

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 KJ 1739

**STATE OF LOUISIANA
IN THE INTEREST OF S.D.C.**

Judgment Rendered: February 12, 2010

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JEW by (Handwritten initials)

On Appeal from the Juvenile Court
In and For the Parish of East Baton Rouge
Trial Court No. 95,900, Division "A"

Honorable Kathleen Stewart Richey, Judge Presiding

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BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

HUGHES, J.

S.D.C. was alleged to be delinquent by petition based on two counts of simple burglary (counts I and IV), violations of LSA-R.S. 14:62(A); one count of theft of a firearm (count II), a violation of LSA-R.S. 14:67.15(A); and two counts of theft, value less than \$300 (counts III and V), violations of LSA-R.S. 14:67(A). S.D.C. denied the allegations and, following the presentation of the State's case at an adjudication hearing, moved for verdict of acquittal on all counts. The juvenile court granted the motion on counts IV and V. Following the completion of the adjudication hearing, S.D.C. was adjudged delinquent on counts I, II, and III. Following a disposition hearing, on count I, S.D.C. was committed to the custody of the Department of Corrections, Office of Juvenile Justice ("DOC/OJJ") for two years. On count II, S.D.C. was committed to the custody of the DOC/OJJ for three years. On count III, S.D.C. was committed to the custody of the DOC/OJJ for six months. The court ordered that all of the commitments would run concurrently with each other. S.D.C. now appeals, challenging the sufficiency of the evidence to support the adjudications of delinquency and the dispositions on counts I, II, and III. For the following reasons, we affirm the adjudications of delinquency and dispositions on counts I, II, and III.

FACTS

East Baton Rouge Parish Sheriff's Office Deputy Jeremy Lambert testified at the adjudication hearing. While on routine patrol on June 3, 2009, at approximately 4:00 a.m., he saw S.D.C. and another juvenile pushing two broken bicycles on the 7200 block of Prescott. Deputy Lambert asked the juveniles where they were going at four o'clock in the morning. S.D.C. replied, "We're going to have to take our lick," or "I'll take my lick." Deputy

Lambert asked S.D.C. what he was talking about and if there was anything Deputy Lambert should know about. S.D.C. replied, "I have a pistol." Deputy Lambert handcuffed S.D.C. A subsequent pat-down search of S.D.C. revealed that he had a loaded Taurus .40 caliber pistol concealed in his waistband in a black nylon holster with an extra magazine. He also had an additional fifteen-round magazine, twenty-nine rounds of .40 ammunition, and a pack of Doral menthol cigarettes. The other juvenile had a backpack containing a Motorola cell phone and cell-phone charger. Deputy Lambert advised both juveniles of their **Miranda** rights.¹ Initially, S.D.C. stated "we broke in," but then claimed the other juvenile broke into the car and he was "just with [him]." The other juvenile accused S.D.C. of breaking into the car. Both juveniles offered to take Deputy Lambert to the car in question.

Deputy Lambert placed the juveniles in his car and, at their direction, drove approximately one mile to 3225 Victoria Apartment Complex, where they pointed out a gold Ford Explorer. Deputy Lambert located the owner of the Explorer, LaQuincy Cummings, and he identified the items recovered from S.D.C. and the other juvenile as items taken from his vehicle.

LaQuincy Cummings also testified at the adjudication hearing. On June 3, 2009, at approximately 4:00 a.m., he learned that his gold Ford Explorer had been burglarized. His personal property contained in the vehicle had been thrown around, "like somebody had been fumbling through it" and certain items were missing, including his Taurus .40 caliber pistol, which he kept unloaded, the holster for the gun with an extra magazine, his cell phone, his cell-phone charger, and his Doral menthol cigarettes. Mr. Cummings had locked his vehicle after exiting it at approximately 10:00 p.m.

¹ **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Mr. Cummings indicated that the items stolen from the vehicle were returned to him by the police that night. He also indicated that he gave no one permission to enter the vehicle or take his belongings from the vehicle.

S.D.C. also testified at the adjudication hearing. He indicated his date of birth was September 29, 1992. He claimed that, when he was stopped by Deputy Lambert, he was on his way to return the gun after having taken it away from the other juvenile. S.D.C. claimed the other juvenile was playing with the gun and told him that he (the other juvenile) had broken into a car. S.D.C. denied breaking into the car. He also denied telling Deputy Lambert that he (S.D.C.) was with the other juvenile when the car was broken into. He claimed he told Deputy Lambert, "He's got to take his lick."

On cross-examination, S.D.C. indicated that he had been with the other juvenile for a "pretty good minute" on the night of the incident and had been with him when he (the other juvenile) stole the bicycle he was pushing. S.D.C. claimed he purchased the cigarettes he was carrying from a convenience store. When questioned as to why a clerk would sell him cigarettes, S.D.C. claimed he had asked someone to buy them for him. When questioned by the court as to how long he had been with the other juvenile on the night of the incident, S.D.C. stated "until like ten," but claimed he (S.D.C.) went walking by himself at approximately 2:00 a.m.

SUFFICIENCY OF THE EVIDENCE

In his first assignment of error, S.D.C. argues that the juvenile court erred in adjudicating him delinquent on count I based on his possession of the weapon taken in the burglary, citing **State v. Searle**, 339 So.2d 1194 (La. 1976) (on rehearing). He also argues that the court erred in adjudicating him delinquent on count I as a principal, citing **State ex rel.**

G.B., 2007-1577 (La. App. 4 Cir. 5/14/08), 985 So.2d 828. Additionally, he argues that the court erred in adjudicating him delinquent on counts II and III because there was insufficient evidence of his specific intent to steal or of his aiding and abetting the thefts by the other juvenile.

When the State charges a child² with a delinquent act,³ it has the burden of proving each element of the offense beyond a reasonable doubt. LSA-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. LSA-Const. art. V, § 10(B); **State in the Interest of D.F.**, 2008-0182, pp. 4-5 (La. App. 1 Cir. 6/6/08), 991 So.2d 1082, 1084-85, writ denied, 2008-1540 (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 LSA-C.Cr.P. art. 821⁴ is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-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

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." LSA-Ch.C. art. 804(1).

³ 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. It includes a direct contempt of court committed by a child." LSA-Ch.C. art. 804(3).

⁴ Pursuant to LSA-Ch.C. 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"

reasonable hypothesis of innocence. **State in the Interest of D.F.**, 2008-0182 at p. 5, 991 So.2d at 1085. 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 probability of misidentification. **State in the Interest of L.C.**, 96-2511, p. 3 (La. App. 1 Cir. 6/20/97), 696 So.2d 668, 670. Once the crime itself has been established, a confession alone may be used to identify the accused as the perpetrator. **State in the Interest of D.F.**, 2008-0182 at p. 6, 991 So.2d at 1085.

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. LSA-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.**, 2008-0182 at p. 5, 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, p. 3 (La. 2/6/98), 707 So.2d 1223, 1225 (per curiam).

Simple burglary is the "unauthorized entering of any . . . vehicle . . . with the intent to commit a felony or any theft therein, other than as set forth in R.S. 14:60." LSA-R.S. 14:62(A).

Theft of a firearm is the misappropriation or taking of a firearm which belongs to another, either without the consent of the other to the misappropriation or taking or by means of fraudulent conduct, practices, or representations. An intent to deprive the other permanently of the firearm is essential. LSA-R.S. 14:67.15(A). For purposes of LSA-R.S. 14:67.15(A), “firearm” means a “. . . pistol, revolver, or other handgun.” LSA-R.S. 14:67.15(B).

Theft is the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices, or representations. An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential. LSA-R.S. 14:67(A).

At the adjudication hearing, the juvenile court found that Mr. Cummings had left his vehicle in the parking lot of his apartment complex and gone to sleep. Thereafter, he was awakened by Deputy Lambert and discovered that someone had entered the vehicle and ransacked it, taking a gun, phone, phone charger, and ammunition. The court noted that Deputy Lambert stopped S.D.C. and another juvenile, pushing bicycles down Prescott at 4:00 a.m. The court found that S.D.C.’s initial statement was “we’re going to have to take our lick,” but then he claimed he did not break into the vehicle, but was “just there.” The court noted that S.D.C. had the weapon taken from the vehicle concealed on his person. The court found S.D.C.’s testimony that he was with the other juvenile for “a good little minute,” but that he was not there when the burglary was committed, and was on his way to return the weapon when stopped by Deputy Lambert, to

be “fantastic.” Based on S.D.C.’s initial account of the incident, the court found that he acted as a lookout while the other juvenile entered the vehicle. The court found that the evidence proved beyond a reasonable doubt that between 2:00 a.m. and 4:00 a.m. on the night of the incident, S.D.C. participated either as the main actor or as a principal with his friend in committing counts I, II, and III.

State v. Searle involved an appeal from a simple burglary conviction wherein the jury had been instructed on the judicially created rule that “unexplained possession of property recently stolen at the time of a burglary creates a presumption that the possessor committed the burglary.” **State v. Searle**, 339 So.2d at 1198. The evidence against the defendant consisted of his possession of a stereo and a rug stolen in the burglary of the Atkinson house, his statement to a friend that he had obtained the items from the Atkinson house, and a request to the friend not to “say anything to anyone.” **State v. Searle**, 339 So.2d at 1197. On rehearing, the court found that the judicially created presumption had resulted in the jury being told that if the State proved beyond a reasonable doubt that the defendant was in the unexplained possession of recently burglarized property, it must presume that he committed the burglary. **State v. Searle**, 339 So.2d at 1206. The court held that the presumption failed to meet the beyond a reasonable doubt standard and the defendant had consequently been adjudged guilty without requiring that the State prove beyond a reasonable doubt every essential element of the crime charged. **Id.**

We find **State v. Searle** distinguishable from the instant case. This case was a juvenile proceeding, and thus, there was no jury, pursuant to

LSA-Ch.C. art. 882,⁵ and no jury instruction as in **State v. Searle**. S.D.C. argues that because the juvenile court referenced his possession of the recently burglarized pistol in finding him guilty of burglary, the court must have used the judicially created presumption overruled by **State v. Searle**. We disagree. S.D.C.'s claim assumes that the juvenile court followed case law overruled over thirty years ago and contrary to modern sufficiency of the evidence analysis. A review of the court's reasons in their entirety, however, indicates that while the court noted S.D.C.'s possession of the recently burglarized weapon, the court found S.D.C. guilty on the basis of his own statements that incriminated him at least as a principal to the burglary. Where there is evidence relative to the circumstances surrounding a burglary that is sufficient, when viewed in the light most favorable to the prosecution, to convince a rational trier of fact that the essential elements of simple burglary were proven beyond a reasonable doubt, we have refused to reverse the conviction on the basis of alleged improper use of the overruled burglary presumption. See State v. Hopson, 464 So.2d 18, 20 (La. App. 1 Cir. 1984), writ denied, 467 So.2d 537 (La. 1985).

State ex rel. G.B. involved an attempted second degree murder conviction stemming from the shooting of two victims, T.H. and R.R., during an encounter between C.L. and T.H., at which five additional boys, including G.B., were present. **State ex rel. G.B.**, 2007-1577 at pp. 1-2, 985 So.2d at 829. R.R. testified that there was animosity between the gunman, C.L., and T.H., and that the other boys watched the incident and did nothing. **State ex rel. G.B.**, 2007-1577 at p. 2, 985 So.2d at 829. Citing the fact that no testimony showed that G.B. fought anyone at the crime scene or

⁵ Article 882 provides: "The adjudication hearing shall be held before the court without a jury."

committed any act in furtherance of the crime, the court found that, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could not have found that the elements of attempted second degree murder were proven beyond a reasonable doubt. **State ex rel. G.B.**, 2007-1577 at p. 7, 985 So.2d at 832.

State ex rel. G.B. is also distinguishable from the instant case. In that case, there was no evidence to exclude the child's claim that he was unaware that the gunman would commit the crime. In this case, however, there was evidence contradicting the child's defense, i.e. S.D.C.'s own statement that he acted as a lookout, an act in furtherance of the crime. The juvenile court was not irrational in finding that S.D.C. was not merely present, but acted as a lookout as his friend broke into the vehicle during the early hours of the morning, ransacking it and removing multiple items from it, which he shared with S.D.C.

Any rational trier of fact, viewing the evidence 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 burglary and theft and S.D.C.'s identity as a perpetrator of those offenses. 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 S.D.C.'s committing simple burglary and theft. S.D.C.'s identity as a perpetrator of the offenses was established by his statement to Deputy Lambert which implicated S.D.C., as well as his friend, at least as a principal to the offenses. See State v. Rogers, 428 So.2d 932, 934 (La. App. 1 Cir. 1983) (stating: "it is not necessary in a

burglary prosecution to prove that one charged as a principal made an unauthorized entry. It is sufficient to show that he aided and abetted one who entered unauthorized.”) (Citations omitted.) S.D.C.’s different accounts of his participation in the offenses also established his guilty knowledge. Purposeful misrepresentation reasonably raises the inference of a guilty mind. **State v. Mitchell**, 99-3342, p. 11 (La. 10/17/00), 772 So.2d 78, 85. The intent of the perpetrators to commit a theft was established by the fact that the vehicle was left in disarray and several valuable items were missing. See **State v. Tran**, 97-640, p. 12 (La. App. 5 Cir. 3/11/98), 709 So.2d 311, 317.

This assignment of error is without merit.

EXCESSIVE DISPOSITION

In his second assignment of error, S.D.C. argues that his three-year commitment to the custody of the DOC/OJJ was excessive in length under the circumstances. He also argues the court erred in failing to place him in some other form of supervised living and in failing to consider that his commitment to DOJ/OJJ would entail excessive hardship to his mother by placing his disability check at the disposal of the State. He does not contest the court’s decision to remove him from the home, conceding that he has a pattern of delinquency and an inability to rehabilitate himself.

Article I, section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant’s constitutional right against excessive punishment and is subject to appellate review. Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain

and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Hurst**, 99-2868, pp. 10-11 (La. App. 1 Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962.

After adjudicating a child to be delinquent, a court is required to impose the "least restrictive disposition" authorized by Articles 897 through 900 of the Children's Code "which the court finds is consistent with the circumstances of the case, the needs of the child, and the best interest of society." LSA-Ch.C. art. 901(B). Commitment of a child to the custody of the Department of Public Safety and Corrections may be appropriate under any of the following circumstances: (1) there is an undue risk that during a period of a suspended commitment or probation the child will commit another crime; (2) the child is in need of correctional treatment or a custodial environment that can be provided most effectively by his commitment; (3) a lesser disposition will deprecate the seriousness of the child's delinquent act; and (4) the delinquent act involved the illegal carrying, use, or possession of a firearm. LSA-Ch.C. art. 901(C); **State in the Interest of J.W.**, 95-1131, pp. 3-4 (La. App. 1 Cir. 2/23/96), 669 So.2d 584, 586, writ denied, 96-0689 (La. 4/26/96), 672 So.2d 911.

No judgment of disposition shall remain in force for a period exceeding the maximum term of imprisonment for the felony forming the basis for the adjudication. LSA-Ch.C. art. 898(A). A maximum term under

LSA-Ch.C. art. 898(A) does not apply if the child reaches age twenty-one.

LSA-Ch.C. art. 898(C)(5).

Whoever commits the crime of simple burglary shall be fined not more than two thousand dollars, imprisoned with or without hard labor for not more than twelve years, or both. LSA-R.S. 14:62(B).

For a first offense, the penalty for theft of a firearm shall be imprisonment with or without hard labor for not less than two years nor more than ten years, without the benefit of probation, parole, or suspension of sentence and a fine of one thousand dollars. LSA-R.S. 14:67.15(C)(1).

The penalty for theft, when the theft amounts to less than a value of three hundred dollars, is imprisonment for not more than six months, or a fine of not more than one thousand dollars, or both. LSA-R.S. 14:67(B)(3).

Following S.D.C.'s adjudication of delinquency, the court ordered a pre-disposition investigation (PDI). In the PDI report, S.D.C. indicated he enjoyed hanging out with girls and smoking marijuana. He also indicated that his hobbies included "selling weed." He claimed he had used and abused marijuana since he was nine years old. He indicated he smoked marijuana "every day and every chance that he got." He claimed that in order to provide the marijuana and/or the money for the marijuana, he would "hustle" the streets.

The PDI report found that S.D.C. was very "street smart," and was very capable of "hustling," but had a sincere desire to change his mindset. The report also noted that his delinquent conduct involved the illegal carrying of a firearm, and a lesser disposition than commitment to the custody of DOC would deprecate the seriousness of that delinquent act. The report found that S.D.C. was in need of a custodial environment, which

could be provided most effectively by his commitment, that would change his “street mindset.”

The report also found that S.D.C. did not act under strong provocation, there were no substantial grounds tending to excuse or justify his delinquent conduct, the victim of the delinquent conduct did not induce or facilitate its commission, S.D.C. had a history of prior delinquency, and he had not led a law-abiding life for a substantial period of time.

Additionally, the report indicated that S.D.C. had been previously afforded the opportunity of an informal adjustment agreement, but did not perform well while under supervision. He was removed from Baton Rouge Marine Institute for behavioral problems, and was arrested on a new charge approximately twenty days prior to the expiration of the informal adjustment agreement. The PDI report recommended that S.D.C. be committed to the non-secure custody of DOC for one year.

S.D.C.’s mother testified at the adjudication hearing. She indicated S.D.C.’s date of birth was September 29, 1992. She indicated S.D.C. and his six-year-old sibling lived with her. She indicated that she needed S.D.C. at home to take out the trash and to take care of his sibling because she was in and out of the hospital. When asked if she would help S.D.C. look for employment, she indicated he was disabled and received a check on the first of the month. She claimed she knew S.D.C.’s probation officer, but did not know his name.

S.D.C. also testified at the adjudication hearing. He indicated that if he were allowed out of detention, he would go back to school and turn his life around. He indicated he was worried about his mother because his check paid the bills. He also indicated that he saved or gave his mother any

money he earned as a mechanic's helper. S.D.C. conceded that he had previously been in detention five or six times and on those occasions had also come into court and promised to change his life and "to do right." He also conceded that he smoked marijuana once a day.

The court noted that on September 11, 2006, S.D.C. was arrested for disturbing the peace and simple battery on a police officer. On December 5, 2007, he was arrested for unauthorized entry of an inhabited dwelling. On April 16, 2008, he was arrested for misdemeanor theft. On February 6, 2009, he was arrested for simple criminal damage to property, value less than \$500, and unauthorized entry of an inhabited dwelling.

On count I, the court committed S.D.C. to the custody of the DOC/OJJ, for two years. On count II, the court committed S.D.C. to the custody of the DOC/OJJ, for three years. On count III, the court committed S.D.C. to the custody of the DOC/OJJ, for six months. The court ordered that all of the commitments would run concurrently with each other. The court also ordered that S.D.C. be placed in an appropriate facility to address his substance abuse treatment needs, educational and vocational training needs, and psychiatric needs, if any. Additionally, the court recommended non-secure placement to address S.D.C.'s needs. The court noted that S.D.C. would be seventeen the next month, and thus, had only approximately one year before he would be on his own and need to take care of himself. The court advised S.D.C. to "let the weed go" and do what he needed to do to be able to take care of himself in a year.

In imposing the dispositions, the court found that on the street, S.D.C. did not follow rules, he smoked marijuana, he did not go to school, and he hustled. The court noted this activity had led to his five criminal arrests.

The court found that the evidence was clear that there was an undue risk that S.D.C. would commit further delinquent offenses if left on the street. The court found that his delinquent act had involved the carrying and possession of a firearm, and that he was in need of a correctional environment that could be provided most appropriately by his commitment. The court found that S.D.C. would not get the help and guidance that he needed unless he went into state custody, and noted that he had been given “plenty of opportunity” to show the court that he had an ability to change his conduct, but had failed to do so for two years.

The dispositions imposed in this case were not grossly disproportionate to the severity of the offenses and, thus, were not unconstitutionally excessive. Further, the court carefully considered the circumstances of the case, including whether S.D.C. had to be committed to DOJ/OJJ and the hardship that such a commitment would have on his family, the needs of S.D.C., and the best interest of society and imposed dispositions consistent with the dispositional guidelines of the Children’s Code.

This assignment of error is without merit.

**ADJUDICATIONS OF DELINQUENCY AND DISPOSITIONS
ON COUNTS I, II, AND III AFFIRMED.**