2018 IL App (1st) 172954-U

SIXTH DIVISION
Order filed: May 25, 2018

No. 1-17-2954

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

In re AMARI N., a Minor,	)	Appeal from the
	)	Circuit Court of
Minor-Appellant,	)	Cook County
	)	
(The People of the State of Illinois,	)	
	)	
Petitioner-Appellee,	)	
	)	
v.	)	No. 17 JD 1433
	)	
Amari N.,	)	Honorable
	)	Kristal Royce Rivers,
Respondent-Appellant).	)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Connors and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: We reverse the trial court's judgment adjudicating the respondent delinquent by reason of his commission of aggravated unlawful use of a weapon where a police officer's course-of-investigation testimony contained inadmissible hearsay and the evidence failed to prove that the respondent possessed a firearm.

¶ 2 The respondent, Amari N., appeals from the trial court's judgment adjudicating him a delinquent minor by reason of his commission of one count of aggravated unlawful use of a

weapon (AUUW) and the resulting sentence of 24 months' probation, 30 days' electronic monitoring, and 30 hours' community service. The respondent argues that (1) the trial court erred by considering hearsay contained in a police officer's course-of-investigation testimony as substantive evidence of his guilt, and (2) the State failed to prove him guilty of AUUW beyond a reasonable doubt. For the reasons that follow, we reverse.

¶ 3 The State alleged in a petition for adjudication of wardship that the 16-year-old respondent committed two counts of AUUW and one count of unlawful possession of a firearm (UPF). The first AUUW count alleged that the respondent knowingly carried a firearm when he was not on his own land, home, or fixed place of business, and did not have a valid Firearm Owner's Identification (FOID) card (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2016)). The second AUUW count alleged that the respondent, being under age 21 and not engaged in lawful activities under the Wildlife Code (520 ILCS 5/1.1 *et seq.* (West 2016)), carried a firearm on his person (720 ILCS 5/24-1.6(a)(1), (a)(3)(I) (West 2016)). The UPF count alleged that the respondent, while under age 18, knowingly possessed a firearm that could be concealed upon his person (720 ILCS 5/24-3.1(a)(1) (West 2016)).

¶ 4 The matter proceeded to a bench trial where the following evidence was adduced.

¶ 5 Chicago Police Officer Escobedo, the State's sole witness, testified that, at approximately 1:30 p.m. on July 29, 2017, he was in an unmarked vehicle with two other officers and received a call from "dispatch" regarding a "[m]ale black" carrying a "red backpack" with "a firearm inside." Trial counsel objected on the basis that the dispatch call constituted inadmissible hearsay. The prosecutor responded that Officer Escobedo's testimony as to the dispatch call was "just for the course of conduct, *** not for the truth therein." The judge overruled trial counsel's objection without comment.

¶ 6 Officer Escobedo stated that he and the other officers went to 80th Street and Ashland Avenue, where he observed the respondent carrying a red backpack while riding a bicycle "in and out of traffic." Officer Escobedo exited the vehicle and ordered the respondent to stop, but he crossed the street, abandoned the bicycle, and ran into a vacant lot. A foot pursuit ensued, in which Officer Escobedo chased the respondent through an alley and into the rear yard of 8040 South Marshfield Avenue, where he found the respondent "crouch[ing] by" a detached garage. The respondent then ran into the alley, raised his hands, and was arrested. Officer Escobedo did not find a firearm on the respondent's person or in his backpack, but told another officer, Sergeant Vargas, "to go back to where I observed [the respondent] crouching by the garage." When Officer Escobedo relocated to the garage, he observed Sergeant Vargas holding a "handgun, no more than five inches in length." On cross-examination, he acknowledged that the incident occurred in a high-crime area and that he never saw the respondent with a firearm. The recovered firearm was not subject to forensic testing, and Officer Escobedo's reports did not mention that he observed the respondent "crouch[ing] by the garage."

¶ 7 The State entered the stipulated testimony of Sergeant Vargas, who, if called to testify, would state that he went "to the area where the [respondent] was seen by the rear of the garage" and found a loaded "semiautomatic handgun" on a windowsill, "slightly covered by a piece of wood."

¶ 8 Following this evidence, the State rested. The respondent moved for a directed finding, which was denied. Thereafter, he rested without presenting any evidence. During closing arguments, the State submitted that the respondent "matched the description of an earlier call of a person with a firearm," and a firearm was recovered at the garage where he was found hiding.

¶ 9 The trial court found the respondent delinquent of UPF and AUUW based on his age, and not delinquent of AUUW based on lacking a valid FOID Card. In her oral findings, the judge stated that the respondent would not have been found delinquent had the evidence only shown that he was "in the vicinity" of where the firearm was found. The judge explained, however, that Officer Escobedo testified credibly and that evidence of "guilt on the [respondent's] part" included the fact that he "match[ed] the description of someone having a gun," fled from officers, and "crouch[ed] down in the area where" the firearm was recovered. The judge added that "the only logical reason" for the respondent to surrender at that juncture was that "he's the one who *** placed the gun wherever it was found by [Sergeant] Vargas which is in the exact same area that [the respondent] was seen by Officer Escobedo," and, "[f]or that reason, *** [the respondent is] found guilty."

¶ 10 The matter proceeded to a sentencing hearing, where the trial court merged the respondent's UPF adjudication into his AUUW adjudication and imposed sentence of 24 months' probation, 30 days' electronic monitoring, and 30 hours' community service. This appeal followed.

¶ 11 On appeal, the respondent first contends that the trial court erred in considering Officer Escobedo's hearsay testimony regarding the dispatch call as substantive evidence of his guilt.[1] The State argues that, even if the trial court erred in this regard, the error was harmless.

¶ 12 This court reviews evidentiary decisions *de novo* when, as in this case, "the only issue *** is the correctness of the trial court's legal interpretation" of a rule of evidence, including the rule against hearsay. *People v. Risper*, 2015 IL App (1st) 130993, ¶¶ 33-35.

[1] In his brief on appeal, the respondent asks this court to consider the hearsay issue as a matter of plain error or ineffective assistance of counsel because "trial counsel did not make a contemporaneous objection or file a posttrial motion." As noted, however, trial counsel objected to the hearsay testimony at trial. Minors in delinquency proceedings "must object at trial to preserve a claimed error for review" but "are not required to file a postadjudication motion." *In re Samantha V.*, 234 Ill. 2d 359, 368 (2009).

¶ 13 The rule against hearsay generally prohibits "the introduction at trial of such out-of-court statements that are offered to prove the truth of the matter asserted." *People v. Peterson*, 2017 IL 120331, ¶ 17. Testimony regarding an out-of-court statement that is offered to prove something other than the truth of the matter asserted is not hearsay and, relevant to this case, may be introduced "for the limited purpose of showing the course of a police investigation where such testimony is necessary to fully explain the State's case to the trier of fact." *People v. Williams*, 181 Ill. 2d 297, 313 (1998). Thus, "an officer may testify to *** the existence of conversations, without violating the hearsay rule," even where "a logical inference may be drawn that the officer took subsequent steps as a result of the substance of that conversation." *People v. Jones*, 153 Ill. 2d 155, 159-60 (1992). However, an officer may not testify to "the substance of the conversation" where it relates to "whether the defendant was the man who committed the crime," because "if the substance of the conversation came into evidence it would inevitably go to prove the matter asserted." *Id.* at 160.

¶ 14 In this case, Officer Escobedo testified that he received a call from "dispatch" regarding a "[m]ale black" carrying a "red backpack" with a firearm inside. The dispatch call's content goes to prove the matter asserted, *i.e.*, that the respondent, who Officer Escobedo later saw carrying a red backpack, was the individual who reportedly possessed a firearm. Consequently, we agree with the parties that Officer Escobedo's testimony regarding the content of the dispatch call was inadmissible under the course-of-investigation exception and should not have been admitted at trial. Compare *People v. Jura*, 352 Ill. App. 3d 1080, 1088 (2004) (finding error where officers testified that the defendant matched the description of a person with a firearm provided in a dispatch call, as the substance of the call related to "whether the defendant was the man who possessed the gun") with *People v. Gacho*, 122 Ill. 2d 221, 247-48 (1988) (finding no error

where an officer testified that he "spoke" to the victim and then "look[ed] for" the defendant, as he did not relate the conversation's substance).

¶ 15 Having found that the trial court erred in admitting Officer Escobedo's hearsay testimony regarding the substance of the dispatch call, we next consider whether that error was harmless. As the respondent preserved this issue in the trial court, "the State has the burden of persuasion with respect to prejudice." *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009). Courts consider three factors in determining whether the admission of improper evidence was harmless: (1) whether the error contributed to the conviction; (2) whether the improperly admitted evidence was cumulative or duplicative of the properly admitted evidence; and (3) whether the other evidence in the case overwhelmingly supported the conviction. *People v. Drake*, 2017 IL App (1st) 142882, ¶ 27.

¶ 16 The State maintains that the trial court's consideration of Officer Escobedo's hearsay testimony regarding the substance of the dispatch call was harmless because the judge's remarks show that the hearsay was not the primary reason for the respondent's delinquency adjudication. According to the State, the judge expressly stated that she relied on other evidence, including the respondent's flight from police; the fact that he suddenly stopped to crouch by a garage; his surrender immediately afterwards; and the recovery of the firearm "in the area of the garage where [the respondent] had been last seen." We disagree.

¶ 17 Turning to the harmless-error factors, the record shows that Officer Escobedo's hearsay testimony was not cumulative of other evidence, as no evidence, other than the dispatch call, suggested that anyone had identified the respondent as possessing a firearm when officers encountered him. That testimony contributed to the respondent's delinquency adjudication, as the judge stated that "evidence" of his guilt included, *inter alia*, the fact that he "match[ed] the

description of someone having a gun." See *People v. Naylor*, 229 Ill. 2d 584, 603-04 (2008) (although a reviewing court presumes that, in a bench trial, the trial court "disregarded inadmissible evidence in reaching its conclusion," that presumption "may be rebutted where the record affirmatively shows the contrary" (internal quotation marks omitted)). While the judge also stated that the "reason" for the respondent's delinquency adjudication was the fact that he surrendered to officers soon after he was seen crouching by the garage where the firearm was discovered, that evidence did not overwhelmingly establish that he possessed the firearm. No witness saw him in possession of the firearm, no testimony suggested that he attempted to conceal a firearm as he fled or crouched by the garage, and no physical evidence either connected him to the firearm that Sergeant Vargas recovered or established when it was placed on the windowsill. Consequently, we cannot say the trial court's consideration of Officer Escobedo's hearsay testimony regarding the substance of the dispatch call as substantive evidence of the respondent's guilt was harmless.

¶ 18 Because double jeopardy bars retrial after reversal where the evidence at the first trial was not sufficient to support a conviction, we must review the respondent's claim of insufficiency of evidence. See *People v. Olivera*, 164 Ill. 2d 382, 393 (1995). "If the evidence presented at the first trial, including the improperly admitted evidence, would have been sufficient for any rational trier of fact to find the essential elements of the crime proven beyond a reasonable doubt, retrial is the proper remedy." *People v. McKown*, 236 Ill. 2d 278, 311 (2010).

¶ 19 To sustain a delinquency adjudication for AUUW, the State was required to prove that the respondent knowingly carried a firearm while under the age of 21 and not engaged in lawful activities under the Wildlife Code (520 ILCS 5/1.1 *et seq.* (West 2016)). 720 ILCS 5/24-

1.6(a)(1), (a)(3)(I) (West 2016)). The respondent does not challenge that he was under age 21 and not engaged in lawful wildlife activity, but disputes the issue of possession.

¶ 20 When, as here, a respondent is not found in actual possession of a firearm, the State must prove constructive possession. See *People v. Hunter*, 2013 IL 114100, ¶ 19. To establish constructive possession, the State must prove that the respondent (1) had knowledge of the presence of the firearm, and (2) exercised immediate and exclusive control over the area where it was found. *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 17. "In deciding whether constructive possession has been shown, the trier of fact is entitled to rely on reasonable inferences of knowledge and possession, absent other factors that might create a reasonable doubt as to the defendant's guilt." *Id.* (citing *People v. Smith*, 191 Ill. 2d 408, 413 (2000)). Thus, the State may establish the knowledge element by offering evidence of acts, declarations, or conduct from which it can be inferred that the respondent knew that contraband existed in the place where it was found. *People v. Pintos*, 133 Ill. 2d 286, 292 (1989). The State may prove the control element by showing that the respondent had the intent and ability to maintain control and dominion over an item, even if he lacked personal present dominion over it. *People v. Frieberg*, 147 Ill. 2d 326, 361 (1992).

¶ 21 In analyzing the issue of constructive possession, our supreme court's decision in *People v. Jackson*, 23 Ill. 2d 360 (1961), is instructive. In *Jackson*, police officers executed a search warrant at the defendant's apartment and she ran into her bathroom, carrying a purse, and locked the door. *Id.* at 361. When officers entered the bathroom, they found the open purse on the floor and a package of dry and clean drugs in an otherwise dirty and wet airwell beneath the window. *Id.* at 362. The court noted that the airwell was accessible to other apartments and no evidence of record was "sufficient to show that the defendant ever had possession" of the drugs, even if that

was likely the case. *Id.* at 364-65. As the court explained, although a defendant's suspicious conduct in the vicinity of narcotics may prove the element of knowledge, "knowledge of the location of narcotics is not the equivalent of possession." *Id.* at 364. Because the State failed to establish that the defendant "exercised some actual or potential dominion over the narcotics," her conviction was reversed. *Id.* at 365.

¶ 22 Pursuant to *Jackson*, this court has consistently found that suspicious conduct which supports the knowledge prong of constructive possession does not automatically establish the control prong. In *People v. Stewart*, 27 Ill. App. 3d 520, 521-22 (1975), for example, witnesses observed the defendant stooping over in an area of a parking where narcotics were later recovered. As no witness "saw anything in the defendant's hand or anything thrown out of [the] defendant's car," we found that his suspicious conduct "would be sufficient to show guilty knowledge" but not possession of the narcotics. *Id.* at 525. Similarly, in *People v. Evans*, 72 Ill. App. 2d 146, 147 (1966), officers approached the defendant in a bar based on a tip that someone matching his description possessed narcotics. The defendant quickly left his seat and the officers found packages of narcotics stuck under the bar with chewing gum. *Id.* We found that the defendant's conduct was insufficient to establish possession, as no evidence showed that he handled the packages or how long they were present. *Id.* at 147, 149.

¶ 23 Here, the evidence adduced at trial established that Officer Escobedo responded to a dispatch call regarding an individual with a firearm in a red backpack. He observed the respondent with a red backpack and ordered him to stop. The respondent fled and Officer Escobedo chased him into a yard, where he observed the respondent "crouch[ing] by" a garage. The respondent then ran into the alley, where he raised his hands and was arrested. Afterwards,

Sergeant Vargas went "to the area where the [respondent] was seen by the rear of the garage" and found a firearm on the windowsill.

¶ 24 In this case, as in *Jackson*, *Stewart*, and *Evans*, the respondent fled when officers approached him and, subsequently, was observed acting suspiciously—specifically, crouching—near the garage where the firearm was recovered. As in *Jackson*, *Stewart*, and *Evans*, no evidence showed that the respondent exercised control of the firearm before or after he reached the garage, or that he had control of the garage, or that the firearm was not present before he arrived. *Cf. People v. McLaurin*, 331 Ill. App. 3d 498, 503 (2002) (finding constructive possession where "evidence indicated that the cocaine had been placed under the siding so recently that the drug-sniffing dog could not detect its odor," and no evidence indicated that any person besides the defendant "was in that area during the period between when the cocaine would have been placed there and when the police found it"); *People v. Peete*, 318 Ill. App. 3d 961 (2001) (finding constructive possession where an officer observed the defendant holding his waistband and the person who owned the property where the firearm was found testified that "he had never seen the gun there before"). Viewing this evidence in the light most favorable to the State, we can say, at most, that the State established "the discovery of [contraband] in an area where the [respondent] had been seen behaving suspiciously." *Stewart*, 27 Ill. App. 3d at 525. While these circumstances may support an inference of knowledge pursuant to the first prong of constructive possession, they do not support a finding of actual or potential control under the facts adduced at trial. See *People v. Adams*, 161 Ill. 2d 333, 345 (1994) ("Constructive possession may exist even where an individual is no longer in physical control of the drugs, *provided that he once had physical control* of the drugs with intent to exercise control in his own behalf, and he has not abandoned them and no other person has obtained possession." (emphasis

added)). Consequently, the evidence failed to establish that the respondent possessed the recovered firearm.

¶ 25 Because the evidence in this case was insufficient to prove that the respondent possessed the recovered firearm, we find that the State did not prove each element of AUUW beyond a reasonable doubt. The respondent's delinquency adjudication for AUUW is, therefore, reversed. As possession was not established, the respondent's delinquency adjudication for UPF, which the trial court merged into the AUUW adjudication, is also reversed. Finally, because the reversals of the respondent's adjudications are premised on insufficient evidence, a retrial is barred by double jeopardy. See *Olivera*, 164 Ill. 2d at 393.

¶ 26 For all the foregoing reasons, the judgment of the trial court is reversed.

¶ 27 Reversed.