1215-13

No. PD-1215-13
In the
Court of Criminal Appeals
At Austin

ORIGINAL

No. 01-10-00341-CR
In the
Court of Appeals
For the
First District of Texas
At Houston



No. 1196446
In the 178th District Court
Of Harris County, Texas

**CAMERON MOON**
*Appellant*
V.
**THE STATE OF TEXAS**
*Appellee*



# STATE'S PETITION FOR DISCRETIONARY REVIEW

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ORAL ARGUMENT REQUESTED

## STATEMENT REGARDING ORAL ARGUMENT

Pursuant to TEX. R. APP. P. 39.7, the State requests oral argument so that any questions this Court may have about these unique and novel issues may be addressed in full.

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**TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:**

## STATEMENT OF THE CASE

The State filed a petition alleging appellant, a juvenile, engaged in delinquent conduct by intentionally killing Christopher Seabreak.[1] (CR Supp II 34).[2] The State subsequently filed a motion asking the juvenile court to waive its jurisdiction of appellant and certify him to stand trial as an adult in a criminal district court. (CR Supp II 32-33). Following a hearing on the State's motion, the juvenile judge granted the motion and transferred appellant's case to the 178th District Court. (CR 3-4; RR I 128-129).[3]

Appellant was charged by indictment in the 178th District Court with the offense of murder. (CR 2). After finding appellant guilty of the charged offense, the jury assessed punishment at 30-years confinement. (CR 130).

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1 The appellate court's opinion identifies the victim as "Christopher Seabrook." The victim's surname is actually "Seabreak." (CR 2).

2 The appellate record contains three volumes of the clerk's record.
"CR" will refer to the clerk's record filed on June 18, 2010.
"CR Supp" will refer to the supplemental clerk's record filed on December 2, 2010.
"CR Supp II" will refer to the second supplemental clerk's record filed on March 2, 2012.

3 "RR I" refers to the reporter's record for the certification hearing conducted on December 17, 2008, which bears the title "volume 1 of 1 volume." The 14 volumes of the reporter's record generated by the trial conducted in the 178th District Court will be referred to by the volume numbers appearing on the respective title pages.

## STATEMENT OF THE PROCEDURAL HISTORY

On direct appeal, appellant argued the juvenile judge erred in waiving jurisdiction over him and certifying him to stand trial as an adult. On July 30, 2013, a panel of the First Court of Appeals issued a published opinion in which it agreed that the juvenile judge erred by transferring appellant's case to a criminal district court. *Moon v. State*, No. 01-10-00341-CR, 2013 WL 3894867, at *9 (Tex. App.--Houston [1st Dist.] July 30, 2013, pet. filed). The court of appeals then determined that the district court lacked jurisdiction over this case and, therefore, vacated its judgment and dismissed the case. *Id.* The court concluded that this case remains pending in the juvenile court. *Id.* No motion for rehearing was filed.

## FIRST QUESTION PRESENTED FOR REVIEW

> What is the correct appellate standard for reviewing the sufficiency of the evidence to support a juvenile judge's decision to waive jurisdiction over a juvenile offender - the civil sufficiency standard or the criminal sufficiency standard?

**Reasons for granting review**

Review of this question presented should be granted because the intermediate courts of appeals have reached conflicting decisions on the appropriate appellate standard for reviewing the sufficiency of the evidence supporting a transfer order, with some courts applying the civil standard and some applying the criminal standard. *Moon*, 2013 WL 3894867, at *3 (applying civil

standard); *In re J.J.*, 916 S.W.2d 532, 535 (Tex. App.--Dallas 1995, no writ) (same); *Bleys v. State*, 319 S.W.3d 857, 861 (Tex. App.--San Antonio 2010, no pet.) (applying criminal standard). As such, review is appropriate under TEX. R. APP. P. 66.3(a). Review is also appropriate under TEX. R. APP. P. 66.3(b) since resolution of this issue will impact appellate review of every appeal challenging the sufficiency of the evidence to support a juvenile transfer order. Given this effect on the jurisprudence of the state, this Court should settle this issue.

**Argument**

In its evaluation of the sufficiency of the evidence to support the juvenile court's ruling to waive jurisdiction over appellant, the court of appeals reviewed the factual and legal sufficiency of the evidence under the appellate standards used in civil cases. *Moon*, 2013 WL 3894867, at *3 (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005); *Faisst v. State*, 105 S.W.3d 8, 12 (Tex. App.--Tyler 2003, no pet.)). The State submits that the court of appeals erred in using the civil standards since relevant legislative amendments and recent caselaw demonstrate that the proper sufficiency standard of review is the one used in criminal cases. The determination of the proper standard of review is particularly important in this case because the appellate court below found the evidence legally sufficient, but factually insufficient, to support one of the juvenile judge's findings supporting his waiver of jurisdiction.

Before discussing and analyzing this standard-of-review issue, however, it may be helpful to place the issue in the proper context by briefly examining the: (1) substantive law relating to juvenile certifications; (2) the juvenile judge's fact findings and ruling in this case; and (3) the appellate court's analysis of the sufficiency of the evidence to support these fact findings and ruling.

**The applicable law for certification hearings**

When the State petitions a juvenile court to waive jurisdiction over a juvenile offender and certify him to stand trial as an adult, the juvenile court must conduct a hearing and consider transferring the juvenile for criminal proceedings. TEX. FAM. CODE ANN. § 54.02 (b), (c) (West Supp. 2012). The juvenile court may waive its exclusive original jurisdiction and transfer a juvenile to a criminal district court if: (1) the juvenile is alleged to have committed a felony offense; (2) the juvenile was at least 14 years old when he committed the offense if it was a first-degree felony (as in this case); and (3) "after a full investigation and hearing, the juvenile court determines that there is probable cause to believe that the child before the court committed the alleged offense and that because of the seriousness of the alleged offense or the background of the child the welfare of the community requires criminal proceedings." TEX. FAM. CODE ANN. § 54.02(a) (West Supp. 2012).

In making a determination on the third requirement, the court must consider:

(1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against people;

(2) the sophistication and maturity of the juvenile;

(3) the record and previous history of the juvenile; and

(4) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the juvenile by use of procedures, services, and facilities currently available to the juvenile court.

TEX. FAM. CODE ANN. § 54.02 (f) (West Supp. 2012). If the juvenile court waives jurisdiction, it must state specifically in its order its reasons for waiver. TEX. FAM. CODE ANN. § 54.02 (h) (West Supp. 2012).

**The juvenile court's order and findings**

Following a hearing conducted pursuant to section 54.02, the juvenile court waived its jurisdiction over appellant. (CR 3-4). The waiver order states that, prior to the hearing, the court ordered and obtained a diagnostic study, social evaluation, and full investigation of appellant, his circumstances, and the circumstances of the alleged offense. (CR 3). Following a full investigation, the court concluded that: (1) appellant was charged with the felony offense of murder; (2) appellant was above the minimum age required for certification; and (3) there was probable cause to believe appellant committed the alleged murder and that because of the seriousness of the offense, the welfare of the community required criminal proceeding. (CR 3). In making this determination, the court confirmed that it had considered the four factors listed in section 54.02(f). (CR 3).

The court's order further reflects that the judge "specifically finds that [appellant] is of sufficient sophistication and maturity to have intelligently, knowingly and voluntarily waived all constitutional rights heretofore waived by [appellant], to have aided in the preparation of his defense and to be responsible for his conduct; that the offense allege[d] to have been committed was against the person of another; and the evidence and reports heretofore presented to the court demonstrate to the court that there is little, if any, prospect of adequate protection of the public and likelihood of reasonable rehabilitation of [appellant] by use of procedure, services, and facilities currently available to the Juvenile Court." (CR 3-4).

In addition to these written findings, the judge also announced oral findings on the record. He found that, due to appellant's age, the juvenile system would not have sufficient time to "work with" him, an apparent reference to the lack of rehabilitation opportunity. (RR I 129-130). The judge further found that the seriousness of the offense rendered the case appropriate for a criminal district court, noting "this is as serious as it gets in our court." (RR I 130).

The judge also observed that appellant was actually on probation for another criminal offense, criminal mischief, when he committed the murder. (RR I 130). The judge found this circumstance to be an aggravating feature that reflected

poorly on the rehabilitative effectiveness of the juvenile system in appellant's particular case. (RR I 130).

**The appellate court's determination of the sufficiency of the evidence**

The court of appeals noted that the juvenile judge's waiver order states that his waiver of jurisdiction was supported by the first, second, and fourth factors under section 54.02(f). *Moon*, 2013 WL 3894867 at *5. The appellate court then analyzed the sufficiency of the evidence, under the civil standard of review, to support the juvenile judge's findings relating to these three factors.

Second factor

Regarding the second factor, the court of appeals ruled there was "no evidence" supporting the juvenile court's finding that appellant was "of sufficient sophistication and maturity to have intelligently, knowingly and voluntarily waived all constitutional rights heretofore waived by [appellant], to have aided in the preparation of his defense and to be responsible for his conduct." (CR 3). *Id.* at *6-7. As such, the appellate court found the evidence supporting the juvenile court's finding regarding appellant's sophistication and maturity was legally insufficient. *Id.* at *7.

Fourth factor

The fourth factor considers the prospect of adequate protection of the public and the likelihood of the juvenile's rehabilitation. TEX. FAM. CODE ANN. § 54.02

(f)(4) (West Supp. 2012). At the time of the murder, appellant was already on probation for having committed the misdemeanor offense of criminal mischief. (RR I 71; Petitioner's exhibit 1). He also committed four infractions while housed in a juvenile facility after the murder; descriptions of three of the infractions mention physical altercations or fights. (RR I - Petitioner's exhibit 1). Based on this evidence, the court of appeals found the evidence was legally sufficient to support the juvenile judge's determination that "there is little, if any, prospect of adequate protection of the public and the likelihood of reasonable rehabilitation of [appellant] by use of procedures, services, and facilities currently available to the Juvenile Court." *Moon*, 2013 WL 3894867, at *8. (CR 4).

However, applying the civil standard for factual sufficiency review, the court of appeals determined the evidence was factually insufficient to support the juvenile judge's finding on the fourth factor. *Id.* at *8-9. The court explained that appellant's misdemeanor offense was non-violent and the report listing appellant's four infractions fails to detail the circumstances of his misconduct. *Id.* at *8. The appellate court also noted that a psychiatrist had determined that appellant has little inclination for violence or aggressive behavior and is "at little risk" to harm others. *Id.* The appellate court also considered testimony indicating that appellant was amenable to treatment. *Id.*

<u>First factor</u>

The first factor considers whether the offense was committed against a person or property. TEX. FAM. CODE ANN. § 54.02 (f)(1) (West Supp. 2012). The court of appeals found the first factor was the only factor that weighed in favor of transferring appellant to district court. *Moon*, 2013 WL 3894867, at *9. Unlike its consideration of the other two factors, however, the court did not discuss the facts of the case as they relate to this factor. There was no analysis of the manner in which the murder was committed. *Id.*

The appellate court's conclusion

Based on its sufficiency evaluations and determinations relating to these three factors, the court of appeals held that the juvenile judge erred when he certified appellant as an adult and transferred his case to the district court. *Moon*, 2013 WL 3894867, at *9. In other words, the court of appeals ruled that the evidence supporting the juvenile judge's evaluation of the section 54.02(f) factors was insufficient to support the judge's ultimate determination under section 54.02(a) that "because of the seriousness of the offense, the welfare of the community requires criminal proceedings." TEX. FAM. CODE ANN. § 54.02 (a) (West Supp. 2012). (CR 3).

**Analysis**

The court of appeals reviewed the juvenile judge's rulings under the dual sufficiency-of-the-evidence standards used in civil cases. Namely, the court

reviewed the legal sufficiency by "credit[ing] evidence favorable to the challenged finding and disregard[ing] contrary evidence unless a reasonable fact finder could not reject the evidence." *Moon*, 2013 WL 3894867, at *3 (citing *City of Keller*, 168 S.W.3d at 827; *Faisst*, 105 S.W.3d at 12). It reviewed the factual sufficiency by considering "all of the evidence presented to determine if the court's finding is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust." *Moon*, 2013 WL 3894867, at *3 (citing *Faisst*, 105 S.W.3d at 12).

At one time, the civil sufficiency standard of review may have been the proper standard for reviewing the sufficiency of the evidence to support a juvenile judge's decision to waive jurisdiction of a juvenile. Due to statutory amendments, however, the criminal standard is now the proper standard.

In *In re J.J.*, for example, the court observed that juvenile transfer orders "are generally treated the same as other civil appeals." *J.J.*, 916 S.W.2d at 535.[4] The court, therefore, concluded that "the evidentiary standards applied in civil cases are applied to discretionary [juvenile] transfer appeals." *Id.* To support its determination that the civil standard was appropriate for reviewing juvenile

[4] In determining that the civil standard of sufficiency review was appropriate for reviewing the juvenile judge's rulings, the court below relied on *Faisst*, which in turn relied on *J.J.*, for this proposition. *Moon*, 2013 WL 3894867, at * 3. As will be demonstrated, reliance upon *J.J.* for this proposition is no longer proper due to relevant statutory amendments and additions.

transfer orders, the court cited the then-existing version of section 56.01 of the Texas Family Code. *Id.*

At that time, section 56.01(a) provided that an appeal from an order of a juvenile court is carried out as in civil cases generally. *See* Act of May 23, 1991, 72nd Leg., R.S., ch. 680, § 1, 1991 Tex. Gen. Laws, 2466. Section 56.01(c) provided that an appeal may be taken by a juvenile from an order entered under one of the five following family code statutes:

(1) section 54.02 (relating to transfer of child to district court);

(2) section 54.03 (relating to delinquent conduct determinations);

(3) section 54.04 (relating to juvenile dispositions);

(4) section 54.05 (relating to modifications of previous juvenile dispositions);

(5) chapter 55 (relating to commission of juvenile to mental facility).

Since section 54.02 was specifically identified in section 56.01, which listed the family code provisions that were to be treated "as in civil cases generally," it made sense to apply the civil sufficiency standard to appellate examinations of the sufficiency of the evidence to support a juvenile judge's findings and rulings under section 54.02.

However, section 56.01(c) was amended in 1995 and it no longer provides for appeals of section 54.02 transfers from juvenile court to district court. *Ex parte Venegas*, 116 S.W.3d 160, 163 (Tex. App.--San Antonio 2003, no pet.); Acts 1995,

74th Leg., R.S., ch. 262, § 48, 1995 Tex Gen. Laws, 2546. The amendment to section 56.01(c) expressly deleted section 54.02 orders from the list of orders from which an appeal may be taken, while sections 54.03, 54.04, 54.05, and chapter 55 remained on the list. *Id.*; TEX. FAM. CODE ANN. § 56.01 (c) (West Supp. 2012).

Contemporaneous with the 1995 amendment to section 56.01(c) of the Texas Family Code, the legislature added article 44.47 to the Texas Code of Criminal Procedure. Acts 1995, 74th Leg., R.S., ch. 262, § 85, 1995 Tex Gen. Laws, 2584. This statute authorizes appeals from certification orders under section 54.02, but provides such an appeal may be taken only in conjunction with the appeal of a conviction of the offense for which the defendant was transferred to criminal court. *Id.*; TEX. CODE CRIM. PROC. ANN. art. 44.47(a), (b) (West 2006). Significantly, when the legislature transferred the right of appeal from section 54.02 orders from the family code to code of criminal procedure, it announced that a section 54.02 appeal "is a criminal matter and is governed by [the Texas Code of Criminal Procedure] and the Texas Rules of Appellate Procedure that apply to a criminal case." Acts 1995, 74th Leg., R.S., ch. 262, § 85, 1995 Tex Gen. Laws, 2584; TEX. CODE CRIM. PROC. ANN. art. 44.47(c) (West 2006); *see also In the Matter of M.A.V.*, 88 S.W.3d 327, 331 n.2 (Tex. App.--San Antonio 2002, no pet.) (discussing 1995 amendments and indicating criminal sufficiency standards should apply to cases occurring after the effective date of the amendments).

Now that a section 54.02 appeal is considered a "criminal matter,"[5] rather than one to be treated as "in civil cases generally,"[6] appellate courts recognize that a juvenile judge's findings under section 54.02 "are reviewed by the same standards applicable generally to legal and factual sufficiency review *in criminal cases*." *Bleys*, 319 S.W.3d at 861 (italics added). "In determining whether the trial court abused its discretion in certifying a juvenile defendant as an adult and transferring juvenile proceedings to a criminal court, the reviewing court considers the sufficiency of the evidence: the trial court's findings of fact are reviewed by the same standards applicable generally to legal and factual sufficiency review *in criminal cases*." 31 Tex. Jur.3d, *Delinquent Children* § 276 (2013) (italics added).

Furthermore, applying the criminal standard of sufficiency review to transfer orders would be consistent with other similar areas of juvenile law that incorporate the criminal standard. "Although juvenile proceedings are civil matters, the standard applicable in criminal matters [*Brooks v. State*] is used to assess the sufficiency of the evidence underlying a finding that a juvenile engaged in delinquent conduct." *In re J.J.*, 373 S.W.3d 730, 734 (Tex. App.--Houston [14th Dist.] 2012, pet. denied); *In re A.O.*, 342 S.W.3d 236, 239 (Tex. App.--Amarillo 2011, pet. denied); *see also In re B.L.D.*, 113 S.W.3d 340, 351 (Tex. 2003) (recognizing "juvenile delinquency cases to be 'quasi-criminal' because" they are

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5 TEX. CODE CRIM. PROC. ANN. art. 44.47(c) (West 2006).

guided to some extent by the code of criminal procedure); TEX. FAM. CODE ANN. § 54.03(f) (West Supp. 2012) (applying criminal burden-of-proof standard of "beyond a reasonable doubt" to juvenile adjudication hearings).

Since the criminal sufficiency standard of review is the appropriate standard for an appellate court to review a juvenile judge's certification ruling, the court below erred in applying the civil standard. Specifically, the court should not have employed the two different sufficiency standards used in civil cases, which resulted in the court finding the evidence legally sufficient, but factually insufficient, with regard to one of the juvenile judge's findings.

Rather, the court below should have applied the criminal sufficiency standard of review announced in *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). According to *Brooks*, a single standard of review, the familiar *Jackson v. Virginia* standard[7], is used to review both factual and legal sufficiency claims. *Id.*; *Infante v. State*, 404 S.W.3d 656 (Tex. App.--Houston [1st Dist.] 2012, no pet.) ("We review the factual sufficiency of the evidence under the same appellate standard of review as that for legal sufficiency."). Accordingly, this case should be remanded to the court of appeals to consider the sufficiency of the evidence under the proper appellate standard of review.

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[6] TEX. FAM. CODE ANN. § 56.01(a) (West Supp. 2012).

[7] This standard requires an appellate court to review the sufficiency of the evidence by considering all of the evidence in the light most favorable to the verdict to determine whether

## SECOND QUESTION PRESENTED FOR REVIEW

> Having determined that the evidence is sufficient to support only one of the trial judge's three findings regarding the section 54.02(f) factors, did the court of appeals err by failing to consider or analyze whether that single factor is nevertheless sufficient, alone, to support the judge's transfer order? (CR 3-4)

**Reason for granting review**

The court of appeals's failure to analyze whether the one factor, for which it found sufficient supporting evidence, is sufficient to support the transfer order so far departs from the accepted and usual course of judicial proceedings that it requires this Court's review. TEX. R. APP. P. 66.3(b),(f).

**Argument**

In the order waiving jurisdiction over appellant, the juvenile judge affirmatively found that three of the four factors listed in section 54.02(f) support appellant's transfer to a criminal district court. (CR 3-4). TEX. FAM. CODE ANN. § 54.02(f)(1),(2),(4) (West Supp. 2012). The court of appeals reviewed the sufficiency of the evidence supporting each of these three factors and determined the evidence was insufficient to support the findings relating to subsections (f)(2)[8]

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any rational factfinder could have found the essential elements of the offense beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

[8] The "sophistication and maturity" factor.

and (f)(4)[9], but found the evidence sufficient to support the trial judge's finding relating to subsection (f)(1)[10]. *Moon*, 2013 WL 3894867, at *6-9.

Having found the evidence sufficient to support the judge's finding under one of the four section 54.02(f) factors, the court of appeals failed to consider or analyze whether this factor was sufficient, standing alone, to support the trial judge's ultimate determination under section 54.02(a)(3) that the seriousness of the alleged offense requires criminal proceedings for the community's welfare. (CR 3). Rather, the court of appeals simply concluded: "Under these circumstances, we hold that the juvenile court abused its discretion when it certified [appellant] as an adult and transferred his case to the district court." *Id.* at *9. The court of appeals seemingly simply presumed that a single factor could not support a transfer order.

The court of appeals should have considered whether the single factor upon which it found sufficient supporting evidence was sufficient to support the transfer order. Although a juvenile court must consider all four factors listed in section 54.02(f), it is not required to find that each factor has been established, nor is it required to give each factor equal weight. *Bleys*, 319 S.W.3d at 862. The juvenile court may order a transfer "on the strength of *any* combination" of the factors. *Hidalgo v. State*, 983 S.W.2d 746, 754 n.16 (Tex. Crim. App. 1999) (italics added).

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9 The "adequate protection of the public and rehabilitation" factor.

10 The "offense against person or property" factor.

Therefore, the court of appeals should have analyzed whether the subsection (f)(1) factor was sufficient to support the transfer order.

At one time, there were six factors under section 54.02(f) - the current four factors plus: (1) whether the alleged offense was committed in an aggressive and premeditated manner; and (2) whether there is evidence on which a grand jury may be expected to return an indictment. Act of June 16, 1973, 63rd Leg., ch. 544, §54.02(f), 1973 Tex. Gen. Laws, 1477.[11] These two additional factors both relate to the circumstances of the alleged offense.

Courts interpreting the sufficiency of the evidence to support a transfer order under the old six-factor system determined that the evidence can be sufficient even when the evidence is insufficient as to three of those factors; notably three of the four modern-day factors: (1) sophistication and maturity; (2) previous history of the child; and (3) adequate protection of public and rehabilitation prospects. *In the Matter of C.C.*, 930 S.W.2d 929, 933-34 (Tex. App.--Austin 1996, no writ); *Casiano v. State*, 687 S.W.2d 447, 449 (Tex. App.--Houston [14th Dist.] 1985, no writ); *In re Q.D.*, 600 S.W.2d 392, 394-95 (Tex. App.--Fort Worth 1980, no writ). In other words, these courts found the evidence sufficient to support a transfer order based solely on the strength of the circumstances of the alleged offense.

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[11] The statute was amended in 1995 to reduce the factors to the current four. Act of May 31, 1995, 74th Leg., ch. 262, § 34, 1995 Tex. Gen. Laws, 2533.

Similarly, in this case, the court of appeals should have considered the sufficiency of the evidence to support the transfer order based on the strength of the lone factor relating to the circumstances of the alleged offense, despite any evidentiary insufficiency of the other three factors. After all, by analogy, in the capital murder context, a defendant can be found to be a future danger based on the facts of the offense alone, a finding which then may lead to the imposition of a death sentence. *Freeman v. State*, 340 S.W.3d 717, 725 (Tex. Crim. App. 2011); TEX. CODE CRIM. PROC. ANN. art. 37.071 (West Supp. 2012). If the circumstances of the offense, alone, may be sufficient to impose a death sentence, the circumstances of the alleged offense, alone, potentially should be sufficient to determine that the "seriousness of the offense alleged" imperils "the welfare of the community." TEX. FAM. CODE ANN. § 54.02 (a)(3) (West Supp. 2012). And this determination should be permitted by an analysis of the section 54.02(f)(1) factor, the factor that permits a consideration of the manner in which the alleged offense was committed.

To be clear, the State is not suggesting that all juvenile murder cases require certification simply because murder is a serious offense. Murders can vary greatly factually, depending on the manner in which the murder is committed, the context in which it is committed, and the motivation for its commission. Therefore, the

State is arguing that the particular circumstances under which a juvenile commits a murder may be sufficient, alone, to warrant a transfer, but not necessarily always.

In this case, for example, the circumstances reveal a particularly wanton murder, warranting a transfer order. Appellant was charged with murder, but the record reflects that he committed the murder in the course of an attempted robbery. (RR I 14, 32). Such conduct constitutes a capital murder, the most serious offense in the penal code. TEX. PEN. CODE ANN. § 19.03(a)(2) (West Supp. 2012); TEX. PEN. CODE ANN. § 12.31 (West 2011). The seriousness of the offense is exacerbated by the fact that it was committed in the context of drug transaction. (RR I 4, 32). It is well settled and well known that weapons and violence are associated with the drug trade. *Martinez v. State*, 236 S.W.3d 361, 370 (Tex. App.--Fort Worth 2007, pet. dism'd, untimely filed). Furthermore, appellant personally shot the victim, he was not a mere party to the offense. And he shot the victim multiple times, continuing to shoot even after the victim began to run away. (RR I 6, 12-13). Appellant actually exited the vehicle and pursued the victim as he fled, shooting him in the back. (RR I 5-6, 12-13). Appellant engaged in this conduct in a grocery store parking lot, indicating he placed innocent bystanders at risk with his multiple gunshots in a public area. (RR 2, 46) Therefore, not only was the type of offense committed extremely serious, but the particular manner in which appellant committed it illustrates the serious nature of his conduct.

Accordingly, this case should be remanded to the court of appeals so that the court may consider whether the sole factor that it found to be supported by sufficient evidence is itself sufficient to support the juvenile judge's transfer order. *Cf. A.S. v. Tex. Dep't of Family & Protective Servs.*, 394 S.W.3d 703, 714 (Tex. App.--El Paso 2012, no pet.) (in context of parental rights termination, a nine-factor test is used to gauge the child's best interest; however, sufficient evidence of a *single factor* may be sufficient to support a finding that termination is in child's best interest).

## THIRD QUESTION PRESENTED FOR REVIEW

> May an appellate court refuse to consider a juvenile judge's oral finding on a section 54.02(f) factor when determining whether the evidence is sufficient to support a transfer order? (RR 130).

**Reason for granting review**

Whether a juvenile judge's oral finding relating to the section 54.02(f) factors may be considered by a reviewing court is an important issue that should be resolved by this Court. TEX. R. APP. P. 66.3(b).

**Argument**

In his written order waiving jurisdiction, the juvenile judge made specific written findings on three of the four factors listed in section 54.02(f). (CR 3-4).

There is no written finding on appellant's "record and previous history." TEX. FAM. CODE ANN. § 54.02(f)(3) (West Supp. 2012).

At the certification hearing, however, defense counsel asked the judge to make findings supporting his decision to transfer appellant. (RR 129). The judge orally listed a number of factors supporting his ruling, including the fact that, at the time of the murder, appellant was actually on probation for having committed another offense. (RR 130). But the judge did not include this finding relating to appellant's "record and previous history" in his written findings.

Absent a written finding on the "record and previous history" factor, the court of appeals presumed that the juvenile judge did not find that this factor supported the waiver of jurisdiction. *Moon*, 2013 WL 3894867, at *5 n.10, 9 n.15. Despite the juvenile judge's failure to reduce this oral finding to writing in the order as required by statute[12], the judge's oral pronouncement of findings clearly indicates he made a finding on appellant's criminal history and considered it in his ruling. (RR 130).

Since the trial judge clearly made this finding and relied on it in making his ultimate ruling, the court of appeals should have consider this factor as well. *In re J.C.C.*, 952 S.W.2d 47, 49 (Tex. App.--San Antonio 1997, no writ) (reviewing court considered juvenile judge's oral findings under section 54.02 despite requirement

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12 TEX. FAM. CODE ANN. § 54.02(h) (West Supp. 2012).

that finding be specifically stated in order); *Cf. Taylor v. State*, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004) ("When there is a conflict between the oral pronouncement of sentence and the sentence in the written judgment, the oral pronouncement controls.").

## PRAYER FOR RELIEF

It is respectfully requested that this petition be granted, the court of appeals's judgment be reversed, and the cause be remanded to the court of appeals for further consideration.

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The undersigned attorney certifies that this computer-generated document has a word count of 4,493 words, based upon the representation provided by the word processing program that was used to create the document.

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Date: 9/23/2013

# APPENDIX

**Opinion issued July 30, 2013**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-10-00341-CR**

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**CAMERON MOON, Appellant**
**V.**
**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 178th District Court**
**Harris County, Texas**
**Trial Court Case No. 1196446**

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## OPINION

Charged with the delinquent conduct of homicide,[1] sixteen-year-old Cameron Moon was certified by the juvenile court to stand trial as an adult in

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1 TEX. FAM. CODE ANN. § 51.03(3) (West Supp. 2012) (delinquent conduct); TEX. PENAL CODE ANN. § 19.03(b)(1) (West 2011) (murder).

Criminal District Court, where a jury convicted him of murder and assessed punishment at thirty years' imprisonment.

On appeal, Moon contends that (1) the juvenile court erred in waiving its jurisdiction and (2) the district court abused its discretion by denying Moon's motion to suppress the statements he made during his interrogation. We vacate the district court's judgment and dismiss the case.

## I. Background

### *A. Evidence of the Murder*

In July 2008, Deer Park Police Detective Jason Meredith arrived at a grocery store parking lot to investigate a homicide and found Christopher Seabrook dead. Seabrook's cousin, Able Garcia, told the Detective that he and Seabrook had made arrangements to buy a pound of marijuana from a seller whom Garcia knew as "JT." Garcia arrived first, and Seabrook pulled up and parked his truck alongside Garcia's car. The two cousins sat in Garcia's car until a third vehicle, driven by Gabriel Gonzalez, arrived and parked next to Seabrook's truck.

Seabrook approached Gonzalez's car, leaned in the window, and spoke to the front seat passenger. Garcia heard the conversation grow heated, saw Seabrook lunge into the passenger side window, and then heard gunshots. Seabrook then ran from the vehicle but was fired upon by someone who jumped from the passenger

side of the car. The shooter, identified by Garcia only as a white male, returned to Gonzalez's car, which sped away.

Gonzalez later returned to the parking lot and admitted to the Detective that he was the driver of the third vehicle, the shooter whom Gonzalez identified as "Crazy" had been seated next to him, and Emmanuel Hernandez was the backseat passenger. Gonzalez recounted that Seabrook pulled Crazy from the car and gunshots were fired. Gonzalez thereafter directed the police to where the shooter lived in La Porte. When recovered by the police, Seabrook's cell phone indicated that the last incoming call was from a phone owned by Moon.

The continued investigation at the parking lot led to the arrest of Hernandez for possession of marijuana and to the discovery of the pistol from which, a ballistic test confirmed, were fired three of the four bullets recovered from Seabrook's corpse.[2] Hernandez identified Moon, who he knew as "J.T.," as the shooter and told the Detective that he and Moon had intended to "jack" Seabrook.[3] Text messages from Moon on Hernandez's cell phone before the shooting asked if he was "ready to hit that lick"[4] and to bring a gun; after the shooting the texts

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2 The fourth bullet was so badly fragmented that tests could not be conducted.

3 According to Hernandez, although he and Moon had no marijuana when they met Seabrook, they used the offer to sell to lure Seabrook so they could rob him.

4 Detective Meredith testified that to "hit a lick" means to commit a robbery.

pleaded "don't say a word" and "tell them my name is Crazy, and you don't know where I live."

Moon later confessed to the shooting, was arrested, taken into custody and two days following the shooting, on July 20, 2008, taken to the Juvenile Detention Center.

### *B. Evidence of Moon's History and Background*

At the juvenile court hearing on the State's motion to waive jurisdiction held December 17, 2008, Moon's maternal aunt, Jennifer Laban, testified about Moon's family life: his parents divorced when he was very young; when Moon was two-and-a-half years old, his mother gave birth to, suffocated, and threw her newborn daughter into a trash can. After she was convicted of capital murder and sentenced to life without the possibility of parole, Moon never saw his mother again. Moon learned of his mother's history for the first time in 2007, one year before the incident that gives rise to this case.

Moon had been charged with criminal mischief five months earlier for allegedly "keying" another student's vehicle and subsequently went to live with his maternal grandmother, Sharon Van Winkle, in La Porte. As a result of the mischief charge, Moon was compelled to enroll in an alternative school and, Laban testified, began exhibiting anxiety and panic attacks such that she and Van Winkle took Moon to see Tom Winterfeld, a counselor.

Mary Guerra, the juvenile probation officer assigned to Moon for the "keying" case, testified that Moon passed all of his classes with no reports of negative behavior at either the alternative school or the detention center's charter school. He successfully completed a program designed to address teen and family relationships, anger management and substance abuse, and was compliant, never angry, always called to check in with her, and was "very cooperative."

Forensic psychiatrist Dr. Seth Silverman[5] testified and submitted his psychiatric evaluation that noted:

> • Moon is mild mannered, polite, and dependent, almost to the point of being fearful, easily influenced, and confused;
>
> • It is this examiner's strong opinion that adult criminal justice programs have few constructive and, possibly, many destructive influences to offer to Moon. There is little to no programming. Therapy, and attempts at rehabilitation, if any, are clearly minimal. Numerous severe, untoward, and aggravating influences are present.
>
> • Moon has little inclination toward violence, does not fit the mold of individuals treated and assessed who have been charged with similar offenses, and he does not appear to be a flight risk or prone to aggressive behavior; and
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> • Moon's thought process lacks sophistication that is indicative of immaturity.

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[5] At the time of the hearing, Dr. Silverman had thirteen years' of extensive experience with the juvenile justice system as well as extensive contact with the adult criminal justice system.

Ulysses Galloway, a Harris County probation officer who supervised Moon in the juvenile justice center, described him as "a good kid, young man."[6] He testified that, in his eleven years as a probation officer, he has seen a lot of kids come and go and "Moon is one of the best kids I have seen come through . . . ." Galloway also testified that Moon followed his orders, attended classes, was neither aggressive nor mean-spirited, and he considered Moon amenable to treatment. Two other Harris County probation officers who supervised Moon—Warren Broadnaz and Michael Merrit—testified that their observations of Moon were exactly the same as Galloway's.

Julie Daugherty, the mother of Moon's former girlfriend, described Moon as extremely polite and respectful. Leslie Wood, Moon's childhood friend, testified that she had never seen Moon become aggressive.

On December 18, 2008, the juvenile court granted the State's motion to waive jurisdiction and transferred Moon's case to the 178th District Court. On April 19, 2010, a jury convicted Moon of murder and assessed punishment at thirty years' imprisonment. Moon timely filed this appeal.

## II. WAIVER OF JURISDICTION

Moon's first issue contends that the juvenile court erred in waiving jurisdiction. Specifically, he argues that the juvenile court abused its discretion

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[6] Galloway approached Moon's counsel on his own initiative and offered to testify on Moon's behalf.

because (1) it failed to provide a specific statement of its reasons for waiver or to certify its fact findings; (2) it misunderstood and misapplied the factors it was required to consider in deciding whether to waive jurisdiction; (3) its finding related to Moon's sophistication and maturity was unsupported by the evidence; (4) its finding related to adequate protection of the public and likelihood of rehabilitation was unsupported by the evidence; and (5) it based its decision on factors that are not proper considerations in the waiver analysis. The State maintains that the juvenile court followed proper procedure in reaching its decision and that the evidence supported the court's findings.

### *A. STANDARD OF REVIEW*

An appellate court reviews a juvenile court's decision to certify a juvenile defendant as an adult and transfer the proceedings to criminal court under an abuse of discretion standard. *State v. Lopez*, 196 S.W.3d 872, 874 (Tex. App.—Dallas 2006, pet. ref'd); *Faisst v. State*, 105 S.W.3d 8, 12 (Tex. App.—Tyler 2003, no pet.). Absent an abuse of discretion, the appellate court will not disturb a trial court's transfer and certification order. *Faisst*, 105 S.W.3d at 12 (citing *C.M. v. State*, 884 S.W.2d 562, 563 (Tex. App.—San Antonio 1994, no writ)). Relevant factors to be considered when determining if the court abused its discretion include legal and factual sufficiency of the evidence. *In re K.B.H.*, 913 S.W.2d 684, 688 (Tex. App.—Texarkana 1995, no pet.).

A trial court's findings of fact are reviewed by the same standards applicable generally to legal and factual sufficiency review: if an appellate court finds the evidence factually or legally insufficient to support the juvenile court's order transferring jurisdiction of a youth to the criminal district court, it will necessarily find the juvenile judge has abused his discretion. *In re G.F.O.*, 874 S.W.2d 729, 731–32 (Tex. App.—Houston [1st Dist.] 1994, no writ). 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. *See City of Keller v. Wilson,* 168 S.W.3d 802, 827 (Tex. 2005); *Faisst*, 105 S.W.3d at 12. If there is more than a scintilla of evidence to support the finding, the no evidence challenge fails. *Faisst*, 105 S.W.3d at 12. Under a factual sufficiency challenge, we consider all of the evidence presented to determine if the court's finding is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. *See id.*

***B. APPLICABLE LAW***

In *Kent v. United States*, 383 U.S. 541 (1966), the United States Supreme Court stated that "[i]t is clear beyond dispute that the waiver of jurisdiction is a 'critically important' action determining vitally important statutory rights of the juvenile." *Id.* at 556. The Court characterized the "decision as to waiver of jurisdiction and transfer of the matter to the District Court [as] potentially as

important to petitioner as the difference between five years imprisonment and a death sentence." *Id.* at 557. In *Hidalgo v. State*, 983 S.W.2d 746 (Tex. Crim. App. 1999), the Court of Criminal Appeals likewise recognized that "transfer to criminal district court for adult prosecution is 'the single most serious act the juvenile court can perform . . . because once waiver of jurisdiction occurs, the child loses all protective and rehabilitative possibilities available.'" *Id.* at 755. The *Hidalgo* Court noted that "transfer was intended to be used only in exceptional cases" and that "[t]he philosophy was that, whenever possible, children 'should be protected and rehabilitated rather than subjected to the harshness of the criminal system' because 'children, all children are worth redeeming.'" *Id.* at 754 (citation omitted).

Section 54.02 of the Family Code authorizes a juvenile court to waive its exclusive, original jurisdiction and to transfer a child to a criminal district court if:

> (1) the child is alleged to have committed a felony;
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> (2) the child was fourteen years or older if the alleged offense is a first degree felony or fifteen years or older if the alleged offense is a second degree felony;[7] and
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> (3) after a full investigation and hearing, the juvenile court determines that there is probable cause to believe that the juvenile committed the offense alleged and that because of the seriousness of the offense alleged or the background of the juvenile, the welfare of the community requires criminal proceedings.

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[7] Other criteria may satisfy this prong of the statute, but they are not applicable in this case.

TEX. FAM. CODE ANN. § 54.02(a) (West Supp. 2012).[8]

To limit the juvenile court's discretion in making the waiver determination, the Supreme Court in *Kent* set out a series of factors for juvenile courts to consider. *Hidalgo*, 983 S.W.2d at 754 (citing *Kent*, 383 U.S. at 566–67). These factors are incorporated into section 54.02(f), which provides as follows:

> (f) In making the determination required by Subsection (a) of this section, the court shall consider, among other matters:
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> (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
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> (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). The juvenile court "may order a transfer on the strength of any combination of the criteria" listed in subsection (f). *Hidalgo*, 983

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[8] Before 1995, the Family Code authorized civil appeals from an order "respecting transfer of the child to a criminal court for prosecution as an adult." In 1995, the legislature deleted former Family Code section 56.01(c)(1)(A), which had allowed a civil appeal from an order waiving jurisdiction. *See* Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 48, 1995 Tex. Gen. Laws 2517, 2546. In the absence of a statute allowing an appeal, the result was that the waiver-of-jurisdiction order could only be appealed as in criminal cases generally, *i.e.*, after final conviction in the criminal court. *See Apolinar v. State*, 820 S.W.2d 792, 793 (Tex. Crim. App. 1991).

S.W.2d at 754 n.16 (citing *United States v. Doe*, 871 F.2d 1248, 1254–55 (5th Cir.), *cert. denied*, 493 U.S. 917 (1989)).

Section 54.02(d) requires that, prior to the hearing on the motion to transfer, the juvenile court "shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense." TEX. FAM. CODE ANN. § 54.02(d). If the juvenile court waives jurisdiction, it must "state specifically in the order its reasons for waiver and certify its action, including the written order and findings of the court . . . ." *Id.* § 54.02(h). Rigid adherence to these requirements is mandatory before a court may waive its jurisdiction over a juvenile. *In re J.R.C.*, 522 S.W.2d 579, 582–83 (Tex. Civ. App.—Texarkana 1975, writ ref'd n.r.e.); *see also In re J.T.H.*, 779 S.W.2d 954, 960 (Tex. App.—Austin 1989, no pet.).

### *C. JUVENILE COURT'S ORDER*

In its Order to Waive Jurisdiction, the juvenile court found that "because of the seriousness of the OFFENSE, the welfare of the community requires criminal proceeding." TEX. FAM. CODE ANN. § 54.02(a)(3).[9] The juvenile court noted that,

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[9] Here, it is undisputed that the first two prongs of section 54.02(a) are satisfied: the State charged Moon with murder, a first degree felony, and Moon was sixteen years old at the time of the alleged offense. *See* TEX. FAM. CODE ANN. § 54.02(a), (b) (West Supp. 2012).

in making that determination, it had considered the four factors enumerated in section 54.02(f), among other matters. The court concluded as follows:

> The Court specifically finds that the said **CAMERON MOON** is of sufficient sophistication and maturity to have intelligently, knowingly and voluntarily waived all constitutional rights heretofore waived by the said **CAMERON MOON**, to have aided in the preparation of HIS defense and to be responsible for HIS conduct; that the OFFENSE allege[d] to have been committed WAS against the person of another; and the evidence and reports heretofore presented to the court demonstrate to the court that there is little, if any, prospect of adequate protection of the public and likelihood of reasonable rehabilitation of the said **CAMERON MOON** by use of procedures, services, and facilities currently available to the Juvenile Court.

Thus, the juvenile court found that waiver of its jurisdiction was supported by the first, second, and fourth factors under section 54.02(f).[10]

### *D. "SOPHISTICATION AND MATURITY"*

Moon's argument regarding the court's "sophistication and maturity" finding is two-fold. First, he argues that the juvenile court misunderstood and misapplied this factor. Second, he contends that the evidence does not support the court's finding. The State contends that the juvenile court applied the proper approach in making its determination regarding Moon's sophistication and

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[10] Absent a finding regarding the third factor—Moon's record and previous history—we presume that the juvenile court did not find that this factor supported waiver. *See* TEX. FAM. CODE ANN. § 54.02(h); *Hidalgo*, 983 S.W.2d at 754 n.16 ("Should the juvenile court decide to waive its exclusive jurisdiction, the court is required to state in its order the specific reasons for waiver.").

maturity, and that the evidence was sufficient to support the juvenile court's finding on this factor.

*1. PROPER STANDARD*

Moon argues that the proper standard for considering the sophistication and maturity prong is not whether he was sophisticated and mature enough to waive his constitutional rights or to assist in the preparation of his defense, as the juvenile court found. Rather, he argues, this factor relates only to the question of culpability and criminal sophistication. In support of his argument, Moon relies on *R.E.M. v. State*, 541 S.W.2d 841 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.) and *Hidalgo v. State*, 983 S.W.2d 746 (Tex. Crim. App. 1999).

In *R.E.M.*, the defendant sought reversal of the juvenile court's order transferring the murder charge against him to district court. *See R.E.M.*, 541 S.W.2d at 843. With regard to the juvenile court's finding that the defendant was of "sufficient sophistication and maturity to have intelligently, knowingly, and voluntarily waived all constitutional and statutory rights heretofore waived," the appeals court stated

> This finding is somewhat difficult to understand. We believe that the requirement that the juvenile court consider the maturity and sophistication of the child refers to the question of culpability and responsibility for his conduct, and is not restricted to a consideration of whether he can intelligently waive rights and assist in the preparation of his defense.

*Id.* at 846.

In *Hidalgo*, the appellant challenged his transfer from juvenile court on the ground that he had been denied his right to assistance of counsel because his appointed attorney had not been notified of a psychological examination until after the exam had taken place. *See Hidalgo*, 986 S.W.2d at 747–48. In examining the purpose of the transfer mechanism, the Court noted

> State legislatures originally devised the process as a means of removing serious or persistent juvenile offenders generally not amenable to rehabilitation to the adult criminal system. The presence of such juveniles was seen as a threat to the fundamental structure of the juvenile system and the less *criminally sophisticated.* [Footnote omitted]. Transfer was intended to be used only in exceptional cases.

*Id.* at 754 (emphasis added).

Based on the above-quoted language, Moon urges us to conclude that the sophistication and maturity element relates only to his culpability and criminal sophistication, and not to an ability to waive his rights or aid in the preparation of his defense. We decline the invitation. Although the *R.E.M.* court believed that the sophistication and maturity factor referred to the question of culpability, it also stated that it was "*not restricted* to a consideration of whether he can intelligently waive rights and assist in the preparation of his defense." *R.E.M.*, 541 S.W.2d at 846 (emphasis added).[11] With regard to *Hidalgo*, we do not read the Court's

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[11] Several courts after *Hidalgo* have concluded, albeit in unpublished decisions, that a juvenile's ability to waive his rights and assist in the preparation of his defense bear on the question of his sophistication and maturity. *See Jiminez v. State*, No. 13–99–776–CR, 2002 WL 228794, at *8 (Tex. App.—Corpus Christi 2002, pet.

explanation of the purpose behind transfer—to remove serious or persistent offenders who were considered a threat to the less criminally sophisticated in the juvenile system—as a restriction on what the court may consider in determining a juvenile's sophistication and maturity under subsection (f). We conclude that the juvenile court did not err in considering Moon's ability to waive his rights and assist in the preparation of his defense.

*2. EVIDENCE OF SOPHISTICATION AND MATURITY*

Moon contends that the juvenile court's finding as to his sophistication and maturity is unsupported by the evidence.

Pointing to Moon's text messages instructing Hernandez to not "say a word," "[t]ell them my name is Crazy, and you don't know where I live," and to the exculpatory stories Moon told Detective Meredith before confessing to the shooting, the State's brief argues that Moon's efforts to conceal the crime and avoid apprehension demonstrate that he knew the difference between right and

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ref'd) (not designated for publication) (finding juvenile was sufficiently sophisticated and mature to understand adult criminal proceedings and to assist in preparation of his defense); *see also In re B.T.*, 323 S.W.3d 158, 161 (Tex. 2010) (noting one court of appeals's description of "complete diagnostic study" as one that "bears upon the maturity and sophistication of the child and relates to the questions of culpability, responsibility for conduct, and ability to waive rights intelligently and assist in the preparation of a defense"); *Acevedo v. State*, No. 05–08–00467–CR, 2009 WL 930347, at *2 (Tex. App.—Dallas 2009, no pet.) (finding statutory requirement of complete diagnostic study bears upon juvenile's maturity and sophistication and relates to questions of culpability, responsibility for conduct, and ability to waive rights intelligently and assist in preparation of defense).

wrong and that his conduct was wrong. The finding of the juvenile court on the sophistication and maturity issue, however, was based on Moon's ability to waive his rights and assist counsel in preparing his defense, not an appreciation of the nature of his actions or that his conduct was wrong. Moon's text messages and exculpatory stories constitute no evidence supporting the juvenile court's finding that Moon was sufficiently sophisticated and mature to waive his rights and assist in preparing his defense.

In *Hidalgo*, the Court of Criminal Appeals noted that a psychological examination is ordinarily required to assist the court in assessing a juvenile's sophistication, maturity, and the likelihood of rehabilitation as required by subsection(f).[12] In his psychiatric evaluation report, Dr. Silverman concluded that Moon "has a lack of sophistication and maturity" and that his "thought process lacks sophistication which is indicative of immaturity." Dr. Silverman also found Moon to be "mild mannered, polite, and dependent almost to the point of being

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[12] The *Hidalgo* Court stated

> To assist the court in assessing these factors, the law requires a psychological examination by a doctor with specialized training in adolescent psychology and forensic assessment [citation omitted]. The exam provides insight on the juvenile's sophistication, maturity, potential for rehabilitation, decision-making ability, metacognitive skills, psychological development, and other sociological and cultural factors.

*Hidalgo*, 983 S.W.2d at 754.

fearful, easily influenced and confused." The State presented no controverting expert testimony to undermine Dr. Silverman's conclusion regarding Moon's lack of sophistication and his immaturity.

The State correctly asserts that as the sole judge of credibility, the juvenile court was entitled to disbelieve Dr. Silverman's testimony that Moon lacked sophistication and maturity. *See In re D.W.L.*, 828 S.W.2d 520, 525 (Tex. App.—Houston [14th Dist.] 1992, no pet.) (noting juvenile court is sole fact-finder in pretrial hearing and may choose to believe or disbelieve any or all of witnesses' testimony). Nonetheless, there must be some evidence to support the juvenile court's finding that Moon was sufficiently sophisticated and mature for the reasons specified by the court in order to uphold its waiver determination. Our review finds no evidence supportive of the court's finding that Moon was "of sufficient sophistication and maturity to have intelligently, knowingly and voluntarily waived all constitutional rights heretofore waived . . . [and] to have aided in the preparation of [his] defense." As such, the evidence to uphold the juvenile court's finding regarding Moon's sophistication and maturity is legally insufficient.

### *E. PROTECTION OF THE PUBLIC AND REHABILITATION OF THE JUVENILE*

Moon next contends that the evidence adduced is insufficient to support the court's finding that

> "there is little, if any, prospect of adequate protection of the public and likelihood of reasonable rehabilitation of [Moon] by use of

procedures, services, and facilities currently available to the Juvenile Court."

The State contends that the evidence regarding this factor is sufficient to support the court's finding and asserts that the juvenile court does not abuse its discretion by finding that the community's welfare requires transfer due to the seriousness of the crime alone, despite the juvenile's background. Pointing to the offense itself and the evidence showing that it was committed during a drug transaction and that Moon repeatedly shot Seabrook while he fled, the State concludes, "based on the seriousness of the offense alone, the evidence sufficiently demonstrated that appellant's transfer was consistent with the public's need for protection."

The State conflates subsections (a)(3) and (f). Subsection (a)(3) authorizes the juvenile court to waive jurisdiction if it determines that "because of the seriousness of the offense alleged *or* the background of the juvenile, the welfare of the community requires criminal proceedings." TEX. FAM. CODE ANN. § 54.02(a) (emphasis added). Thus, a juvenile court can properly find that the welfare of the community requires criminal proceedings because of the seriousness of the offense, the background of the individual, or both. *See id.* However, a finding based on the seriousness of the offense under subsection (a) does not absolve the juvenile court of its duty to consider the subsection (f) factors. If, as the State argues, the nature of the offense alone justified waiver, transfer would

automatically be authorized in certain classes of "serious" crimes such as murder, and the subsection (f) factors would be rendered superfluous. *See R.E.M.*, 541 S.W.2d at 846 ("We find nothing in the statute which suggests that a child may be deprived of the benefits of our juvenile court system merely because the crime with which he is charged is a 'serious' crime."). Further, the cases relied on by the State do not suggest that the nature of the crime alone can support waiver; rather, they merely make the observation that subsection (a)(3) is written in the disjunctive. *See McKaine v. State*, 170 S.W.3d 285, 291 (Tex. App.—Corpus Christi 2005, no pet.) (noting that because § 54.02(a)(3) is disjunctive, "[e]ven if we were to sustain McKaine's challenge regarding his background, his failure to challenge the court's finding regarding the seriousness of the offense would preclude relief."); *In re D.D.*, 938 S.W.2d 172, 177 (Tex. App.—Fort Worth 1996, no writ) ("The second element, however, is not written in the conjunctive. It requires only that the trial court find that the seriousness of the offense or the background of the child requires criminal prosecution to protect the welfare of the community.").

### *I. EVIDENCE RELATED TO PROTECTION OF THE PUBLIC*

The record reflects that Moon had a sole misdemeanor conviction for "keying" a car, and while locked up in the juvenile facility was accused of four infractions.[13] The probation report provides no details.

In his psychiatric evaluation report, Dr. Silverman stated that Moon "has little inclination towards violence," "does not fit the mold of individuals treated and assessed who have been charged with similar offenses," and "does not appear to be a flight risk or prone to aggressive behavior." Dr. Silverman found Moon "especially when compared to other individuals with similar [alleged] aggressive behavior who have been treated by this psychiatrist—to be mild mannered, polite, and dependent, almost to the point of being fearful, easily influenced and confused." In his report, Dr. Silverman also referenced the notes of Moon's therapist, Tom Winterfeld, stating that Moon showed no signs of aggression. Dr. Silverman concluded that Moon "is at little risk to . . . harm himself or others." Moon's juvenile probation officers described Moon as "very cooperative" and compliant, never angry, "a good kid, young man," "one of the best kids I have seen come through," and neither "aggressive nor mean-spirited." Daugherty, the mother of Moon's former girlfriend, described him as "an extremely polite young

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[13] Moon was convicted of "mischief—$500/$1499.00 Property Damage" for keying a car on school grounds. The infractions at the juvenile facility consisted of two attempted physical altercations, one physical altercation, and one related to contraband.

man" and "very respectful." Wood, Moon's childhood friend, testified that she had never seen him become aggressive.

### *II. EVIDENCE OF LIKELIHOOD OF REHABILITATION*

Dr. Silverman noted that "[p]rior to the alleged offense, Moon had been subject to multiple significant psychosocial stressors, including but not limited to, a change of caretakers, custody battle between caretakers, and placement in an alternative school. He had also learned the reason that he had never had contact with his biological mother—she was incarcerated for life because she had killed her newborn after delivering at home and then place[d] it in a garbage dumpster." Dr. Silverman stated "[i]t is this examiner's strong opinion that adult criminal justice programs have few constructive, and possibly many destructive, influences to offer [] Moon. There is little to no programming. Therapy and attempts at rehabilitation, if any, are clearly minimal. . . . Moon, in the opinion of this forensic psychiatrist, might be harmed by placement in an adult criminal justice jail due to its untoward influences and lack of rehabilitative intent." Dr. Silverman concluded that Moon "would probably benefit from placement in a therapeutic environment specifically designed for adolescent offenders, especially one licensed by, and contracted with, the Texas Youth Commission." His conclusion comported with Winterfeld's therapy notes indicating that Moon had responded to psychological

therapy. Officer Galloway, Moon's juvenile probation officer, also testified that he considered Moon amenable to treatment.

Construing the prior "keying," juvenile facility infractions, and the nature of the charged offense as more than a scintilla of evidence and considering only this favorable evidence to support the court's finding, we must conclude the evidence to be legally sufficient to support the court's determination that "there is little, if any, prospect of adequate protection of the public and likelihood of reasonable rehabilitation of [Moon] by use of procedures, services, and facilities currently available to the Juvenile Court." However, careful consideration of all of the evidence presented further compels the conclusion that the evidence is factually insufficient to support the juvenile court's finding. As to the protection of the public, Moon's keying a car is not only a non-violent act, it is an undeniably low-level misdemeanor mischief offense against property—hardly the sort of offense for which "there is little, if any, prospect of adequate protection of the public and likelihood of reasonable rehabilitation . . . by use of procedures, services, and facilities currently available to the Juvenile Court." Further, the probation report offers no details regarding Moon's "write-ups" at the resident juvenile facility. Indeed, Moon's juvenile detention officers, presumably in a position to observe such incidents, uniformly testified that Moon "was one of the best kids I have seen

come through," that he followed orders, attended classes, and was not aggressive or mean-spirited.

The State relies only on the juvenile court's conclusion that, "due to appellant's age, the juvenile system would not have authority over appellant long enough to rehabilitate him." Such a conclusion, of course, is not evidence, and there is nothing in the record supporting this conclusion.[14] Further, the State's reliance on *Faisst* is misplaced. *See* 105 S.W.3d at 12–13, 15. There, the appeals court found the evidence sufficient to support the juvenile court's finding that the juvenile system could not adequately provide for the defendant's rehabilitation because the offense of intoxication manslaughter required a longer period of supervision and probation than was available under the juvenile system. *See Faisst*, 105 S.W.3d at 15. However, there was specific testimony that (1) in the juvenile system the maximum punishment is twelve months of intensive supervision followed by twelve months of probation, (2) the defendant had a "significant problem with alcohol abuse," and (3) such a "person needs a minimum of fifteen to twenty months of supervision to ensure that rehabilitation takes place." *See id.* at 12. The record here has no such evidence. Indeed, the only evidence regarding the likelihood of Moon's rehabilitation was the uncontroverted

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[14] This conclusion is particularly noteworthy in light of the juvenile court's oral finding at the conclusion of the hearing that "the court does not know of any, in terms of the services, facilities and procedures in the juvenile system."

testimony that Moon was amenable to treatment. Consequently, we conclude that the juvenile court's finding that "there is little, if any, prospect of adequate protection of the public and likelihood of reasonable rehabilitation of [Moon] by use of procedures, services, and facilities currently available to the Juvenile Court" was so against the great weight and preponderance of the evidence as to be manifestly unjust.

In sum, we find the evidence legally insufficient to support the juvenile court's finding related to Moon's sophistication and maturity. We also find the evidence factually insufficient to support the court's finding regarding the prospect of adequate protection of the public and the likelihood of Moon's rehabilitation. Thus, the first factor—whether the offense was against person or property—is the only factor weighing in favor of Moon's transfer.[15] Under these circumstances, we hold that the juvenile court abused its discretion when it certified Moon as an adult and transferred his case to the district court.[16]

## III. Conclusion

Because the juvenile court abused its discretion in waiving its jurisdiction over Moon and certifying him for trial as an adult, the district court lacked

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15 As previously noted, the juvenile court did not specify Moon's record and previous history as a reason supporting its waiver decision.

16 In light of our disposition of Moon's first issue, we do not reach his second issue complaining of the district court's denial of his motion to suppress.

jurisdiction over this case. We therefore vacate the district court's judgment and dismiss the case. The case remains pending in the juvenile court.

Jim Sharp
Justice

Panel consists of Justices Jennings, Higley, and Sharp.

Publish. TEX. R. APP. P. 47.2(b).