

No. 1-14-1417

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

<i>In re</i> J.H., a Minor)	Appeal from the
)	Circuit Court of
(The People of the State of Illinois,)	Cook County, Illinois
)	
Petitioner-Appellee,)	
)	No. 13 JD 2600
v.)	
)	
Jordan H.,)	Honorable
)	Terrence V. Sharkey,
Respondent-Appellant.))	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

ORDER

Held: We hold the State failed to satisfy its burden of proving defendant guilty beyond a reasonable doubt because it failed to present sufficient evidence showing respondent actually or constructively possessed the gun at issue here or that he was legally accountable for the people who did possess the gun.

¶ 1 Respondent, J.H., a minor, appeals his adjudication of delinquency and dispositional order of commitment. According to the State's evidence presented at trial, respondent and J.V., also a minor, were in the back seat of a car driven by Eric Herrejon. J.Q., a minor who had been sitting in the front seat of the car, opened the car door and pointed a gun at the complaining witness. During the police pursuit of the vehicle, Herrejon threw the gun out of the driver's side window. Respondent and J.V. were tried in a joint adjudicatory hearing.¹ Findings of guilt were entered against respondent for aggravated unlawful use of a weapon for possessing a weapon without having a valid Firearm Owner's Identification (FOID) card (720 ILCS 5/24-1.6(a)(1)(C) (West 2012)); aggravated unlawful use of a weapon for possessing a weapon while under the age of 21 and not engaged in lawful activities under the Wildlife Code (720 ILCS 5/24-1.6(a)(1)(I) (West 2012)); aggravated assault (720 ILCS 5/12-2(c)(1) (West 2012)); and unlawful possession of a firearm for possessing a firearm while under 18 years of age (720 ILCS 5/24-3.1(a)(1) (West 2012)). After merging respondent's adjudications into his adjudication for aggravated unlawful use of a weapon for possessing a weapon without having a FOID card, the circuit court sentenced respondent to four years of probation.

¶ 2 Respondent does not challenge his adjudication for aggravated assault (720 ILCS 5/12-2(c)(1) (West 2012)) before this court. He does, however, challenge the sufficiency of the evidence used against him for his adjudications for aggravated unlawful use of a weapon for possessing a weapon without having a valid FOID card (720 ILCS 5/24-1.6(a)(1)(C) (West 2012)); aggravated unlawful use of a weapon for possessing a weapon while under the age of 21 and not engaged in lawful activities under the Wildlife Code (720 ILCS 5/24-1.6(a)(1)(I) (West

¹ J.Q., the minor in the front passenger seat, pled guilty prior to trial. Erick Herrejon, the driver, was charged in adult court. The circuit court adjudicated J.V. delinquent. J.Q., J.V., and Herrejon are not parties to this appeal.

2012)); and unlawful possession of a a firearm while under 18 years of age (720 ILCS 5/24-3.1(a)(1) (West 2012)). Respondent argues the State failed to prove he had actual or constructive possession of the gun at issue, or that he is legally accountable for the actions of the people in the car who did possess the gun. We hold the State failed to satisfy its burden of proving defendant guilty beyond a reasonable doubt because it failed to present sufficient evidence showing respondent actually or constructively possessed the gun at issue here or that he was legally accountable for the people who did possess the gun.

¶ 3

JURISDICTION

¶ 4 The circuit court entered its final judgment on May 13, 2014. Respondent timely filed his notice of appeal on the same day. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rules 603, 606, and 660, governing appeals from a final judgment entered below. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. R. 603 (eff. Feb. 6, 2013); R. 606 (eff. Feb. 6, 2013); R. 660 (eff. Oct. 1, 2001).

¶ 5

BACKGROUND

¶ 6 On June 17, 2013, the State filed a petition for adjudication of wardship alleging respondent committed three counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6 (West 2012)², one count of aggravated assault (720 ILCS 5/12-2(c)(1) (West 2012)), and one count of unlawful possession of a firearm (720 ILCS 5/24-3.1(a)(1) (West 2012)). The State asked respondent be adjudged a ward of the court.

² Prior to trial, the State nol-prossed one of the three counts of aggravated unlawful use of a weapon.

¶ 7 At respondent and J.V.'s joint adjudication hearing, the State presented testimony from Jose Ramirez, the complaining witness; Daniella Rico, Ramirez's wife and an eyewitness; Officer Ruth Castelli, one of the arresting officers; and Officer Chris Hacket, who recovered the weapon used during the incident.

¶ 8 Officer Ruth Castelli of the Chicago police department testified that on May 14, 2013, at approximately 6:50 a.m., she and her partner, Officer Philop, received a radio transmission regarding "a person-with-a-gun call." They were able to locate the complaining witness, Jose Ramirez, near 4443 South Wood Street, in Chicago, Illinois. Ramirez told her that four Hispanic males in a beige Ford Expedition automobile approached him and pointed a gun at him. Officer Castelli testified that while she spoke to Ramirez, Ramirez pointed "towards 44th and Wood, and [said], '[t]hat looks like the offender's car.'" Officer Castelli proceeded to follow the car which proceeded westbound from 44th Street and Wood Street. The car refused to stop despite the activation of Officer Castelli's emergency lights and siren. At approximately 4540 South Wood Street, she observed the driver of the vehicle "toss" a handgun out of the driver's side window.

¶ 9 Officer Castelli eventually managed to curb the vehicle. She described the occupants of the car as follows: Eric Herrejon drove the vehicle; J.Q. rode in the front seat; while respondent and J.V. were in the backseat. J.Q. wore "a black hoodie" and she thought J.V. wore all black. Officer Castelli testified respondent wore what "[l]ooked like *** a red Bull's jersey." When searching J.Q., Officer Castelli found a black ski mask. Officers Castelli and Philop conducted a show-up identification in the location where they curbed the vehicle. Ramirez positively identified the minors. Officer Castelli testified that two of the minors did not have valid FOID

cards.³ She further testified that the minors were not engaged in an activity under the Wildlife Code, and that both of the minors in the back seat were under 18 years old.

¶ 10 On cross-examination, Officer Castelli testified Ramirez identified J.Q. as possessing the weapon, pointing it out of the car, and saying "What's up saints." Eric Herrejon, the driver, threw the weapon out of the driver's side window. She could not remember which of the four arrestees she handcuffed or which one she physically searched.

¶ 11 Jose Ramirez testified that on the day of the incident, he was walking his wife to work near the 4600 block of South Wood Street when a beige four door Ford Expedition automobile drove near him. He was able to hear the car, an older model, because it had a "distinct sound." When asked whether the windows were up or down, he answered "[t]hey might have been somewhere between." He later testified that there were no obstructions to his view of the inside of the vehicle. Individuals in the car, he could not remember which ones, were telling him "What's going on saint."

¶ 12 Ramirez testified he saw a person in "the passenger side rear was wearing *** a red *** shirt or a red jacket," which he thought was "a sports jacket." Regarding this person on the backseat of the passenger side of the vehicle, Ramirez testified he saw "a lot of shuffling movement." The State later asked Ramirez what exactly he meant by the term "shuffling," to which Ramirez answered "the front one looking towards the back, and the front one looking at the same guy that's looking at him - - right from the front passenger." Ramirez testified that the person in the backseat on the driver's side "had a cell phone out filming - - what had seemed like

³ Officer Castelli did not specify which two of the three minors in the car did not have a valid FOID card. Specifically, the State asked her "at the time ***these two minors were arrested, did either minor have a valid FOID card on their person," to which she responded "No."

he was filming." After this first confrontation with the beige car, Ramirez and his wife continued to walk because he did not know who the people were.

¶ 13 Ramirez testified that the car, however, "never left the area *** because they came back around." At that point, "[t]wo blocks down from the original corner," the car containing the same people, sitting in the same positions, approached him again in a second encounter. Ramirez testified "[t]hey still continued saying bad words to me, and I s[aw] actions of opening the door." He told his wife to walk the opposite way. Ramirez testified as follows regarding how he saw J.Q., the occupant of the front seat of the passenger side of the vehicle, possess what he believed to be a gun:

"Q. Now, which doors of the vehicle began to open?

A. It started all around. It's just - - I didn't see exactly which one. I seen all of them were all open. By the time I turned around, they were all open - - not, like wide open; but they were half way enough to - - I seen a leg sticking out.

Q. Now, in addition to seeing that leg sticking out, were you able to see any other item or any other things while you were looking at the vehicle?

A. Yes. While I was looking at them shuffle, they came out, and I seen a black, shiny object; and I - - it wasn't the guy with the phone. So I'm more paranoid at that time and second, and I didn't stay more than a couple of seconds to see if - - exactly what - - I ran."

¶ 14 Ramirez specified that the person from the front passenger side had the black shiny object, which he believed to be a gun. Ramirez explained that he saw the black shiny object "around the mid level of his body, by his arms*** in the middle of his body." Ramirez illustrated this by motioning towards the center of his body, towards the right hand side his body. When asked "what motion that item was moving in," Ramirez testified "[t]owards me." When asked "[w]hose leg was it that you saw getting out of the vehicle," Ramirez answered "[p]assenger front." Ramirez later testified that he saw legs come out of both the front and back passenger side of the car. Ramirez testified consistently with Officer Castelli's account of his initial interaction with the police, the subsequent police pursuit, and his identification of the car's occupants at the scene.

¶ 15 Daniella Rico, Rameriz's wife, testified " [t]he one in the backseat of the passenger's side was wearing red and white. If I'm not mistaking, it was *** a Bulls jersey with the white sweater and a white hat." She described the person in the back seat on the driver's side as wearing a dark colored jacket or sweater. The person in the back seat on the driver's side had a cell phone and she thought he was filming the encounter.

¶ 16 Officer Chris Hackett of the Chicago police department testified he recovered "one Ruger 9-millimeter semi-automatic handgun" near the scene of the incident. The color of the gun was "[b]lue steel," which he described as "between navy and gray." Nine live rounds were found inside the weapon. On cross-examination, Officer Hackett admitted the weapon was not fingerprinted.

¶ 17 Respondent motioned for a directed finding, which the circuit court denied.

¶ 18 The circuit court found respondent and J.V. guilty of all counts. Regarding respondent, the court noted that "[i]t really is a tougher call," but pointed out that respondent either got out of

the car or started to get out of the car. According to the court, "an innocent person would have exited the vehicle when he had that opportunity." Instead, respondent went back inside the vehicle. The court explained it found "linkage" between respondent and the crime. The circuit court adjudged respondent to be a ward of the court and placed him on 4 years probation. On that same day, respondent timely appealed.

¶ 19

ANALYSIS

¶ 20 Before this court, respondent challenges the sufficiency of the evidence for his adjudications for aggravated unlawful use of a weapon for possessing a weapon without having a valid FOID card (720 ILCS 5/24-1.6(a)(1)(C) (West 2012)); aggravated unlawful use of a weapon for possessing a weapon while under the age of 21 and not engaged in lawful activities under the Wildlife Code (720 ILCS 5/24-1.6(a)(1)(I) (West 2012)); and unlawful possession of a firearm for possessing a firearm while under 18 years of age (720 ILCS 5/24-3.1(a)(1) (West 2012)). He does not challenge his adjudication for aggravated assault (720 ILCS 5/12-2(c)(1) (West 2012)). Regarding his adjudications for aggravated unlawful use of a weapon and unlawful possession of a firearm, respondent argues the State failed to prove his actual or constructive possession of the firearm. Respondent also argues that although the evidence showed that the people in the front seat of the car, J. Q. and Herrejon, possessed the gun, he is not legally accountable for their actions.

¶ 21 The State responds it presented sufficient evidence to convict respondent. Specifically, the State argues respondent had both actual possession and constructive possession of the firearm jointly with J.Q., the minor in the front passenger side seat of the car. Alternatively, the State argues that if this court should reverse respondent's adjudication for aggravated unlawful use of a weapon for possessing a weapon without having a valid FOID card (720 ILCS 5/24-1.6(a)(1)(C)

(West 2012)), we should uphold his adjudication for aggravated unlawful use of a weapon for possessing a weapon while under the age of 21 and not engaged in lawful activities under the Wildlife Code (720 ILCS 5/24-1.6(a)(1)(I) (West 2012)) pursuant to accountability principles and remand the matter for sentencing.

¶ 22 When presented with a challenge to the sufficiency of the evidence, we must determine " ' whether, 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 crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In doing so, we will not substitute our judgment for the trier of fact or retry the defendant. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). The trier of fact's credibility determinations are entitled to great weight as it saw and heard the witnesses. *People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007). Additionally, "a reviewing court must allow all reasonable inferences from the record in favor of the prosecution." *People v. Givens*, 237 Ill. 2d 311, 334 (2010).

¶ 23 Although we give great deference to the trier of fact, its acceptance of testimony is neither binding nor conclusive. *Id.* at 115. We will not allow unreasonable inferences from the record. *Cunningham*, 212 Ill. 2d at 280. Furthermore, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970); *People v. Carpenter*, 228 Ill. 2d 250, 264 (2008); see also *People v. Ehlert*, 211 Ill. 2d 192, 213 (2004) ("Simply stated, the fact that defendant is 'probably guilty' does not equate with guilt beyond a reasonable doubt."). If, after a careful examination of the evidence, we conclude that there was insufficient evidence of defendant's guilt beyond a reasonable doubt, the conviction must be

reversed. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). "Accordingly, a conviction will be reversed where the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of defendant's guilt." *Wheeler*, 226 Ill. 2d at 115.

¶ 24 Section 24-1.6 of the Criminal Code of 1961 addresses the offense of aggravated unlawful use of a weapon. 720 ILCS 5/24-1.6 (West 2012). At the time of the offense, section 24-1.6 provided, in relevant part:

"(a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:

(1) Carries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission, any Pistol, revolver, stun gun or taser or other firearm; or

(2) *** and

(3) One of the following factors is present:

* * *

(C) the person possessing the firearm has not been issued a currently valid Firearm Arm Owner's Identification Card; or

* * *

(I) the person possessing the weapon was under 21 years of age and in possession of a

handgun ***, unless the person under 21 is engaged in lawful activities under the Wildlife Code ***, 720 ILCS 5/24-1.6 (a)(1), (2), (3)(C), (3)(I) (West 2012).

¶ 25 The Criminal Code of 1961 also provides, in relevant part, that a person commits unlawful possession of a firearm when he or she "is under 18 years of age and has in his possession any firearm of a size which may be concealed upon his person." 720 ILCS 5/24-3.1(a)(1) (West 2012).

¶ 26 Accordingly, in order for the State to show respondent committed aggravated unlawful use of a weapon and unlawful possession of a firearm, it had to show respondent possessed the gun. 720 ILCS 5/24-1.6(a)(1),(2),(3)(C),(3)(I) (West 2012); 720 ILCS 5/24-3.1(a)(1) (West 2012). The element of possession may be satisfied by either actual or constructive possession of the weapon. *People v. Ingram*, 389 Ill. App. 3d 897, 899 (2009). "Actual possession is the exercise by the defendant of present personal dominion over the illicit material and exists when a person exercises immediate and exclusive dominion or control over the illicit material, but does not require present personal touching of the illicit material." *People v. Givens*, 237 Ill. 2d 311, 335 (2010). In order to establish constructive possession, the State has to prove beyond a reasonable doubt that respondent (1) had knowledge of the presence of the weapon; and (2) that he exercised exclusive and immediate control over the area where the weapon was found. *People v. Sams*, 2013 IL App (1st) 121431, ¶10. Although a defendant's control over a location does give rise to an inference of possession, mere proximity to the weapon is insufficient to show possession. *Sams*, 2013 IL App (1st) 121431, ¶10, ¶13; *People v. McIntyre*, 2011 IL App (2d) 100889, ¶17. Circumstantial evidence may be used to prove knowledge and possession. *People v. Bailey*, 333

Ill. App. 3d 888, 891(2002). The State, however, still must present such circumstantial evidence. *Id.*

¶ 27 In this case, we hold the State failed to prove beyond a reasonable doubt that respondent possessed the gun that was attributed to him. Our review of the record shows that the State established that only two people possessed the gun, J.Q. and Eric Herrejon. Based on Jose Ramirez's testimony, the front seat passenger, J.Q., had possession of the gun as Ramirez testified he saw the gun "around the mid level of [J.Q.'s] body, by his arms." Ramirez illustrated this by motioning towards the center of his body, towards the right hand side of his body. Officer Castelli testified she saw Eric Herrejon, the driver of the car; throw a gun out of the window. Accordingly, the State established J.Q. and Eric Herrejon had actual possession of the gun. Absent from the record is any evidence that would give rise to an inference that respondent had actual possession of the gun. Specifically, there is no evidence indicating defendant "had immediate and exclusive dominion or control" over the gun. *Givens*, 237 Ill. 2d 335. No witnesses saw defendant possessing the gun and the gun was not tested for fingerprints.

¶ 28 Similarly, the State has also failed to show respondent constructively possessed the weapon. In order to show constructive possession, the State had to show defendant exercised exclusive and immediate control over the area where the weapon was found. *Sams*, 2013 IL App (1st) 121431, ¶10. The State did not present any such evidence here. The State only showed that the occupants of the front seat of the vehicle possessed the gun. There was no evidence that respondent had any control, or even access, to the front seat area of the vehicle. The only testimony regarding the gun was that Officer Castelli saw the driver throw it out the window and that Ramirez saw it on J.Q., specifically "around the mid level of his body." All

the State showed regarding respondent was that he was inside the vehicle and at one point his leg started to exit the vehicle. Merely being present in the car, however, does not establish constructive possession. *McIntyre*, 2011 IL App (2d) 100889, ¶17. Although the State may establish the element of possession through circumstantial evidence, they must actually present such evidence. *Bailey*, 333 Ill. App. 3d at 891. The State failed to do so here. They did not present any evidence, circumstantial or otherwise, to show defendant had any control over the weapon or the area around the weapon.

¶ 29 According to the State, respondent had joint possession of the weapon. Joint possession occurs "[i]f two or more persons share the intention and power to exercise control." *Givens*, 237 Ill. 2d at 335. In cases of joint possession, "the evidence must support a conclusion that the defendant had control, or the ability to exercise control, over the contraband." *McIntyre*, 2011 IL App (2d) 10089, ¶17. Based on the record, the State presented no evidence that respondent had any shared intention or power to exercise control over the weapon. The State bases its argument on Ramirez's testimony that during the first of the two encounters with the car, he noticed what he called "shuffling." During direct examination, the State asked Ramirez what he meant by the term "shuffling." Ramirez responded "the front one looking towards the back, and the front one looking at the same guy that's looking at him - - right from the front passenger." Ramirez's explanation of the meaning of the term "shuffling," does not support an inference that defendant intended to share power or exercise control over the weapon. Although Ramirez's definition of the term shuffling is not very clear, at most it establishes that the occupants of the car were "looking" at each other, which does not show respondent jointly possessed the weapon.

¶ 30 The State further argues that even if respondent did not have actual or constructive possession of the weapon, he should be held legally accountable for J.Q.'s and Herrejon's actions.

A person is legally accountable for another person's criminal conduct when "either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2012); see also *People v. Dennis*, 181 Ill. 2d 87, 96 (1998).

¶ 31 We hold the State failed to prove respondent was legally accountable for Herrejon's or J.Q.'s actions because the State failed to present any evidence that shows respondent helped or facilitated J.Q. or Herrejon's possession of the gun. Specifically, there was no evidence showing that respondent solicited, aided, agreed, or attempted to help J.Q. or Herrejon possess the weapon at issue. 720 ILCS 5/5-2(c) (West 2012). The State did present evidence that unidentified occupants of the car were verbally harassing Ramirez and that Ramirez saw respondent's leg exiting the car. This evidence, however, supports respondent's adjudication for assault, which he does not contest here. Absent from the record is any evidence that could lead to a reasonable inference that respondent facilitated or helped J.Q. or Herrejon possess the gun. Based on the record before us, we hold respondent is not legally accountable for J.Q.'s or Herrejon's possession of the gun due to the absence of any evidence indicating defendant helped J.Q. or Herrejon possess the weapon.

¶ 32 Accordingly, we reverse respondent's adjudications for aggravated unlawful use of a weapon for possessing a weapon without having a valid FOID card (720 ILCS 5/24-1.6(a)(1)(C) (West 2012)); aggravated unlawful use of a weapon for possessing a weapon while under the age of 21 and not engaged in lawful activities under the Wildlife Code (720 ILCS 5/24-1.6(a)(1)(I) (West 2012)); and unlawful possession of a firearm for possessing a firearm while under 18 years of age (720 ILCS 5/24-3.1(a)(1) (West 2012)) because the State failed to show defendant

actually or constructively possessed the weapon, or that he should be held legally accountable for J.Q.'s or Herrejon's possession of the weapon. We affirm respondent's adjudication for aggravated assault (720 ILCS 5/12-2(c)(1) (West 2012)), and remand the matter for sentencing.

¶ 33 We note that respondent also raises two issues concerning the constitutionality of the aggravated unlawful use of a weapon statute. 720 ILCS 5/24-1.6 (West 2012). Due to our conclusion in this case, we need not address these arguments. Our decision not to address these issues is consistent with the principle that reviewing courts should resolve disputes on nonconstitutional grounds. *People v. Jackson*, 2013 IL 113986, ¶14 ("This court has repeatedly cited the general principle that courts will address constitutional issues only as a last resort, relying whenever possible on nonconstitutional grounds to decide cases.").

¶ 34 CONCLUSION

¶ 35 The judgment of the circuit court of Cook County is affirmed in part and reversed in part. Cause remanded for resentencing.

¶ 36 Affirmed in part, reversed in part. Cause remanded.