STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017 KJ 0890

STATE OF LOUISIANA IN THE INTEREST OF T. H.[1]

Judgment Rendered: NOV 01 2017

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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. JU110793

Honorable Adam J. Haney, Judge Presiding

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* * * * *

BEFORE: HIGGINBOTHAM, HOLDRIDGE, AND PENZATO, JJ.

HH Holdridge J., concurs in part and dissents in part

[1] To protect T.H.'s identity as a minor, we have re-captioned this case and refer to him by his initials. See Uniform Rules – Courts of Appeal, Rule 5-2.

HIGGINBOTHAM, J.

T.H., a child, was alleged to be delinquent and/or in need of supervision by petition based on one count of first degree rape in violation of La. R.S. 14:42(A)(1) (count 1), one count of first degree rape in violation of La. R.S. 14:42(A)(2) (count 2), one count of first degree rape in violation of La. R.S. 14:42(A)(5) (count 3), and one count of simple robbery in violation of La. R.S. 14:65 (count 4).[2] He denied the allegations, and following an adjudication hearing, the juvenile court found him not guilty of counts 1 and 2 and dismissed those charges, and adjudged him delinquent as to counts 3 and 4. Following a disposition hearing, T.H. was committed to the secure custody of the Department of Public Safety and Corrections, Office of Juvenile Justice, until his 21st birthday, without benefit of parole, probation or suspension of sentence.[3] He now appeals, challenging the sufficiency of the evidence on both counts.

FACTS

The victim, T.S.[4], age fourteen at the time of this offense, testified at trial. According to T.S., she resided at Scotland Square Apartments (in East Baton Rouge Parish) with her grandmother, mother, younger brother and younger sister. On the morning of December 17, 2016, T.S.'s father, E.S., who did not live with them,

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[2] Two other juveniles, M.P. (the brother of T.H.) and D.L., were also charged and adjudicated for the same crimes, and each of their adjudications are the subject of separate appeals. See **State in Interest of D.L.**, 2017-0891 (La. App. 1st Cir. __/__/17), __ So.3d __, and **State in Interest of M.P.**, 2017-0892 (La. App. 1st Cir. __/__/17), __ So.3d __.

[3] Although the minutes of the disposition hearing, which were signed by the clerk of the juvenile court, provided separate adjudications for each count, the transcript of that hearing did not reflect separate dispositions. Nevertheless, this court has found it is appropriate in juvenile cases for a court to declare a single disposition for multiple adjudications. See **State In Interest of J.C.**, 2009-2000 (La. App. 1st Cir. 7/15/10), 2010 WL 2802104, *4 (unpublished). The disposition herein until T.H.'s 21st birthday was the mandatory disposition based upon a violation of La. R.S. 14:42, first degree rape. La. Ch. Code art. 897.1(A). Moreover, this court further notes that the disposition until T.H.'s 21st birthday results in a custody period of 6 years, 7 months and 10 days (according to the record, T.H. has been in custody since 12/22/2016), which is less than the maximum term of imprisonment for the felony of simple robbery, and accordingly, it is within the limits of the statute. See La. Ch. Code art. 898(A); La. R.S. 14:65.

[4] The initials of the victim and her family members are used in order to keep her identity confidential pursuant to La. R.S. 46:1844(W).

picked up the children, and they returned to the apartment after lunch. That afternoon, T.S.'s grandmother asked T.S. to go to the mailbox and check the mail. While walking alone to the mailbox, T.S. was stopped by two boys (later identified as M.P. and D.L., also charged as noted herein). Although T.S. did not know the boys, she described herself as friendly and answered the boys' questions about her name, age and whether she had a boyfriend. The boys walked with T.S. to the mailbox, and M.P. asked T.S. for a hug. When she hugged him, D.L. took her cell phone out of her back pants pocket and ran off with it. T.S. asked M.P. to help her get her phone back, and M.P. offered to take her to D.L.

As they approached an area behind the apartments where dumpsters were located, T.S. saw D.L. with her phone. T.S. saw another boy (later identified as T.H.) on the other side of a nearby fence/gate. When T.S. asked for her phone, the boys began passing it back and forth, and D.L. told her she was not getting the phone back until she let one of the boys "yeah", which T.S. was aware meant to have sex. Although T.S. told them she was not that kind of girl, she testified that the boys forced her. According to T.S., the boys pulled her pants down and despite her efforts to pull them up, the boys bent her over and "hit" her from behind, meaning to have intercourse from the back. T.S. testified the two boys kept switching positions, with one sticking his penis in her mouth while the other was behind her having intercourse with her. T.S. unequivocally testified that both M.P. and D.L. put their penis in her vagina, and at least one of them, possibly both, put their penis in her mouth. T.S. told one of the boys she had surgery on her mouth to try to avoid putting his penis in her mouth. During this activity, T.H. threw a condom to one of the boys, and at some point, T.H. came over the fence. Although T.S. recalled that T.H. got behind her, she was unsure what he did while behind her. In her statement with the Children's Advocacy Center, T.S. stated that T.H.'s pants were down, but she did not see his penis, and was unsure whether he put his penis in her vagina. T.S.

testified that T.H. was not present when D.L. originally took her phone, and the only time T.H. had the phone was when they were playing with it.

T.S., knowing that her father was at the apartment and hoping that he would catch the boys, told the boys there was $1,000 at the apartment that she would give them to get her phone back. When the boys agreed, T.S. walked to the apartment with M.P. and D.L. According to T.S., T.H. had jumped back over the fence and left. T.S. entered the apartment with M.P. and D.L., but when her grandmother, who is deaf, came out of the bathroom and yelled, one boy called to the other and they both ran outside. As T.S. also ran outside, she saw her brother and told him that the boys attacked her and took her phone. Her brother then called their father, who was out looking for T.S., and as the father returned, he and T.S. got into his car in pursuit of the boys. They eventually got out of the car and ran after the boys but were unable to catch them. T.S. identified the three boys in court as the ones who committed these acts.

T.S. testified she did not try to run or stop them when they began pulling her pants down because there were two boys on that side of the fence with her. When asked if she tried to "punch" them, T.S. testified that the boys told her if she hit them, they would hit her. T.S. testified that she did not consent to the sexual activity and did not consent to the taking of her phone, which she never got back.

T.S.'s brother testified at trial that he also went to look for T.S. after his father called that he could not find her. As he returned to the apartment, he saw two boys, one in the apartment and one on the side of the building. T.S. was outside and told him the boys raped her. He called their father and told him what T.S. said, and when the boys started running, he tried to chase them until he saw them climb over a fence. He called the police while T.S. and their father looked for the boys. T.S.'s father, E.S., also testified at trial that he became concerned and went to look for T.S. As he returned to the apartment, T.S. and her brother ran toward him, and his son said boys

took T.S.'s phone and raped her. He and T.S. pursued them in his car, then on foot, but were unable to catch them. Subsequently, E.S. obtained information from calling people and social media as to the name of one of the boys, which he gave to the police.

Officer Amy Krumm with the Baton Rouge Police Department responded to the call, and after obtaining a statement from T.S. went to the area of the dumpsters, where she found a condom. Officer Krumm described T.S. as crying and emotionally upset. She observed dirt and grass stains on T.S.'s pants around the knees and up the legs and buttocks areas, and noted that her hair was somewhat disheveled.

Wanda Pezant, a certified nurse practitioner, accepted by the court as an expert sexual assault nurse, examined T.S. that evening at the hospital. T.S. was very tearful, but alert and oriented during the examination. Nurse Pezant observed vaginal bruising, abrasions and redness and anal abrasions and redness. She also observed hymenal notching, which she testified was consistent with forced sexual intercourse. The injuries to the vaginal area were consistent with sexual intercourse. The injuries to the anal area were consistent with penetration, and although scarring and trauma in this area may often be found in cases of consensual sex, it is less common to see the abrasions and friction in the direction observed on T.S., which was the basis for her opinion that these injuries were consistent with forced penetration. Nurse Pezant opined that these injuries, while they may seem minor, were pretty dramatic and consistent with forced sexual assault, and she further opined that the statement given by T.S. was very consistent with the documented injuries.

Although a rape kit was performed, at the time of the trial, the investigating officers were unaware of any DNA results. The condom found at the scene, the recorded statement of T.S. to the Children's Advocacy Center, the recorded

statements of the three boys, T.H., M.P. and D.L., and surveillance video of the area were each admitted into evidence. The surveillance video did not include the area where the sexual assault was alleged to have occurred, but did include some limited footage of two of the boys following T.S. Each of the boys provided varying versions of the events, which each gradually included more incriminating details as the versions changed. In his statement to police, D.L. admitted to taking T.S.'s phone and to putting his penis in her mouth. Although he claimed the vaginal sex occurred in T.S.'s apartment, he admitted to vaginal sex and also confirmed that T.S. offered to give them $1,000 for her stuff, which prompted them to go to the apartment. In his statement to police, M.P. admitted to putting his penis in T.S.'s mouth, and after putting on the condom, tried to put it in her vagina. M.P. also confirmed that T.S. offered them $1,000 and told them she had surgery on her mouth. T.H. admitted giving a condom to M.P. and holding the phone at one point, but then giving it back to D.L. T.H. denied touching T.S.

The juvenile court noted that it considered the statements of each juvenile only as to that juvenile, not the others. The court found the statements of T.S. credible and found the statements of each of the juveniles to be self-serving, noting each juvenile's statement changed multiple times, but each time became more consistent with T.S. The court found that T.S.'s statement made sense to the court, while the juveniles' statements, based upon the facts, did not make sense. The juvenile court found each of the juveniles guilty of first degree rape, in violation of La. R.S. 14:42(A)(5), and simple robbery, in violation of La. R.S. 14:65.

SUFFICIENCY OF THE EVIDENCE

In his two assignments of error, T.H. asserts the evidence was insufficient to adjudicate him delinquent for either first degree rape or simple robbery.

In a juvenile adjudication proceeding, the state must prove beyond a reasonable doubt that the child committed a delinquent act alleged in the petition.

La. Ch. Code art. 883. The burden of proof, beyond a reasonable doubt, is no less severe than the burden of proof required in an adult proceeding. **State in Interest of S.T.**, 95-2187 (La. App. 1st Cir. 6/28/96), 677 So.2d 1071, 1074. In **State in Interest of Giangrosso**, 385 So.2d 471, 476 (La. App. 1st Cir. 1980), affirmed, 395 So.2d 709 (La. 1981), this court stated:

> In juvenile proceedings, the scope of review of this court extends to both law and fact. We must, therefore, decide if the trial judge was clearly wrong in his determination that the defendants were proven guilty beyond a reasonable doubt. [Citations omitted.]

The Supreme Court affirmed this court's decision in **Giangrosso**, concluding that a rational trier of fact could have found, from the evidence adduced at the trial, proof of guilt beyond a reasonable doubt, citing **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). **Giangrosso**, 395 So.2d at 714. See **State in Interest of Batiste**, 367 So.2d 784, 788 (La. 1979). See also **In Interest of L.C.**, 96-2511 (La. App. 1st Cir. 6/20/97), 696 So.2d 668, 670.

Accordingly, on appeal the standard of review for sufficiency of the evidence enunciated in **Jackson** is applicable to delinquency cases, *i.e.* viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the state proved the essential elements of the crime beyond a reasonable doubt. **Jackson**, 443 U.S. at 319, 99 S.Ct. at 2789; See also La. Code Crim. P. art. 821(B)[5]; **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660; and **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). It is well settled that, if found to be credible, the testimony of the victim of a sex offense alone is sufficient to establish the elements of the offense, even where the State does not introduce medical, scientific, or physical evidence or prove the commission of the offense by the defendant. **State v. Lilly**, 2012-0008 (La. App. 1st Cir. 9/21/12), 111 So.3d 45, 62, writ denied, 2012-2277 (La. 5/31/13), 118 So.3d 386.

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[5] In the absence of specific procedures provided by the Louisiana Children's Code, courts shall proceed in accordance with the Louisiana Code of Criminal Procedure. See La. Ch. Code art. 803.

Further, because a review of the law and facts in a juvenile delinquency proceeding is constitutionally mandated, an appellate court must review the record to determine if the trial court was clearly wrong in its factual findings. See **State in Interest of D.M.**, 97-0628 (La. App. 1st Cir. 11/7/97), 704 So.2d 786, 789-90. 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 evaluations of credibility and reasonable inferences of fact should not be disturbed upon review. **State in Interest of Wilkerson**, 542 So.2d 577, 581 (La. App. 1st Cir. 1989).

The **Jackson** standard is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. 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 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. When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Captville,** 448 So.2d 676, 680 (La. 1984).

First Degree Rape

La. R.S. 14:41(A) defines "rape" as the act of anal, oral, or vaginal sexual intercourse with a male or female person committed without the person's lawful consent. La. R.S. 14:42 provides, in pertinent part:

> A. First degree rape is a rape committed . . . where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:
>
> * * *

(5) When two or more offenders participated in the act.

B. For purposes of Paragraph (5), 'participate' shall mean:

(1) Commit the act of rape.

(2) Physically assist in the commission of such act.

T.H. argues there was no evidence to prove he had anal, oral, or vaginal sexual intercourse with T.S., as she testified that she did not know if T.H. touched her with his penis. He also argues there is no evidence that he physically assisted in commission of the rape.

In addition to the definition of "participate" contained in La. R.S. 14:42, La. R.S. 14:24 provides that all persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals. Thus, the State may prove a defendant guilty by showing that he served as a principal to the crime by aiding and abetting another. Under this theory, the defendant need not actually have sexual intercourse with the victim to be found guilty of the crime. See **State v. Garcia**, 44,562 (La. App. 2d Cir. 10/28/09), 26 So.3d 159, 164, writ denied, 2009-2583 (La. 2/11/11), 56 So.3d 992 ("[T]he trial court did not have to determine that defendant was the attacker if the evidence supported that he was at least a principal to the attack. . . . Defendant had the requisite mental intent even if he was not the attacker who did the sexual assault because he knew his codefendant had a knife and helped the sexual assault occur, watched it happen, and ensured that it could continue by subduing the husband.")

As noted above, La. R.S. 14:42(B)(2) defines participation in the act of first degree rape by more than one offender as including physical assistance in the commission of such an act of intercourse. Moreover, with regard to the law of principals, the defendant's mere presence at the scene is not enough to "concern"

him in the crime. Only those persons who knowingly participate in the planning or execution of a crime may be said to be "concerned" in its commission, thus making them liable as principals. A principal may be connected only to those crimes for which he has the requisite mental state. **State in the Interest of D.F.**, 991 So.2d at 1085. However, "[i]t is sufficient encouragement that the accomplice is standing by at the scene of the crime ready to give some aid if needed, although in such a case it is necessary that the principal actually be aware of the accomplice's intention." **State v. Anderson**, 97-1301 (La. 2/6/98), 707 So.2d 1223, 1225 (per curiam), quoting 2 W. LaFave and A. Scott, Substantive Criminal Law, § 6.7, p. 138 (West 1996). See also **State in Interest of K.J.C.**, 2009-0658 (La. App. 1st Cir. 9/11/09), 2009 WL 3162216 (unpublished).

Aggravated rape is a general intent crime. See La. R.S. 14:11, 14:42; **State in interest of L.W.**, 2009-1898 (La. App. 1st Cir. 6/11/10), 40 So.3d 1220, 1224, writ denied, 2010-1642 (La. 9/3/10), 44 So.3d 708. General criminal intent is present whenever there is specific intent, and also when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act. La. R.S. 14:10(2). As a general rule, "liability [as a principal] will not flow merely from a failure to intervene;" however, "silence in the face of a friend's crime will sometimes suffice when the *immediate proximity* of the bystander is such that he could be expected to voice some opposition or surprise if he were not a party to the crime." **State v. Bridgewater**, 2000-1529 (La. 1/15/02), 823 So.2d 877, 891, on rehearing (June 21, 2002), cert. denied, 537 U.S. 1227, 123 S.Ct. 1266, 154 L.Ed.2d 1089 (2003), quoting W. LaFave and A. Scott, Jr., Substantive Criminal Law § 6.7(a)(1986) (Emphasis supplied).

In this case, the victim, T.S., testified that T.H. came over the fence at some point during the assault, and he got behind her, although she could not testify

specifically what he did behind her. Aside from his denial that he touched T.S., T.H. admittedly observed as M.P. and D.L. raped T.S., certainly rendering him aware of their intentions, and T.H. voluntarily provided a condom to M.P. when he asked for one. In addition, T.H. acknowledged that T.S. told M.P. and D.L. she did not want to do this when M.P. told her to bend over. T.H. argues "at most" the State proved he failed to stop or report this rape, and cites **State v. McGhee**, 2015-285 (La. App. 3d Cir. 11/4/15), 179 So.3d 739, in support of his argument that such omissions merely constitute misprision of a felony, which ceased to be a crime in Louisiana in 1942. In **McGhee**, 179 So.3d at 746-47, the Third Circuit found that the evidence was insufficient to support defendant's conviction for simple kidnapping as a principal, finding that the evidence only proved that defendant was in the same place as his friend, and at most, he failed to stop or report the kidnapping. However, the Louisiana Supreme Court reversed the Court of Appeal, finding the evidence included not only defendant's presence at the crime scene, but also his participation in stalking the victim with his friend. **State v. McGhee**, 2015-2140 (La. 6/29/17), 223 So.3d 1136, 1138 (per curiam).

T.H.'s argument herein ignores his active role in providing a condom to M.P., despite hearing T.S.'s plea that she did not want to engage in this activity, and the fact that he came over the fence during this activity. T.H.'s participation is not properly characterized as a "mere presence" at the scene. Rather, any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found beyond a reasonable doubt that T.H. was guilty of first degree rape as a participant or principal herein when two or more offenders participated in the act. Further, after undertaking our state's constitutionally mandated review of the law and facts in a juvenile proceeding, we find no manifest error by the juvenile court in its adjudication on this count. This assignment of error is without merit.

Simple Robbery

La. R.S. 14:65(A) defines simple robbery as 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, but not armed with a dangerous weapon.

T.H. argues the State produced no evidence that he assisted in or had anything to do with the robbery of T.S. According to the testimony of T.S., although T.H. was not with the other boys when they initially took her phone from her pocket, when M.P. led her to the dumpster area, T.H. was there, on the other side of the fence. T.S. testified that, despite her request that they return the phone, the boys, including T.H., tossed her phone around in a circle. In his statement to the police, T.H. admitted that D.L. threw the phone to him and asked him to hold it, but he said he gave it back to D.L.

T.H. argues that, because there was no evidence he was aware of the robbery before it was completed, no rational trier of fact could have found he had the requisite mental state to commit the crime. Simple robbery is a general intent crime. La. R.S. 14:10(2); **State v. Davis**, 2012-0386 (La. App. 1st Cir. 11/2/12), 111 So.3d 100, 103. An offender has the requisite general intent when, from the circumstances, the prohibited result may reasonably be expected to follow from the offender's voluntary act, irrespective of any subjective desire on his part to have accomplished such result. **Id**. Although general intent is a question of fact, it may be inferred from the circumstances of the transaction. See **State v. Johnson**, 2003-1228 (La. 4/14/04), 870 So.2d 995, 998-99.

T.H.'s argument appears to assume that the crime was complete at the time the phone was taken, but this court finds such a narrow view unsupported by jurisprudence. The Supreme Court has found that the element of force or intimidation need not occur before or contemporaneously with the taking, but rather recognized that the elements of the crime can be proven by evidence that it occurred

in the course of completing the crime. **State v. Meyers**, 620 So.2d 1160, 1163 (La. 1993). In this case, during the sequence of events transpiring from the taking of T.S.'s phone, the running away with the phone, and T.S. following to retrieve the phone, T.H. was present as T.S. attempted to retrieve the phone, at which point he was aware of the taking of the phone. Yet, not only did T.H. remain silent as to the acts of M.P. and D.L., but he helped them to retain the phone, thereby concerning himself in this crime despite his lack of initial participation therein. Any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found beyond a reasonable doubt that T.H. was guilty of simple robbery as a principal herein. Further, after undertaking our State's constitutionally mandated review of the law and facts in a juvenile proceeding, we find no manifest error by the juvenile court in its adjudication on this count. This assignment of error is without merit.

ADJUDICATIONS AND DISPOSITION AFFIRMED.

STATE IN INTEREST OF T.H.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2107 KJ 0890

HOLDRIDGE, CONCURRING IN PART AND DISSENTING IN PART

I concur in part and dissent in part from the majority opinion. I concur in the finding that the defendant should be adjudicated a delinquent for one count of simple robbery. I respectfully dissent from the finding that the defendant should be adjudicated a delinquent for the crime of first degree rape. Viewing the evidence in the light most favorable to the prosecution, I find that no rational trier of fact could find beyond a reasonable doubt that the defendant committed the crime of first degree rape. In fact, the record contains no evidence whatsoever that he committed that crime.