

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KJ 1850

STATE OF LOUISIANA IN THE INTEREST OF J.W.B.

Judgment Rendered: February 10, 2012.

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On Appeal from the
Juvenile Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
Case No. 99,648-A

The Honorable Kathleen Stewart Richey, Judge Presiding

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BEFORE: CARTER, C.J., PARRO AND HIGGINBOTHAM, JJ.

CARTER, C. J.

A thirteen-year-old juvenile, identified herein as J.W.B., was alleged to be delinquent by a petition filed on February 24, 2011, pursuant to the Louisiana Children's Code.¹ The petition was based upon the alleged commission of aggravated battery (count one), a violation of Louisiana Revised Statutes 14:34, and illegal use of weapons or dangerous instrumentalities (count two), a violation of Louisiana Revised Statutes 14:94B. The juvenile entered a denial to the allegations. Count two of the petition was dismissed, and after an adjudication hearing, the juvenile court adjudicated the family to be in need of services pursuant to Louisiana Children's Code article 730(2), (3), and (10). At the disposition hearing, the juvenile court judge committed the juvenile to the Office of Juvenile Justice for a period not to exceed his eighteenth birthday.

On appeal, the juvenile argues that he cannot be adjudicated under Children's Code article 730(10), because the weapon used in this case was a BB gun and was suppressed by the juvenile court. After a thorough review of the record and the error assigned, we affirm the adjudication and disposition.

FACTS

On February 18, 2011, at approximately 5:45 p.m., Deputy Henry Logan of the East Baton Rouge Parish Sheriff's Office was dispatched to a Baton Rouge apartment in reference to a battery complaint. The complaint was based on J.W.B.'s shooting a fourteen-year-old female in the back with a BB gun, firing the gun several times. The victim, who lived two doors away from the juvenile and was walking near her residence at the time, observed the juvenile standing near his

¹ According to the petition, the juvenile's date of birth is September 28, 1997. Thus, the juvenile is fourteen years old at the time of this decision.

residence as he fired the BB gun. The victim sought her mother's assistance after she was struck. The juvenile's sister witnessed the shooting and informed her mother, and the juvenile fled from the scene on foot. The victim sustained swelling, bruises, and a laceration. The Emergency Medical System (EMS) was notified, arrived, and treated the victim. Deputy Logan patrolled the area in search of the juvenile, but was unable to locate him. The following day, Deputy Logan was informed that the juvenile had returned home and he arrested the juvenile at his residence.²

ADJUDICATION

In the sole assignment of error, the juvenile notes that the major element of Children's Code article 730(10) is that the child be in possession of a handgun or a semiautomatic handgun. The juvenile contends that in this case the adjudication is erroneous, because there was no evidence of any firearm, handgun, or semiautomatic gun admitted at the adjudication hearing. The juvenile notes that the juvenile court granted his motion to suppress the BB gun and his statements. Furthermore, the juvenile argues that even if the BB gun had been admitted, the legislature did not contemplate the inclusion of a BB gun in the category of handgun/firearm for the purposes of any statute. Thus, the juvenile contends that the adjudication is based on insufficient evidence. The juvenile concludes that the failure to produce an actual firearm for consideration requires this court to find the adjudication erroneous and reverse it.

The applicable codal article requires that following an adjudication hearing, the juvenile court shall immediately declare whether the evidence warrants an

² The juvenile court granted motions to suppress the juvenile's statements and the physical evidence (including the BB gun) recovered as a result of Deputy Logan's search.

adjudication that the child is delinquent. In exceptional circumstances, the court may take the matter under advisement. Moreover, if the evidence warrants, the court may adjudicate the family to be in need of services and proceed to a disposition in accordance with Chapters 10 and 12 of Title VII. La. Ch. Code Ann. art. 884. Children's Code article 730, in pertinent part, provides as follows:

Allegations that a family is in need of services must assert one or more of the following grounds:

* * *

- (2) That a child is ungovernable.
- (3) That a child is a runaway.

* * *

- (10) That a child is found in possession of a handgun or semiautomatic handgun under circumstances that reasonably tend to exclude any lawful purpose.

Based on the juvenile court's adjudication in the instant case, the State bore the burden of proof by a preponderance of the evidence.³ See La. Ch. Code Ann. art. 770; *State ex rel. J.W.D., Jr.*, 05-1135 (La. App. 3 Cir. 2/1/06), 921 So. 2d 1165, 1167. It is not the duty of the State to prove its case beyond a reasonable doubt, by clear and convincing evidence, or to disprove every hypothesis of innocence. See *State ex rel. A.N.*, 46,597 (La. App. 2 Cir. 7/20/11), 70 So. 3d 1041, 1046.

At the adjudication hearing, the juvenile's sister testified that she witnessed her brother fire a BB gun three or four times on the date in question. She realized the victim had been struck when she heard her cries. Further, the victim testified that the juvenile offender shot her with a BB gun. While the victim did not see the

³ In his brief, the juvenile cites *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), and argues that the proof beyond a reasonable doubt standard is applicable in this case. However, as noted by the State in its brief, Children's Code article 770 provides the burden of proof in an adjudication under Title VII of the Children's Code, including Children's Code art. 730.

BB gun and only heard it firing, the juvenile's sister observed the gun and testified that it was similar to the one the State produced as an example.

In rendering the adjudication, the juvenile court judge noted that a BB gun is variably referred to as a handgun and a gun that requires "bullets." Considering testimony by the juvenile's mother that indicated she lacked control over the juvenile and that he was often away from home without permission, the juvenile court judge found that the State had proved the grounds for a family in need of services adjudication (alternatively alleged by the State at the adjudication hearing) pursuant to Children's Code article 730(2) and (3). Additionally, under paragraph ten of Article 730, the court further found that the juvenile was in possession of a handgun under circumstances that reasonably tend to exclude any lawful purpose.

Although the juvenile's statements and the physical evidence were suppressed, the juvenile court had the opportunity to see and hear the witnesses. A "BB" or small lead pellet is generally designed for use in an air compression pistol. We note that a BB or pellet gun has been held to be a "dangerous weapon," i.e., an instrument which, in the manner used, is calculated or likely to produce death or great bodily harm. *See State v. Watson*, 397 So. 2d 1337, 1342 (La.), *cert. denied*, 454 U.S. 903 (1981); *State v. Hensley*, 04-617 (La. App. 5 Cir. 3/1/05), 900 So. 2d 1, 7, *writ denied*, 05-0823 (La. 6/17/05), 904 So. 2d 683; *State v. Kelly*, 576 So. 2d 111, 119 (La. App. 2 Cir.), *writ denied*, 580 So. 2d 666 (La. 1991). Thus, although a BB gun is not a firearm, it is an instrument that can cause great bodily harm. Article 730 simply uses the word "handgun" as opposed to firearm. *Contrast* La. Rev. Stat. Ann. § 14:95.8D. Based on the testimony presented in this case, the juvenile was in possession of a BB gun, a dangerous weapon that was loaded and fully functional, capable of firing projectiles and causing great bodily harm. He fired it more than once, striking the victim in the back. Thus, we cannot say that

the juvenile court erred in adjudicating the family in need of services pursuant to subsection ten of Children's Code article 730. We find no merit in the juvenile's sole assignment of error.

CONCLUSION

For the foregoing reasons, we affirm the adjudication and disposition.

AFFIRMED.