NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 KJ 0657

STATE OF LOUISIANA IN THE INTEREST OF K. C.

Judgment rendered: SEP 11 2009

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On Appeal from the Juvenile Court
Parish of East Baton Rouge, State of Louisiana
Suit Number: 94,342; Division A
The Honorable Kathleen S. Richey, Judge Presiding

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BEFORE: DOWNING, GAIDRY AND McCLENDON, JJ.

DOWNING, J.

K.C., a child, was alleged to be delinquent by petition #94342 alleging one count of simple criminal damage to property (damage less than $500) (count I), a violation of La. R.S. 14:56; and two counts of aggravated assault (counts II and III), violations of La. R.S. 14:37. He denied the allegations and, following an adjudication hearing, K.C. was adjudged delinquent as alleged on counts I and II, but not delinquent on count III. Following a disposition hearing, on count I, the juvenile court placed the child in the custody of the Department of Public Safety and Corrections, Office of Juvenile Justice, for six months; on count II, the court placed the child in the custody of the Department of Public Safety and Corrections, Office of Juvenile Justice, for six months, the placement to run concurrently with the disposition imposed under count I, but consecutively with the dispositions imposed under petition #94385.[1] The child now appeals, challenging the sufficiency of the evidence to support the adjudication of delinquency on count I and II. For the following reasons, we affirm the adjudication of delinquency and disposition on counts I and II.

FACTS

On August 3, 2008, the victim, Jose Carreo, and his wife were at their home on Brentwood, near Goodwood Boulevard, in Baton Rouge. At approximately 9:30 p.m., the couple was in the living room watching television together. Suddenly, the victim heard sounds of metal repeatedly striking his car, a 1986 or 1998 LeBaron, parked on the side of the house adjacent to the living. He opened the door to investigate and saw K.C. and two other boys standing across the street. K.C. was pointing a gun at the victim. The victim testified he did not know "what it was[,] a bullet or gun." When asked if he thought K.C. was going to shoot him, the victim stated, "well you never know about you know[.]" She pleaded with him not to go

[1] The child separately appeals from his adjudication of delinquency on count II under petition #94385. See **State in the Interest of K.J.C.**, 2009-0658 (La. App. 1st Cir. __/__/09), ___ So.3d ___.

outside but he went outside anyway, and the victim's wife followed him outside. In an effort to defend his wife, and because he was "mad," the victim began walking toward K.C. K.C. and the other boys "panned out[.]" The police arrived, however, before the victim reached K.C., and the victim saw "the guys" throw the gun to the ground. The victim had not given anyone permission to shoot his vehicle.

On the night of the incident, at approximately 9:00 p.m., Jacinto Stewart was visiting her children's grandmother on Goodwood Boulevard. Stewart called the police after the grandmother was "accidentally" struck on the cheek by a BB. Prior to the shooting, Stewart had seen K.C. and "Cedric" walking up and down the street for ten or fifteen minutes. Also during that time, Stewart had heard K.C. and Cedric shooting at the stop sign and at her brother-in-law's 2000 Chevrolet Cavalier. She told K.C. and Cedric to "chill out[.]" K.C. replied it "wasn't him[,]" but Stewart had seen him with the gun. Immediately after the shooting, Stewart saw K.C. and Cedric across the street with a BB gun.

Also on August 3, 2008, Baton Rouge City Police Officer Cary Joseph Cullen investigated a report of a black male, wearing a skull cap and a black T-shirt, shooting a BB gun on Goodwood Boulevard. When Officer Cullen arrived at the scene, a black female pointed out K.C. as the person shooting the gun. K.C. was standing at the rear of a truck. Officer Cullen asked K.C. where the BB gun was located, and K.C. took Officer Cullen to the front of the truck and picked up a black BB gun pistol, which had been lying by the front driver's-side tire. K.C. denied shooting the BB gun. He claimed that he had given the gun to a man, whose name he could not remember and whom he could not describe, and the man had used the gun.

SUFFICIENCY OF THE EVIDENCE

In assignment of error number 1, the child argues the juvenile court erred in adjudicating him delinquent on count I because there was insufficient evidence of the actual damage to the vehicle and of his identity as the person who shot the

vehicle with the BB gun. In assignment of error number 2, the child argues the juvenile court erred in adjudicating him delinquent on count II because there was insufficient evidence he used a dangerous weapon and of his identity as the person who pointed the BB gun at the victim.

When the State charges a child with a delinquent act, it has the burden of proving each element of the offense beyond a reasonable doubt. La.Ch.C. art. 883. On appeal, the applicable standard of review is whether or not, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. This standard of review applies to juvenile proceedings in which a child is adjudicated a delinquent. However, in juvenile proceedings, the scope of review of this court extends to both law and facts. La. Const. art. V, § 10(B); **State in the Interest of D.F.**, 08-0182, pp. 4-5 (La. App. 1st Cir. 6/6/08), 991 So.2d 1082, 1084-85, writ denied, 08-1540 (La. 3/27/09), 5 So.3d 138.

The **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), standard of review incorporated in La.C.Cr.P. art. 821[2] 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 the Interest of D.F.**, 08-0182 at p. 5, 991 So.2d at 1085. The testimony of the victim alone is sufficient to prove the elements of the offense. **State in the Interest of D.M.**, 97-0628, p. 6 (La. App. 1st Cir. 11/7/97), 704 So.2d 786, 790. When the key issue is the defendant's identity as the perpetrator, rather than whether the crime was committed, the State is required to negate any reasonable

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[2] Pursuant to La.Ch.C. art. 104, "[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 ...."

probability of misidentification. Positive identification by only one witness may be sufficient to support the defendant's conviction. **State in the Interest of L.C.**, 96-2511, p. 3 (La. App. 1st Cir. 6/20/97), 696 So.2d 668, 670.

SIMPLE CRIMINAL DAMAGE TO PROPERTY

Simple criminal damage to property is the intentional damaging of any property of another, without the consent of the owner, and except as provided in La. R.S. 14:55 (aggravated criminal damage to property), by any means other than fire or explosion. La. R.S. 14:56(A).

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. La. R.S. 14:24. However, 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.**, 08-0182 at p. 5, 991 So.2d at 1085.

At the adjudication hearing, in regard to count I, the juvenile court found that K.C. and another individual were passing the gun back and forth, and that if K.C. did not shoot the gun, he passed it to the person who did shoot it, and that the victim's broken vehicle was damaged by the "ping, ping, ping of the B-B's."

K.C. argues that the BB gun did not cause "legally cognizable damage" because the victim never stated exactly how much it would cost to repair the damage caused by the BB gun, because the vehicle was approximately 20 years old, and because the vehicle was non-functional.

La. R.S. 14:56(A) requires "intentional damaging" of any property of another, but does not require the damage to be of any particular amount. The

applicable sentence for violation of La. R.S. 14:56(A) depends upon whether the damage is less than $500, $500 to less than $50,000, or $50,000 or more. See La. R.S. 14:56(B). In the instant case, the State alleged K.C. was delinquent on the basis of his simple criminal damage to property, with the damage amounting to less than $500. Thus, proof of any amount of damage was sufficient. The victim testified that his vehicle was an "86" or "98" "Labaron" convertible but it was not running at the time of the incident. He also indicated, however, that the car was worth approximately $1,000, and that the little holes resulting from the car being shot by the BB gun would require that the car be repaired with a "paint job."

K.C. also argues that none of the witnesses saw him shooting the BB gun. However, in order to prove K.C. guilty as a principal to count I, the State was required to show that K.C. shot the victim's car *or* that he knowingly participated in the shooting. The victim testified that K.C. was holding the gun when he opened the door to investigate who had shot his car. Stewart indicated that shortly before the shooting of the victim's vehicle, K.C. and Cedric were walking up and down Goodwood Boulevard shooting at the stop sign, shooting at another vehicle, and ultimately shooting at her children's grandmother. K.C. was also able to take Officer Cullen directly to the BB gun when he arrived at the scene.

Any rational trier of fact, viewing the evidence concerning count I in the light most favorable to the State, could have found, proven beyond a reasonable doubt and to the exclusion of every reasonable hypothesis of innocence, the essential elements of simple criminal damage to property and K.C.'s identity as a perpetrator of that offense. Additionally, 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 of delinquency based on K.C.'s being a principal to simple criminal damage to property.

AGGRAVATED ASSAULT

Assault is an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery. La. R.S. 14:36. Aggravated assault is an assault committed with a dangerous weapon. La. R.S. 14:37(A).

"Dangerous weapon" includes any gas, liquid or other substance or instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm. La. R.S. 14:2(A)(3). A toy gun can be considered a dangerous weapon if the fact finder determines that the interaction between the offender and the victim created a highly charged atmosphere whereby there was danger of serious bodily harm resulting from the victim's fear for his life. See **State v. Woods**, 97-0800, p. 11 (La. App. 1st Cir. 6/29/98), 713 So.2d 1231, 1239, writ denied, 98-3041 (La. 4/1/99), 741 So.2d 1281.

At the adjudication hearing, in regard to count II, the juvenile court found that K.C. pointed a gun at the victim, and the victim was surprised and angry, and approached K.C. to defend his wife.

K.C. argues that although the jurisprudence has recognized that even a toy gun can be a "dangerous weapon," because count II was an "aggravated assault from across the street[,]" the BB gun was not "calculated or likely to produce death or great bodily harm." Under the definition of La. R.S. 14:2(3), however, a dangerous weapon is not necessarily an instrumentality that can or will, without some intervening circumstance, produce death or great bodily harm; neither, thereunder, is it only one which in itself is likely to produce the stated result. **State v. Johnston**, 207 La. 161, 20 So.2d 741, 743 (1944). The use of any gun in an assault is likely to produce, at least, great bodily harm to the person assaulted because he may attempt to escape, to wrest the gun from the assailant, or to deliver to him some death-dealing blow; and in making any of these attempts, serious injury often results. Moreover, the victim of the assault, in repelling the assailant,

also may inflict great bodily harm or death on him. See **Johnston**, 20 So.2d at 744. Officer Cullen's timely arrival fortunately prevented physical confrontation between the victim and K.C. in this case. The fact that no one was injured in the encounter between K.C. and the victim, however, does not mean that the BB gun was not a dangerous weapon in the manner used.

K.C. also argues that the victim's identification of him as his assailant on count II was constitutionally insufficient because the victim had little time to view the suspect, he had come home from a party where he had been drinking, there were at least three boys in the victim's view, the lighting was poor, and other witnesses could not tell if K.C. or another boy dropped the gun.

The victim indicated he viewed K.C. pointing a gun at him during the time he (the victim) was walking across the street toward him. The victim conceded he had consumed two beers at a party earlier during the evening, but also indicated he was absolutely sure of his identification of K.C. as his assailant. The victim conceded it was dark, but indicated there were lights on his property and he could see all three boys across the street. K.C. also references testimony from Stewart that K.C. and the other boys ran when the police came out to the scene. Stewart, however, did not indicate that she viewed the "throw down" of the weapon.

Any rational trier of fact, viewing the evidence concerning count II in the light most favorable to the State, could have found proven beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, the essential elements of aggravated assault and K.C.'s identity as the perpetrator of that offense. Additionally, 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 of delinquency based on K.C.'s commission of aggravated assault.

These assignments of error are without merit.

DECREE

For the above reasons we affirm the adjudication of delinquency and disposition on count I and count II.

ADJUDICATIONS OF DELINQUENCY AND DISPOSITIONS ON COUNT I AND COUNT II AFFIRMED