SUPREME COURT OF LOUISIANA

No. 2017-CK-2021

STATE OF LOUISIANA

IN THE INTEREST OF T.H.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL FIRST CIRCUIT, PARISH OF EAST BATON ROUGE

J. Clark, dissenting with reasons.

I respectfully dissent, finding sufficient evidence for the adjudication of first degree rape. 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. I acknowledge that a 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 v. Neal*, 00–0674, p. 12 (La. 6/29/01), 796 So.2d 649, 659, *cert. denied*, 535 U.S. 940, 122 S.Ct. 1323, 152 L.Ed.2d 231 (2002). Moreover, I am cognizant that 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*, 00-1529, pp. 11–12 (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 2 Wayne R. LaFave and Austin W. Scott, Jr., *Substantive Criminal Law* § 6.7(a)(1986).

Applying the law of principals to the instant facts, I find that T.H. was correctly adjudicated delinquent on the first degree rape charge. The case hinged on whether or not T.H. was physically present and close enough to the event to understand what was happening. Though T.H. was separated from the others by a fence, testimony indicated that he was close enough to hear. For example, T.S. testified that she saw T.H.'s face from where she was. Additionally, T.H. was close enough to participate in throwing the phone back and forth with the other boys. When the attack began, T.S. tried to pull her pants back up and get her phone, which T.H. should have been able to observe if he was close enough to throw a phone. T.S. testified that she loudly denied the boys' request that she exchange sex for her phone, stating "They could all hear me . . .they were in a distance enough for them to hear me." Thus, I surmise T.H. could hear T.S. loudly denying the suggestion she have sex with M.P. and D.L. in exchange for her phone, but he almost certainly saw T.S. try to pull her pants back up. Despite the circumstances, T.H. tossed M.P. a condom when he asked, and at some point stood behind T.S. while the sexual incidents transpired. Though T.S. in a statement to police said that T.H.'s pants were down when he was behind her, no one elicited this testimony from her while she was on the stand. However, her statement apparently is part of the record and was considered by the court in adjudicating defendant guilty of the offense.

In my opinion, the state met its burden to prove that T.S. was not merely present, but rather the type of friend mentioned in *Bridgewater, supra*, whose immediate proximity suggested that he could be expected to voice some opposition or surprise if he were not a party to the crime. Thus, I dissent and would affirm the rape adjudication.