] We number them for ease of reference.

10. Based on his disruptive behavior in school, appellant did not avail himself of education provided to him, and his disruptive behavior contributed to his low verbal comprehension index score.

11. Appellant has a higher intellectual level than demonstrated by the overall mean score based on the facts of the offense itself and the Court's review of all the testing performed on appellant.

12. Appellant's psychological evaluation and Chibueze's testimony revealed that appellant has an average level of criminal sophistication and dangerousness when compared to other juvenile offenders.

13. Based on the offense itself, the manner in which appellant participated in the offense, and the judge's more than thirty years of experience in the juvenile justice system, appellant has a high level of criminal sophistication and dangerousness in comparison to most offenders his age.

14. Appellant was involved in a deliberate, planned offense, and it is significant when considering his level of dangerousness that appellant placed most of his body inside Flemings' vehicle in an effort to find items to steal while Flemings was bleeding profusely from a mortal gunshot.

15. Appellant's behavior revealed a callous disregard for another person's life and showed a significant lack of empathy.

16. It is significant that Chibueze had not viewed the surveillance recording of the offense prior to making her conclusions about appellant's level of criminal sophistication and dangerousness.

17. Appellant acted in an overly defensive manner during the administration of the Jesness Inventory Revised assessment.

18. Because appellant acted in an overly defensive manner, the court does not believe in the validity of the Jesness test or Chibueze's conclusions in adherence with it.

19. Since Chibueze's overall opinion regarding sophistication and maturity was based, in part, on the Jesness test, her overall opinion lacked credibility.

20. Chibueze found appellant had an average level of maturity in comparison to most offenders his age.

21. It is significant that when the RSTI results were assessed, without the index offense included as a consideration, appellant's overall level of sophistication-maturity fell in the high range.

22. It is significant that appellant scored in the high range on autonomy, cognitive capacity and emotional maturity in this RSTI assessment.

23. Appellant's level of sophistication-maturity falls in the high range and weighs in favor of certification.

Appellant complains, inter alia, that when making findings with regard to this factor, the court improperly disregarded the only expert's testimony and reinterpreted the test results without evidence, adjusting them higher. We agree in part. As the ultimate factfinder, the juvenile court was entitled to believe or disbelieve any part of Chibueze's testimony. *See S.G.R.*, 496 S.W.3d at 241 (juvenile court entitled to credit one expert's testimony over another's). However, the court was not entitled to enter findings which contradict the expert's testimony or reinterpret the expert's tests. The judge is not an expert and his reinterpretation of the test results is not supported in the record.

Chibueze testified that the IQ test is an objective, not subjective, test; and, thus, it was improper for the trial court to find that appellant has a higher intellectual level than demonstrated by his overall IQ score (Finding 11). There is no evidence in the record to support the court's finding that appellant's processing speed IQ may be attributed more weight than his full scale IQ or that appellant's overall IQ score "heavily weighs" his vocabulary knowledge (Findings 7 and 8). Nor is there evidence to support the court's finding that appellant did not avail himself of his education and, thus, was responsible for his low verbal comprehension score (Finding 10).

Chibueze testified that appellant has a learning disability which has been documented in school and was reflected in testing. According to Chibueze, individuals with appellant's learning disability typically have lower verbal

abilities, which is reflected in the IQ as well as the achievement score. Chibueze stated that verbal comprehension is the most susceptible to exposure to education. But sometimes there will be no improvement, regardless of how much intervention the individual receives. Chibueze stated that some individuals with a low verbal IQ might be impacted because they have not been going to school, but it is not unequivocal. Chibueze agreed, as a general statement, that it is more difficult for an individual to learn if he is acting out in school. Because appellant has a disorder when it comes to verbal ability, Chibueze declined to find a correlation between his disruptive behavior in school and his verbal comprehension index. Although the court was free to disregard this evidence, nothing in the record supports the opposite conclusion.

Finally, the evidence in the record does not support the court's finding that appellant's overly defensive manner invalidated the Jesness test (Finding 18). Although Chibueze testified that appellant's results from the Jesness test should be viewed with caution because appellant responded in an overly defensive manner (Finding 17), she explicitly stated that appellant's level of defensiveness did not invalidate the test. The court could not reach the contrary conclusion because no evidence supports that conclusion. Likewise, the judge could not perform his own reinterpretation of the test to determine that Chibueze's opinion lacked credibility (Finding 19).

Accordingly, we conclude there is no evidence to support the court's findings 7, 8, 10, 11, 18, and 19, as outlined above, and we disregard them in considering whether the record contains sufficient evidence to support the trial court's ultimate determination that appellant's level of sophistication and maturity weighed in favor of certification. *See In re B.R.H.*, 426 S.W.3d 163, 168 (Tex.

App.—Houston [1st Dist.] 2012, no pet.) ("[W]e defer to the trial court's findings unless the record contains no evidence to support them.").

We next consider the evidence supporting the remaining findings. Both Chibueze's testimony and appellant's psychological evaluation support the court's findings related to appellant's specific IQ scores (Findings 1, 2, 3, 4, 5, and 6). Chibueze testified that appellant is in the average range on the perceptual reasoning index, which measures one's ability to make decisions. If someone is in the average range, he does not have any significant deficiencies and operates on the same level as most youths his age with regard to making decisions, or processing information. Appellant also scored in the average range on the processing speed index, which measures how quickly he grasps information and his ability to focus. Based on appellant's score, Chibueze stated appellant's processing speed is "not necessarily something that would impair him when making a decision." Chibueze also testified that appellant had been suspended from school several times for being disruptive and not following instructions (Finding 9).

Chibueze's testimony and evaluation also demonstrate that when the index offense of capital murder is taken into consideration, appellant's level of criminal sophistication and dangerousness is elevated to the average range when he is compared to other juvenile offenders (Finding 12). However, based on the alleged offense itself, the manner in which appellant participated, as well as the court's more than thirty years of experience, the court determined that appellant has a high level of criminal sophistication and dangerousness (Finding 13). The court's order further detailed the aspects of the crime which emphasized appellant's criminal sophistication and dangerousness, finding it significant that Chibueze had not viewed the recording of the offense prior to making her conclusions with regard to

this factor (Findings 14, 15, and 16). Although the court's finding that appellant has a high level of criminal sophistication and dangerousness disregards Chibueze's testimony, we cannot say it was improper under these circumstances. *See generally Ex parte Rodriguez*, 366 S.W.3d 291, 298 n.4 (Tex. App.—Amarillo 2012, pet. ref'd) (noting that "a trial judge is entitled to assess the situation through the lens of his own experience and expertise and draw reasonable inferences from facts in evidence").

Finally, Chibueze testified that when the RSTI, cognitive assessment, and narrative assessment of appellant's level of maturity are considered collectively, appellant exhibits an average level of maturity in comparison to most individuals his age (Finding 20). Chibueze testified that the RSTI indicated appellant's maturity was in the high range based on evidence of emotional maturity as well as some autonomy. Appellant's evaluation reveals that appellant scored in the 94th percentile for sophistication-maturity. Because appellant scored in the high range for autonomy, cognitive capacities, and emotional maturity, appellant's overall level of sophistication-maturity falls in the high range (Findings 21, 22, and 23).

Based on the record before us, we conclude that the juvenile court had more than a scintilla of evidence to support its finding that appellant's sophistication and maturity weighed in favor of certification as an adult and, thus, it is supported by legally sufficient evidence. *See Moon*, 410 S.W.3d at 371.

A review of the factual sufficiency requires us to consider any evidence contrary to the trial court's determination and determine if, after weighing all the evidence, the "juvenile court's finding that appellant was of sufficient sophistication and maturity to be tried as an adult was not so against the great weight and preponderance of the evidence as to be manifestly unjust." *In re K.J.*, 493 S.W.3d 140, 151 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (citing *In re*

*K.D.S.*, 808 S.W.2d 299, 303 (Tex. App.—Houston [1st Dist.] 1991, no pet.)). There is some evidence that does not support a finding of sufficient sophistication and maturity. Both appellant's evaluation and Chibueze's testimony demonstrate that appellant's intellectual sophistication is below average. Chibueze also testified that the RSTI assessment placed appellant in the low range for criminal sophistication and dangerousness when the alleged offense is not considered. However, in light of the record before us, we cannot say that the juvenile court's finding that appellant's sophistication and maturity weighed in favor of certification as an adult was so against the great weight and preponderance of the evidence as to be clearly wrong or unjust.

**3. Appellant's record and history**

Appellant contends the court made no findings under this factor. Contrary to appellant's argument, the court order states that the court considered appellant's record and history and acknowledged that appellant had no documented history with the juvenile justice system. The court found that appellant's lack of a recorded delinquency history did not outweigh his findings in favor of waiver on all the other factors. We note that there need not be evidence to support every section 54.02(f) factor weighing in favor of transfer, as long as there is "sufficient overall evidence" to justify the court's discretionary decision. *See K.J.*, 493 S.W.3d at 152 (citing *Moon*, 451 S.W.3d at 49).

**4. Protection of public and likelihood of rehabilitation**

Based on the findings under the other factors, his knowledge of the available rehabilitative services, his years of experience, and the age restrictions placed on juvenile courts, the trial judge found there was little, if any, prospect of adequate protection of the public and little, if any, likelihood of reasonable rehabilitation of

appellant. Again, in considering this factor, the court set forth numerous findings.[3] We outline those findings as follows:

1. Chibueze's conclusion that appellant has a low risk of reoffending was not credible because it was based, in part, on the Jesness test.
2. In light of all of the evidence and testimony, as well as appellant's actions before, during, and after the offense, appellant's risk assessment level is high, and there is little prospect of adequate protection of the public if appellant remains in the juvenile system.
3. Chibueze's original conclusion that appellant is at low risk for some type of reoffending based on the SAVRY test is not credible.
4. The SAVRY factor of risk taking and impulsivity is high for appellant based on all of the evidence, including the surveillance videos of the offense, as well as Chibueze's testimony after viewing appellant's actions on the video that the factor should be changed from a moderate to high level.
5. Four out of the twenty-four risk factors identified by the SAVRY test are "critical factors that are the most important to consider."
6. Chibueze found that appellant scored in the high range for two of the critical factors—history of violence and low empathy/remorse.
7. The court disagreed with Chibueze's assessment of appellant being at moderate risk for a third critical factor—peer delinquency—finding that appellant's assessment for the peer delinquency factor should be high, significantly because of appellant's "involvement and familiarity" with D.B.
8. The aggravated offense appellant is alleged to have committed exhibited a danger to society and to the public based on its deliberate, planned nature and appellant's significant lack of empathy and increased level of callousness towards his victim.
9. Appellant's lack of empathy and level of callousness decrease his treatment amenability and his chances of successful rehabilitation.
10. Chibueze testified that appellant's level of empathy and a persistent callousness would affect his treatment amenability.

[3] We again number them for ease of reference.

11. Chibeuze did not review appellant's statement to police and review of the statement had a bearing on the court's finding with regard to treatment amenability because it demonstrated that appellant showed no remorse or sorrow for his actions.

12. Appellant's lack of remorse, combined with appellant's repeated and lengthy denial of involvement in the offense, reflects a lower level of treatment amenability.

13. It is significant that Chibueze testified that both lack of remorse and denial of the offense would affect her opinion regarding appellant's level of treatment amenability but that her report failed to account for those factors.

14. Appellant is 17 years old and, under Texas law, could only be placed on probation until his 18th birthday or incarcerated in the Juvenile Justice Department until his 19th birthday.

15. Because of the age restrictions, there is insufficient time to provide the services necessary to rehabilitate him in a manner that is adequate to protect the public.

16. Chibueze testified that she could not state with certainty whether there was sufficient time for appellant to utilize the procedures, services, and facilities currently available in the juvenile system for rehabilitation or to prevent him from reoffending.

17. The prosecutor did not seek grand jury approval of a determinate petition in this case.

18. In light of the egregious and aggravated nature of the alleged crime and based on the psychological evaluation and reports as well as the hearing testimony, appellant will not be amenable to rehabilitation.

As an initial matter, we consider whether the trial court judge may make findings based on his knowledge of the available rehabilitative services, his years of experience, and the age restrictions placed on juvenile courts. "Some facts may be judicially noticed because of their notoriety and indisputable existence." *Eagle Trucking Co. v. Texas Bitulithic Co.*, 612 S.W.2d 503, 506 (Tex. 1981) (citing *Harper v. Killion*, 162 Tex. 481, 348 S.W.2d 521, 522 (1961)). "Well known and easily ascertainable facts may be judicially noticed." *Eagle Trucking Co.*, 612

S.W.2d at 506 (citing *Barber v. Intercoast Jobbers & Brokers*, 417 S.W.2d 154, 158 (Tex. 1967)). However, "[t]he scope of judicial notice is not coextensive with the personal knowledge of the individual judge." *Garza v. State*, 996 S.W.2d 276, 280 (Tex. App.—Dallas 1999, pet. ref'd) (citing *Wilson v. State*, 677 S.W.2d 518, 524 (Tex. Crim. App. 1984)).

We agree with the State that the juvenile court may, on its own motion, take judicial notice of the age restrictions placed on its authority by the Texas Family Code and Human Resources Code because they are the laws of this State and clearly within the court's knowledge. *See* Tex. R. Evid. 201, 202 (permitting trial court to take judicial notice of adjudicative facts and other state laws on its own motion); *see also Watts v. State*, 99 S.W.3d 604, 610–11 (Tex. Crim. App. 2003) (explaining it would be appropriate for a trial judge to consider relevant law when making a legal ruling outside the presence of the jury). However, to the extent the trial court judge relied on his personal knowledge of the rehabilitative services available to appellant and his years of experience to find that there was insufficient time to rehabilitate appellant, we conclude such a finding exceeds the boundaries of judicial notice.

During the hearing, the State questioned Chibueze as to whether she was familiar with any long-term studies on the benefits of the Juvenile Justice Department's program for capital and non-capital violent offenders. Chibueze testified that she did not have access to that type of data. However, the State did not elicit any testimony from Chibueze regarding what rehabilitative services would be available to appellant or why there was insufficient time for appellant to benefit from such services. Absent such testimony, there is no evidence in the record to support the court's finding that there was insufficient time for appellant to utilize the juvenile justice services (Findings 2 and 15).

Nor is there evidence to support the court's finding that Chibueze's overall opinion that appellant is at low risk for reoffending is not credible because it is based, in part, on the Jesness test (Finding 1). Again, contrary to the court's finding, the evidence established that appellant's defensive manner did not invalidate this test. The court could not reach the contrary conclusion because no evidence supports that contrary conclusion. The judge could not perform his own reinterpretation of the test to determine that Chibueze's opinion lacked credibility.

There is also no evidence in the record to support the court's finding that appellant's assessment for the peer delinquency risk factor on the SAVRY should be raised from moderate to high (Finding 7). Chibueze's assessment of this factor already included consideration of appellant's relationship with D.B. Chibueze testified that there is no documentation or testimony that appellant is a member of a gang. Although appellant initially denied socializing with any gang members, he eventually admitted he socialized with D.B., who is a member of the "103 street gang." Appellant reported that with the exception of D.B., the majority of his friends were positive and involved in church and sports. There was no testimony from Chibueze or another expert indicating that this risk factor should be increased.

Nor is there evidence to support the court's finding that appellant's risk assessment level is high (Finding 2). While the court was free to find that appellant is likely to reoffend based on all of the evidence before it, the trial court improperly substituted its own opinion to elevate a finding, based on objective tests, which was established by an expert. Accordingly, we conclude there is no evidence to support the court's findings 1, 2, 7, and 15 as outlined above.

We next consider the evidence supporting the remaining findings. Chibueze testified that critical factors for risk assessment include history of violence, which

was absent for appellant without consideration of the index offense but high with consideration; peer delinquency, which was moderate with or without the index offense; substance abuse, which was also moderate; and empathy and remorse, which was absent when the index offense was excluded but high when included (Findings 5 and 6). During the hearing, the State showed photographs from the crime scene as well as video footage of the episode to Chibueze, which she had not seen prior to her evaluation of appellant. After seeing the video of the episode for the first time, Chibueze stated she would elevate appellant's risk-taking score from moderate to high (Findings 3 and 4). Chibueze agreed it would make sense for the court to focus on the SAVRY results which included the index offense if the court believed there was probable cause appellant was involved in the alleged offense.

Chibueze further stated that appellant's actions that night indicate he has limited empathy, which has an impact on his treatment amenability, but is only one of the factors considered (Findings 8, 9 and 10). Her report reflects appellant's limited empathy. Chibueze further testified that she was unaware of how long it took appellant to be forthcoming with police but that repeated denial would indicate appellant is less likely to take ownership of his action which can be correlated with rehabilitation (Finding 11). Chibueze stated that appellant's actions also have an impact on his treatment amenability with regard to consideration or tolerance of others. Taking into account the footage of appellant's actions as well as appellant's interview with police, Chibueze stated she would have to "re-configurate the numbers" with regard to appellant's treatment amenability (Finding 13). Our review of appellant's recorded statement to police supports the trial court's finding that appellant repeatedly denied involvement in the alleged offense and showed no remorse (Finding 12).

The record also reflects that the prosecutor did not seek grand jury approval of a determinate petition. Section 54.04 of the Family Code permits a judge or jury in certain cases to sentence a juvenile to a term of confinement that exceeds the length of time the individual is eligible to spend in the juvenile justice department. *See* Tex. Fam. Code Ann. § 54.04(d)(3). Such a sentence is served in the juvenile justice department or other authorized facility with a possible transfer to the Texas Department of Criminal Justice. *Id.* However, the decision to seek a determinate sentence is at the discretion of the prosecutor and any determinate petition must be approved by at least nine members of a grand jury. *Id.* §§ 53.045, 54.04. If approved, a juvenile who committed capital murder may be sentenced to up to 40 years. *Id.* §§ 53.045(a)(2), 54.04(d)(3)(A). Therefore, the trial court correctly found that, under Texas law, appellant could only be placed on probation until his 18th birthday or incarcerated in the Juvenile Justice Department until his 19th birthday. *See* Tex. Fam. Code Ann. §§ 54.04(l), 54.04(d)(2); Tex. Hum. Res. Code § 245.151 (Findings 14 and 17). Chibueze testified that appellant would have a more limited amount of time in the juvenile system and that she could not state with certainty whether there was sufficient time for appellant to utilize the resources available in the juvenile system (Finding 16).

Based on the record before us, we conclude that the juvenile court had more than a scintilla of evidence to support its finding that consideration of adequate protection of the public as well as the likelihood of reasonable rehabilitation weighed in favor of certification as an adult; and, thus, the finding is supported by legally sufficient evidence.

We next consider any evidence that is contrary to the trial court's determination and determine if, after weighing all the evidence, the court's finding under this factor was against the great weight and preponderance of the evidence.

There is evidence that appellant's risk of reoffending is low and that his level of treatment amenability is above average. Chibueze testified that the Jesness assessment revealed that appellant comes out in the conformist sub-group, which suggests individuals with similar traits have a slightly lower risk of reoffending. Chibueze also testified that the alleged offense was "very uncharacteristic" for appellant and that he was at low risk for reoffending whether or not the index offense was considered.

Chibueze also testified that appellant exhibits four out of six protective factors measured by the SAVRY assessment, which are considered as increasing a juvenile's ability to rehabilitate successfully. Appellant's protective factors include pro-social involvement with church and sports; strong social support from his parents; positive attachments with his parents and coach; and working well with authority. However, even taking this evidence into account, we cannot conclude that the trial court's determination was against the great weight and preponderance of the evidence, especially given Chibueze's testimony altering her assessment of appellant's treatment amenability.

For all the foregoing reasons, we overrule appellant's legal and factual sufficiency challenges to the trial court's findings under section 54.02(f).

**B. Decision to transfer**

We next consider whether the trial court's decision to waive jurisdiction and transfer the case was "essentially arbitrary" and "without reference to guiding rules or principles." *Moon*, 451 S.W.3d at 47.

The record reflects the trial court addressed each of the section 54.02(f) factors in its order and gave specific reasons and findings in support of its decision that three of the factors weighed in favor of certification. Although flawed at times,

the court showed its work "by spreading its deliberative process on the record." *Moon*, 451 S.W.3d at 49. "[T]he juvenile court that shows its work should rarely be reversed." *Id.*

On this record, we cannot say that the trial court's decision was arbitrary or made without reference to guiding rules or principles. *See Moon*, 451 S.W.3d at 47. Accordingly, we find no abuse of discretion in the trial court's decision to waive jurisdiction and transfer appellant to district court. We overrule appellant's second issue.

## CONCLUSION

We affirm the trial court's order waiving juvenile jurisdiction and transferring appellant to criminal district court.

/s/ Tracy Christopher
Justice

Panel consists of Chief Justice Frost and Justices Boyce and Christopher.