NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KJ 1904

STATE OF LOUISIANA IN THE INTEREST OF C.T.H.

Judgment Rendered: September 21, 2012

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On Appeal from the
Juvenile Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court No. 99981

Honorable Pamela T. Johnson, Judge Presiding

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* * * * *

BEFORE: WHIPPLE, McCLENDON, AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J.

A seventeen-year-old child, identified herein as C.T.H., was alleged to be delinquent by a petition filed on April 20, 2011, pursuant to the Louisiana Children's Code.[1] The petition was based upon the alleged commission of armed robbery, a violation of La. R.S. 14:64. After an adjudication hearing, the juvenile court judge adjudicated C.T.H. a delinquent based on the commission of armed robbery, as alleged. At the disposition hearing, the juvenile court judge committed C.T.H. for two years in the secure custody of the State with credit for time served and with certain conditions.

On appeal, C.T.H. argues that the juvenile court judge erred in determining that he was competent to proceed and in adjudicating him a delinquent based on the alleged offense where the identification process was suggestive and extraneously buttressed. After a thorough review of the record and the errors assigned, we affirm the adjudication and disposition.

STATEMENT OF FACTS

On August 19, 2010, around 10:45 a.m., an armed individual entered Sonny's Pizza Restaurant in Zachary, Louisiana, located on Main Street in a strip mall. Just before the individual entered the restaurant, its owner Dawn Louise Curtis was sitting in the first booth by the front door, facing the door looking out onto Main Street. Two store cooks and a cashier were also present. As Curtis sat in the booth, she observed a young male pacing in the parking lot in front of the restaurant's front door. The individual then looked towards the front door, paced in front of it again, approached the door, and pulled a knitted mask over his face as he grabbed the door handle and entered the restaurant with a black handgun. He

[1]The child's date of birth is November 28, 1994, and he was fifteen years old at the time of the offense and sixteen years old when the petition was filed. On April 18, 2011, before the petition in this case was filed, the juvenile court found the child to be competent to proceed while presiding over competency hearings initiated in other proceedings. (R. 52).

pointed the gun toward Curtis's daughter, Jennifer Evans, who was preparing tables at the time, and demanded money. She pointed toward the cash register and the assailant insisted that she retrieve the money. Evans complied and gave the assailant the cash from the cash register. After he indicated he also wanted the money from the other cash register, she further complied.

Curtis estimated that the robber took one hundred and twenty dollars before exiting the restaurant. Upon his exit, Curtis immediately called 911. When the police arrived, she provided a description of the robber. Within an hour of the incident, the police drove Curtis a block away from the restaurant, where she identified the child herein as the robber. During the adjudication hearing, Curtis again identified the child as the robber.

ASSIGNMENT OF ERROR NUMBER ONE

In the first assignment of error, C.T.H. contends that the juvenile court judge erred in determining that he was competent to proceed. The child notes that he was deemed incompetent on August 11, 2010, and referred to a restoration service provider in accordance with the recommendations of the competency commission. He further noted that on March 11, 2011, the juvenile court judge determined that the child had not been fully restored and was not competent to proceed. The child contends that although the juvenile court judge found him competent to proceed on April 18, 2011, the judge expressed discomfort with the restorer's report and subsequently acknowledged that the child was developmentally disabled and lacked decision-making skills. The child further contends that after his commitment, his I.Q. was determined to be under sixty, and estimated possibly as low as 51, suggesting that he could not have performed well on the written test previously administered. Noting his low I.Q. and the additional infirmity of youth, the child argues that even if he was coached to pass a test, it was not established that he could read, there was no way that he understood the proceedings or was

able to assist his attorney, and the juvenile court judge erred in determining that he could proceed.

Mental incapacity to proceed exists when, as a result of mental disease or defect, the accused presently lacks the capacity to understand the proceedings against him or to assist in his defense. La. Code Crim. P. art. 641. In **State v. Weber**, 364 So.2d 952 (La. 1978), the Supreme Court held that "[t]he defendant carries the burden of establishing by a clear preponderance of the evidence that he lacks the capacity to understand the object, nature, and consequences of the proceedings against him, in a rational as well as factual manner, to consult with counsel in a meaningful way, and to assist rationally in his defense." **Weber**, 364 So.2d at 957 (citing **State v. Bennett**, 345 So.2d 1129 (La. 1977); **State v. Morris**, 340 So.2d 195 (La. 1976); and **State v. Veal**, 326 So.2d 329 (La. 1976)). Although the trial court may receive expert testimony on the issue of a defendant's competency to proceed to trial, the issue of the defendant's mental capacity to proceed shall be determined by the court. La. Code Crim. P. art. 647. Additionally, "[a] judge's determination of [a] defendant's present mental capacity is entitled to great weight on appeal." **Weber**, 364 So.2d at 957.

Louisiana Children Code articles 832-838 provide the procedure for determining a child's mental capacity to proceed. Once a child's competency becomes an issue, the "mental capacity of the child to proceed shall be determined by the court after a contradictory hearing." La. Ch. Code art. 836. Louisiana Children's Code article 833(A) provides in pertinent part, that the court shall order a mental examination of the child when it has reasonable grounds to doubt the mental capacity of the child to proceed. A child's mental incapacity to proceed may be raised at any time by the child, the district attorney, or the court. When the question of the child's mental incapacity to proceed is raised, there shall be no further steps in the delinquency proceeding, except the filing of a delinquency

petition, until counsel is appointed and notified in accordance with La. Ch. Code art. 809(B) and the child is found to have the mental capacity to proceed. La. Ch. Code art. 832. If the court determines by a preponderance of the evidence that the child lacks the mental capacity to proceed and the alleged delinquent act is a felony, the court may order restoration services for the child and appoint a restoration service provider. La. Ch. Code art. 837(B)(3) &(4).

According to the minutes in this case, on October 28, 2009, the juvenile court ordered that a psychiatric evaluation be conducted upon motion of counsel for the child when he appeared for a disposition hearing pursuant to a petition alleging the commission of theft. Subsequently, on May 5, 2010, when the child appeared for a detention hearing relating to an attempted first-degree robbery allegation, the juvenile court ordered that a sanity commission be appointed to determine the child's mental condition at the time of the alleged offense. The court also ordered a sanity hearing to determine the child's mental capacity to proceed.

Dr. Marc Zimmerman examined the child on June 23, 2010, and noted in part in his written assessment that the child was able to read and write and to understand the proceedings and assist in his defense. Similarly, Dr. Brandon Romano evaluated the child on July 2, 2010, and noted that while there appeared to be "minor gaps" in the child's ability to fully understand his legal situation and/or assist his counsel, in his opinion the child was competent to proceed at that time. At the sanity hearing on August 11, 2010, despite the two reports indicating determinations of competency by both examining physicians, the juvenile court found that counsel for the child met their burden of proving that the child was incompetent to assist counsel in the matter. In addition to the reports, the court considered testimony presented at the hearing. While the hearing transcript is not included in the record before this court, the minutes provide that based on the testimony of Dr. Romano, one of the evaluating physicians, the juvenile court

found a substantial possibility that the child's competency could be restored in the future. The court ordered that the competency of the child be restored through the Department of Health and Hospitals (DHH), that the restorer provide its evaluation by September 30, 2010, and that the matter be continued to allow the court to determine if the child's competency had been restored. The sanity hearing was reset for October 13, 2010, also the date of the detention hearing for the instant allegation. Based on testimony presented at that hearing, it was determined that restoration services had not yet begun. As to the instant allegations, the matter was reassigned for a status conference pending DHH restoration services.

At a status hearing on December 16, 2010, the DHH attorney informed the court that the child had not yet been fully restored, but that they would be willing to continue the restoration efforts. Subsequently, at a March 1, 2011 status hearing, the court found insufficient support to declare the child competent despite a February 22, 2011 written assessment by the competency restoration provider indicating that the child had been restored. The restoration provider, Melissa S. Martin, testified that the child was aware of the allegation (attempted first degree robbery) and of his legal rights. The child had been tested on February 17, 2011, and increased his score from the 72% that he received on the prior testing to 100%, with the standard goal being 80%. Martin testified that test items included roles and functions of court personnel and court procedure. She further stated, "I think he can understand the proceedings against him. Um, I think that um, if he had to um, make critical decisions um, that they would have to be explained very carefully and concretely to him." She later cited decisions surrounding a plea bargain as an example of critical decisions that would have to be carefully explained to the child. When questioned as to the child's ability to retain the knowledge demonstrated on the test, she stated, "I don't know if I would say that he wouldn't retain most of it but I – I can't say with great confidence that in three

months he would make a hundred percent again." The court ordered the continuation of restoration services.

Finally, at a status hearing conducted on April 18, 2011, the court determined that the child's competency had been fully restored, considering a provider letter and Martin's hearing testimony. Martin testified in part,

> ... I guess my finding is the same basically as it was last time but I did focus more on each session this time and he is able to um, work with his attorney and talking to him about the case, relating facts about the case um, um, relating the – the circumstances that he knows about, what led to his arrest or what he was told um, by the police at that time. Um, he's able to um, manage himself in Court um, he knows what happens if you do not behave in Court um, he went through decisions um, based on scenarios, he was able to look at different scenarios related to plea bargains and um, work through how to – what's important to look at and make – and making a decision in those areas.

The court concluded that the child was able to assist his counsel and was competent to proceed.

In **State v. Rogers**, 419 So.2d 840 (La. 1982), cited in the child's appeal brief, one of the original psychiatrists appointed by the court testified that the defendant therein was severely mentally retarded with an estimated I. Q. between 50 and 55, and mentally incapable of effectively participating in a criminal prosecution. The doctor administered a Kent Emergency Intelligence Test to the defendant, and the result indicated that his intelligence level was below that of a three-year-old child. The other psychiatrist originally appointed by the trial court was of the opinion that the defendant was moderately mentally retarded with an I.Q. of less than 50 and found that he lacked the mental capacity to stand trial for aggravated rape. She stated that she asked the defendant indirect questions to estimate his judgment and intelligence and found that he was lacking in many areas. The defendant reported to her that he did not know what happened during periods of time up to an hour and a half. He scored below the lowest recordable grade on a Kent E.I.T. test.

The Louisiana Supreme Court was convinced by the evidence in **Rogers** that the defense proved by more than a clear preponderance of the evidence that the defendant lacked the mental capacity to proceed. The Court noted that two doctors concluded that the defendant was seriously, perhaps severely, mentally retarded to the extent that he could not effectively participate in his defense. The Court further noted the conclusions of these two doctors were based on psychological tests, observations, and interview questions that were fully described in their testimony. The Court found that the lower court's acceptance of a third doctor's inadequately supported conclusion in the face of contrary medical opinion having a substantial factual basis was tantamount to turning the court's judicial function over to the third doctor. The Court stated, "This dereliction by the trial court constituted a failure to observe procedures adequate to protect the defendant's right not to be tried or convicted while incompetent to stand trial." **Rogers**, 419 So.2d at 844.

The circumstances in **Rogers** are clearly distinguishable from the instant case. Herein, the juvenile court took painstaking measures to thoroughly assess the child's competency to proceed. Despite June 24, 2010 and July 2, 2010 reports of competency by the sanity commission and a February 22, 2011 report that restoration had been completed, the juvenile court cautiously ordered the continuation of restoration services and did not find the child competent to proceed until April 18, 2011, following a fourth competency determination reported in an April 14, 2011 restoration provider letter and in hearing testimony. At that time, the juvenile court was apparently confident in the child's decisional capacity. Any subsequent IQ test result (conducted subsequent to the disposition in this case) does not negate the evidence before the juvenile court judge at the time of its determination. Based on our review of the record, we find ample support for the juvenile court's conclusion. Accordingly, assignment of error number one lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

In the second assignment of error, C.T.H. notes that the eyewitness identified him without being shown any other suspects. He contends that the identification was the sole evidence against him. The child specifically notes that no gun or money was found although he was detained within fifteen minutes of the robbery. He further notes that he was not wearing the clothing described by the victims when he was detained and that the burned clothing the police later discovered, believed to be worn by the robber during the offense, was never linked to him. C.T.H. concludes that a review of the facts adduced at the hearing supports a finding that the judge was clearly wrong and the adjudication should be set aside.

To adjudicate a child delinquent, the State must prove beyond a reasonable doubt that the child committed the delinquent act alleged in the petition. La. Ch. Code art. 883.[2] The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that the State proved the essential elements of the crime and the identity of the perpetrator of that crime beyond a reasonable doubt. See La. Code Crim. P. art. 821; **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); **State v. Wright**, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, 2000-0895 (La. 11/17/00), 773 So.2d 732. The same standard of review applies to a challenge to the sufficiency of evidence adduced to support an adjudication in a juvenile delinquency proceeding. La. Ch. Code art. 883; **State in the Interest of D.M.**, 97-0628 (La. App. 1st Cir.

[2] The Louisiana Children's Code defines "child" as "any person under the age of twenty-one, including an emancipated minor, who commits a delinquent act before attaining seventeen years of age." La. Ch. Code art. 804(1). A "delinquent act" is defined as "an act committed by a child of ten years of age or older which if committed by an adult is designated an offense under the statutes or ordinances of this state, or of another state if the act occurred in another state, or under federal law, except traffic violations." La. Ch. Code art. 804(3) (prior to the 2010 amendment).

11/7/97), 704 So.2d 786, 789. However, in a juvenile delinquency proceeding, an appellate court is constitutionally mandated to review the law and facts. La. Const. art. V, § 10(A) & (B). See **In the Interest of L.C.**, 96-2511 (La. App. 1st Cir. 6/20/97), 696 So.2d 668, 670.

In a juvenile case, when there is evidence before the trier of fact that, upon its reasonable evaluation of credibility, furnished a factual basis for its finding, on review the appellate court should not disturb this factual finding in the absence of manifest error. Reasonable evaluation of credibility and reasonable inferences of fact should not be disturbed upon review. **State in the Interest of Wilkerson**, 542 So.2d 577, 581 (La. App. 1st Cir. 1989). If there are two permissible views of the evidence, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. However, where documents or objective evidence so contradict a witness's story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable fact finder would not credit the witness's story, the appellate court may find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination. See **State in the Interest of D.H.**, 2004–2105 (La. App. 1st Cir. 2/11/05), 906 So.2d 554, 560.

The **Jackson v. Virginia** standard is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt.[3] When analyzing circumstantial evidence, La. R.S. 15:438 provides that, assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence. **State in the Interest of D.F.**, 2008–0182 (La. App. 1st Cir. 6/6/08), 991 So.2d 1082, 1085, writ denied, 2008–1540 (La. 3/27/09), 5 So.3d 138. In cases involving a claim by the accused that he was not the person who committed the crime, the **Jackson** rationale requires the

[3] Pursuant to La. Ch. Code art. 104(1), "[w]here procedures are not provided in this Code, or otherwise by law, the court shall proceed in accordance with ... [t]he Code of Criminal Procedure in a delinquency proceeding...."

State to negate any reasonable probability of misidentification in order to carry its burden of proof. Positive identification by only one witness is sufficient to support a conviction. **State v. Hughes**, 2005-0992 (La. 11/29/06), 943 So.2d 1047, 1051.

Even if the identification could be considered to be suggestive, that alone does not indicate a violation of the accused's right to due process. It is the likelihood of misidentification that violates due process, not merely the suggestive identification procedure. **State v. Reed**, 97-0812 (La. App. 1st Cir. 4/8/98), 712 So.2d 572, 576, writ denied, 98–1266 (La. 11/25/98), 729 So.2d 572. An in-court identification may be permissible if there is not a "very substantial likelihood of irreparable misidentification." **State v. Martin**, 595 So.2d 592, 595 (La. 1992). See also **State v. Jones**, 94-1098 (La. App. 1st Cir. 6/23/95), 658 So.2d 307, 311, writ denied, 95-2280 (La. 1/12/96), 666 So.2d 320. As a general rule, one-on-one identifications are not favored. However, under certain circumstances, these identifications are permissible. **State v. Thomas**, 589 So.2d 555, 563 (La. App. 1st Cir. 1991). This is particularly true when the one-on-one identification is closely associated in time with the commission of the crime and where the suspect is returned to the location of the crime for immediate identification. Such identifications promote fairness by assuring reliability and the prompt release of innocent suspects. **State v. Robinson**, 404 So.2d 907, 909 (La. 1981).

In **Manson v. Brathwaite**, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977), the Louisiana Supreme Court listed five factors used to weigh against the corrupting effect of a suggestive identification: (1) the witness's opportunity to view the defendant at the time the crime was committed; (2) the degree of attention paid by the witness during the commission of the crime; (3) the accuracy of any prior description; (4) the level of the witness's certainty displayed at the time of the identification; and (5) the length of time elapsed between the crime and the identification.

Herein, the child does not contest the fact that an armed robbery took place, but contests only his identity as the robber. Nonetheless, we note at the outset that the testimony presented during the hearing clearly established the following elements of the offense: "the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon." La. R.S. 14:64(A). Thus, the remaining issue is whether the State carried its burden of negating any reasonable probability of misidentification.

Curtis testified that her attention was drawn to the individual she observed outside of the restaurant as he was pacing back and forth, and she was able to get a good look at him. She did not see anyone else outside of the store, within the vicinity, at the time. She described the individual as a black male, with hair that was thick on each side, wearing plaid, blue-striped shorts. She noted that the blue stripes on the shorts "stuck out." Curtis further testified that the mask used by the assailant only partially covered his face, leaving his eyes and nose exposed. Curtis testified that she was afraid the robber might use the gun to shoot someone and was very concerned about her employees, including her daughter. Curtis recalled that at the time of the initial identification, the child was not holding the gun or wearing the shorts that she observed at the time of the robbery. However, according to her testimony, Curtis clearly observed the robber before he put the mask over his face and entered the restaurant, and clearly observed the child when she identified him as the robber shortly thereafter. Curtis remained in the vehicle with Captain Butch Klean, who slowed his vehicle to a near stop as she made the identification while the child was standing behind a vehicle with police officers. The child was facing Curtis at the time, within close range. Curtis also identified the partially burned shorts in a photograph shown to her by Lieutenant David McDavid of the Zachary Police Department (ZPD) as the shorts worn by the assailant. Curtis agreed that

she may have previously described the assailant's shirt as white, stating that it wasn't black but was a lighter color, but she was uncertain as to whether it was gray, white, or yellow.

Evans also testified at the trial. She was unable to make an identification since, unlike her mother, she did not see the assailant before he covered his face with the mask. However, she did testify that she was under the impression that the robber was a child, specifically a teenager. She stated that he did not have the physical stance of, or carry himself like a full-grown adult male. She also identified the shorts depicted in the photograph as the ones that were worn by the assailant at the time of the robbery.

Chief McDavid (promoted by the time of the adjudication hearing) testified that he was dispatched to the area following the robbery. He ran into the child's mother while travelling in the area, and she stated she was looking for the child. Chief McDavid asked for a description of her son's attire when she last saw him, and she stated that he was wearing a white shirt and plaid pants.[4] Chief McDavid recalled the attire as matching the description of the attire of the perpetrator who robbed the pizzeria and informed the child's mother that he may be a suspect in a crime. Chief McDavid relayed the information to other officers in the area and began canvassing the area. The child was apprehended in an open field located behind Sonny's Pizza, approximately fifteen to twenty minutes after the robbery was reported. The child was wearing blue shorts at the time, but they were not plaid. According to Chief McDavid, who was present at the time of the show-up identification, Curtis was about 99.9 percent sure of the identification and only noted that the child was not wearing the shorts worn at the time of the robbery. A canine assisted the officers in tracking from the scene of the crime to a wooded

[4] During the hearing, the witnesses used the term shorts and pants interchangeably with the clothing in question seemingly being short pants, knee-length, as opposed to full-length pants. (R. 494).

area where the partially burned shorts were discovered. Defense witness Lieutenant Ray Day of the ZPD brought the fabric evidence to the hearing. While he was able to determine that the fabric consisted of lower body attire, based on the remaining presence of belt loops, he noted that it had been seriously damaged by fire and may not have retained its original coloring.

The child's mother testified that the child was wearing plaid shorts that day and that they were red, orange, and yellow with light blue stripes. She stated that the shorts were at home. She stated that she informed Chief McDavid that she was looking for the child after he told her about the robbery. She confirmed that she provided the officer with a description of her son's attire.

In **State v. Winfrey**, 97-427 (La. App. 5th Cir. 10/28/97), 703 So.2d 63, writ denied, 98-0264 (La. 6/19/98), 719 So.2d 481, the court held that an identification procedure was not suggestive although the defendant was alone in the backseat of a police car and in handcuffs at the time he was identified. Therein, the victims were confronted with the defendant approximately thirty to forty-five minutes after the robbery offense. One victim identified the defendant therein as the man who robbed her as soon as she saw him in the back of the police car. The court noted that the victim had ample opportunity to view the defendant at the crime scene. Her prior description of the defendant and his car were accurate. The time between the robbery and confrontation was short. Furthermore, she positively identified the defendant as the robber at the scene. The court concluded the identification was not suggestive, and that the identification did not present a substantial likelihood of misidentification.

Similarly, in the instant case, the victim had ample time to observe the child before he entered the restaurant. She identified him near the scene and during the hearing with a high degree of certainty. The initial identification took place shortly after the incident. Thus, even if we were to find that the identification was

suggestive, the identification did not present a substantial likelihood of misidentification. It is well settled that an appellate court cannot set aside a juvenile court's findings of fact in the absence of manifest error or unless those findings are clearly wrong. See **State in the Interest of D.H.**, 906 So.2d at 559-60. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found the State proved, beyond a reasonable doubt, to the exclusion of any reasonable hypothesis of innocence and negation of any reasonable probability of misidentification, the essential elements necessary to adjudicate the child delinquent based on the commission of armed robbery. The second assignment of error lacks merit.

ADJUDICATION AND DISPOSITION AFFIRMED.