

NOTICE
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2016 IL App (5th) 150432-U

NO. 5-15-0432

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

<i>In re</i> W.S., a Minor)	Appeal from the
)	Circuit court of
(The People of the State of Illinois,)	St. Clair County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 15-JD-63
)	
W.S.,)	Honorable
)	Walter C. Brandon, Jr.,
Defendant-Appellant).)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Welch and Moore concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's finding defendant guilty of attempted aggravated vehicular hijacking is affirmed where the State proved defendant guilty beyond a reasonable doubt. The trial court did not admit improper hearsay into evidence.

¶ 2 Defendant, W.S., a minor, appeals from his adjudication of delinquency in which he was found guilty of attempt to commit aggravated vehicular hijacking and placed on probation. On appeal, defendant alleges the State failed to prove him guilty beyond a reasonable doubt. Alternatively, defendant alleges the trial court admitted improper hearsay into evidence. We affirm.

¶ 3 We note that pursuant to Illinois Supreme Court Rule 311(a)(5) (eff. Feb. 26, 2010) our decision in this case was to be filed on or before March 10, 2016, absent good cause shown. Motions for extension of time to file briefs were filed by defendant-appellant. Defendant-appellant's brief was filed on January 29, 2016, and plaintiff-appellee's brief was filed on March 2, 2016. Defendant-appellant's reply brief was filed on March 16, 2016. Oral argument was heard on April 14, 2016. As a result of these legitimate delays, we find that good cause exists for issuing our decision after March 10, 2016.

¶ 4 **BACKGROUND**

¶ 5 This appeal stems from an exchange that occurred between three individuals. On January 27, 2015, defendant and Christopher Farr (Chris) engaged in an altercation with Kezijon McGraw as Kezijon sat in his automobile. Two days thereafter, the State filed a petition to adjudicate defendant delinquent on one count of attempt to commit aggravated vehicular hijacking. 720 ILCS 5/8-4(a), 18-4(a)(4) (West 2012). The petition alleged that defendant, with the intent to commit aggravated vehicular hijacking, reached through Kezijon's passenger car window and placed a gun to Kezijon's chest.

¶ 6 The State proceeded to trial on July 16, 2015. Defendant and Kezijon testified as the sole eyewitnesses to the altercation. There was no dispute that Kezijon was in his car at the time of the exchange with defendant and Chris, or that Chris attempted to take Kezijon's automobile by force. There was dispute, however, concerning whether defendant was in possession of a firearm at the time of the altercation and whether

defendant possessed the requisite intent to commit attempted aggravated vehicular hijacking.

¶ 7 Kezijon testified that during the exchange, defendant held a small silver object that looked like a gun against Kezijon's head and chest. Defendant testified he was talking with Chris outside at the time Kezijon pulled his car to a stop, and that he stood back from Kezijon's vehicle when Chris and Kezijon began "tussling and stuff." Defendant testified he did not have a gun during the exchange, and further testified the only object he held during the altercation was his cell phone in his right hand.

¶ 8 After listening to all testimony, including testimony from Kezijon, defendant, and responding and investigating officers, defendant was found guilty of attempt to commit aggravated vehicular hijacking. Defendant filed a posttrial motion which was denied, and the trial court subsequently imposed probation. Defendant then timely filed a notice of appeal. For the following reasons, we affirm.

¶ 9 ANALYSIS

¶ 10 I. Failure of Proof Beyond a Reasonable Doubt

¶ 11 Defendant first alleges the State failed to prove him guilty beyond a reasonable doubt. Specifically, defendant argues the State provided insufficient evidence that he possessed a firearm and insufficient evidence that he possessed the requisite criminal intent to commit attempted aggravated vehicular hijacking.

¶ 12 We first address defendant's claim that the State provided insufficient evidence regarding possession of a firearm. When presented with a challenge to the sufficiency of the evidence, it is not the function of a reviewing court to retry the defendant. *People v.*

Givens, 237 Ill. 2d 311, 334, 934 N.E.2d 470, 484 (2010). Rather, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the requisite elements of the crime beyond a reasonable doubt. *Givens*, 237 Ill. 2d at 334, 934 N.E.2d at 484. Thus, it is our duty in this case to carefully examine the evidence while giving due consideration to the fact that the trial court, and in other cases the jury, saw and heard the witnesses. *People v. Smith*, 185 Ill. 2d 532, 541, 708 N.E.2d 365, 369 (1999).

¶ 13 A conviction will only be set aside where the evidence is so improbable or unsatisfactory as to create reasonable doubt of the defendant's guilt. *People v. Hall*, 194 Ill. 2d 305, 330, 743 N.E.2d 521, 536 (2000). Under this standard, this court "must allow all reasonable inferences from the record in favor of the prosecution." *Givens*, 237 Ill. 2d at 334, 934 N.E.2d at 484. The weight to be given the witnesses' testimony, the witnesses' credibility, and the reasonable inferences to be drawn from the evidence are all the responsibility of the fact finder. *People v. Pryor*, 372 Ill. App. 3d 422, 429, 865 N.E.2d 279, 286 (2007).

¶ 14 The testimony of a single witness, if it is positive and the witness credible, is sufficient to convict. *Smith*, 185 Ill. 2d at 541, 708 N.E.2d at 369. It follows that where the finding of guilt depends on eyewitness testimony, a reviewing court must decide whether, in light of the record, a trier of fact could reasonably accept the testimony as being true beyond a reasonable doubt. *People v. Wright*, 2015 IL App (1st) 123496, ¶ 73, 33 N.E.3d 781. Circumstantial evidence is also sufficient to sustain a criminal conviction, so long as the elements of the crime have been proven beyond a reasonable

doubt. *Pryor*, 372 Ill. App. 3d at 429, 865 N.E.2d at 286. However, the trier of fact does not need to be satisfied beyond a reasonable doubt regarding each link in the chain of circumstances. *Hall*, 194 Ill. 2d at 330, 743 N.E.2d at 536. It is sufficient if all of the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *Hall*, 194 Ill. 2d at 330, 743 N.E.2d at 536.

¶ 15 Here, defendant was charged with attempt to commit aggravated vehicular hijacking. A person commits the offense of attempt when, with the intent to commit a specific offense, he or she does any act that constitutes a substantial step toward the commission of that offense. 720 ILCS 5/8-4(a) (West 2012). A person commits vehicular hijacking when he or she knowingly takes a motor vehicle from the person or the immediate presence of another by the use of force or by threatening the imminent use of force. 720 ILCS 5/18-3(a) (West 2012). A factor in aggravation, which is included within defendant's charge, arises when a person carries on or about his or her person or is otherwise armed with a firearm. 720 ILCS 5/18-4(a)(4) (West 2012).

¶ 16 Kezijon testified at trial regarding whether defendant was armed with a firearm during the altercation:

"I was coming around the corner, slowed to brake. And to my left side, on my driver's side, there was [defendant] and Chris on the curve. They ran up to the side of my car, stuck something in the window. Seemed like to me it was a gun. And then Chris demanded for me to get out the car, opened up the side of the door."

¶ 17 Kezijon then positively identified defendant in court, and the State elicited further testimony from Kezijon regarding the incident. When asked by the State about

defendant's conduct when defendant approached Kezijon's car, Kezijon replied, "He didn't say a word. He just stuck something in the car that appeared to me, it looked like a gun. It could have been anything." Kezijon described the object as small and silver, and testified that defendant initially directed the object towards his head and then chest. When asked what made him think the object was a gun, Kezijon replied, "The way, yeah, he was holding it." The record further indicates Kezijon put his hands in the air after he observed defendant holding what he believed to a gun, but did not think he would be killed because "no shots didn't go off."

¶ 18 The topic regarding possession of a firearm continued when Kezijon testified that he spoke to defendant over the phone later in the evening after the incident occurred:

"Q. [Attorney for the State]: Do you remember what you said exactly when you asked about that object?

A. Yes.

Q. What did you say?

A. I said, 'What was that silver in your hand?' And I asked [defendant], 'Was that a gun?' And [defendant] said—and that's when he had paused. [Defendant] was, like, 'Nah, that's just my phone.'

Q. So he said that the thing he stuck through the window was his phone?

A. Yes."

Further, on cross-examination, defense counsel asked Kezijon, "Then you said you got the gun in your chest?," to which he replied, "Yes."

¶ 19 Given Kezijon's testimony, when viewed in a light most favorable to the prosecution, there is a sufficient basis upon which a reasonable trier of fact could have found that defendant possessed a firearm beyond a reasonable doubt. The testimony of a single eyewitness is sufficient to convict. *Smith*, 185 Ill. 2d at 541, 708 N.E.2d at 369. Here, Kezijon presented circumstantial evidence that defendant was armed with a gun. The trial court weighed this testimony along with defendant's testimony denying that he was in possession of a firearm during the exchange, and determined defendant was guilty of attempted aggravated vehicular hijacking. This is not an unreasonable result. Accordingly, we affirm the trial court's judgment.

¶ 20 Defendant argues his adjudication should be reversed because Kezijon could not unequivocally identify that defendant was in possession of a firearm during the exchange. As defendant indicates, no firearm was recovered after the incident and defendant repeatedly denied that he was in possession of a firearm. Defendant further indicates that Kezijon testified he "couldn't really see" what he perceived to be a gun and that it "could have been anything." There was no testimony regarding seeing a barrel or handle of a gun, only a small silver object. Defendant contends this was insufficient evidence to prove defendant guilty beyond a reasonable doubt that he was in possession of a firearm and not some other object. We disagree.

¶ 21 Defendant cites to a number of cases in support of his argument that an eyewitness's testimony must be unequivocal that the defendant was in possession of a firearm to convict. The term "unequivocal" is defined as follows: "Unambiguous; clear; free from uncertainty." *Black's Law Dictionary* 1563 (8th ed. 2004).

¶ 22 Here, Kezijon unequivocally testified that he believed the object defendant held in his hand during the exchange was a gun by the way "he was holding it." Kezijon further testified that defendant pointed the object to his head and then chest. This is circumstantial evidence that defendant was in possession of a firearm.

¶ 23 Although we recognize Kezijon stated that the object "seemed" like a gun and further stated "[i]t could have been anything," Kezijon's testimony, when read in its entirety, firmly and unequivocally establishes that he perceived defendant to be in possession of a firearm. Further, we acknowledge defendant indicates Kezijon also stated "[c]ouldn't really see" when testifying about whether he saw a gun. However, we find defendant takes this statement out of context. Immediately thereafter, Kezijon testified in response to a question of whether Kezijon knew defendant was holding a gun: "Pretty much. If you point it like a gun, it's exactly—that's what goes in my mind, I think it's a gun." For these reasons, we find the State proved beyond a reasonable doubt that defendant was in possession of a firearm. Accordingly, we reject defendant's argument.

¶ 24 We next turn to defendant's contention that the State provided insufficient evidence that he possessed the requisite criminal intent to commit attempted aggravated vehicular hijacking. As we previously indicated, vehicular hijacking requires that a defendant "knowingly" take a motor vehicle from a person or the immediate presence of another by the use of force or by threatening the imminent use of force. 720 ILCS 5/18-3(a) (West 2012). The State was required to prove that defendant knowingly attempted to take Kezijon's vehicle beyond a reasonable doubt.

¶ 25 Criminal intent not only can be inferred from, but is usually proven by, circumstantial evidence. *People v. Maggette*, 195 Ill. 2d 336, 354, 747 N.E.2d 339, 349 (2001). However, the mere presence of a defendant at the scene of a crime is insufficient to make the defendant accountable, even if it is coupled with the defendant's flight from the scene or the defendant's knowledge that a crime has been committed. *People v. Johnson*, 2014 IL App (1st) 122459-B, ¶ 132, 23 N.E.3d 1216. Further, an inference of intent is not permissible if there are circumstances which are inconsistent with the intent to commit the crime. *People v. Davis*, 233 Ill. App. 3d 878, 880, 600 N.E.2d 88, 90 (1992).

¶ 26 Based upon our careful review of the evidence in light of the foregoing principles, we conclude a rational trier of fact could have found defendant possessed the requisite intent to commit attempted aggravated vehicular hijacking. When the State asked Kezijon about defendant's actions when he approached his vehicle, Kezijon replied, "He didn't say a word. He just stuck something in the car that appeared to me, it looked like a gun. It could have been anything." Defendant's act of placing the object which Kezijon perceived to be a gun and subsequently directing the object at Kezijon's head and chest constituted a substantial step towards the commission of the crime for which defendant was charged. It was at this point that defendant knowingly attempted to commit aggravated vehicular hijacking. Further, there is nothing in the record which suggests a reason for Kezijon to implicate defendant falsely. For these reasons, we find the State proved beyond a reasonable doubt that defendant possessed the requisite intent to commit attempted aggravated vehicular hijacking.

¶ 27

II. Hearsay

¶ 28 Alternatively, defendant argues the trial court's judgment should be reversed and remanded for a new adjudication proceeding because it admitted improper hearsay which bolstered Kezijon's credibility. Specifically, defendant contends the trial court erred in allowing Sergeant Bowers to recount Kezijon's out of court statement in detail. Defendant alleges this allowed the State to improperly argue that such hearsay corroborated Kezijon's testimony and subsequently caused the trial court to find Kezijon credible because he was consistent.

¶ 29 The admission of evidence is within the trial court's sound discretion, and will not be reversed absent a clear showing of an abuse of that discretion. *People v. Caffey*, 205 Ill. 2d 52, 115, 792 N.E.2d 1163, 1202 (2001). Hearsay evidence is an out of court statement offered to prove the truth of the matter asserted, and is generally inadmissible due to its lack of reliability unless it falls within an exception to the hearsay rule. *Caffey*, 205 Ill. 2d at 88, 792 N.E.2d at 1187. In contrast, testimony of an out of court statement not offered for its truth, but rather offered to show or explain the course of conduct of another, does not constitute hearsay and is admissible. *People v. O'Toole*, 226 Ill. App. 3d 974, 988, 590 N.E.2d 950, 959 (1992). Out of court statements explaining a course of conduct should be admitted only to the extent necessary to provide that explanation and should not be admitted if they reveal unnecessary and prejudicial information. *O'Toole*, 226 Ill. App. 3d at 988, 590 N.E.2d at 959-60. Further, testimony about the steps of an investigation may not include substance of a conversation with a nontestifying witness. *People v. Boling*, 2014 IL App (4th) 120634, ¶ 107, 8 N.E.3d 65.

¶ 30 Here, Bowers's testimony that defendant claims was improperly permitted concerned an out of court conversation between Bowers and Kezijon shortly after the altercation. This testimony occurred during the State's direct examination of Bowers:

"Q. [Attorney for the State]: Why were you dispatched there?

A. I was advised there was an attempted vehicular hijacking.

Q. What did you do when you arrived?

A. I spoke with [Kezijon]. And he's the one that advised me that he had been driving and somebody had tried to carjack him.

Q. And what did Kezijon tell you about what happened?

A. He said that he was going to Pizza Hut to meet up with some friends.

And that he went the back way—

[Attorney for Defendant]: Objection. Hearsay.

[The Court]: Response?

[Attorney for the State]: Your Honor, I would ask that this be admitted, not for the truth of the matter asserted, but for the [Bowers's] course of conduct of his investigation.

[The Court]: Response?

[Attorney for Defendant]: It seems to me the course of his conduct of his investigation is that he's at the house and he's questioning the individual. The facts of the questioning merely come to prove the fact—to prove—try and prove what

happened. The course of the investigation is he was at Kezijon's house and questioned him.

[The Court]: I'm going to overrule the objection. I'll allow it.

[Attorney for the State]: Thank you.

Q. [Attorney for the State]: What did Kezijon tell you?

A. He advised me that he was going to meet up with people at Pizza Hut, that he drove a back route to Pizza Hut. The back route consisted of his road to Saint Stephens, Saint Raphael and Saint Kevin area. And then he would have turned and went to Pizza Hut. He said that when he turned at the circle, there was no light. And as he made the turn, two people approached his vehicle. He had his window down. One stuck a gun in the window, put it up against his chest. And that he recognized that person as [defendant]. And that another person reached in and grabbed his phone. He recognized that gentleman as Chris, somebody who he believed lived in the area, was from the area, and that he knew had recently got out of jail.

Q. So based on what Kezijon told you, did you identify any suspects for this situation?

A. Well, [defendant], based on his identification. He said he knew him, he went to school with him. The Chris subject was identified later, after speaking with another officer that had been in the area and handled a previous complaint."

¶ 31 After careful review, we cannot say the trial court abused its discretion in permitting Bowers to testify over defense counsel's hearsay objection. We find

defendant's assertion that Bowers's testimony "went way beyond recounting" his conversation with Kezijon is misplaced. A police officer may testify regarding the steps taken in an investigation of a crime " 'where such testimony is necessary and important to fully explain the State's case to the trier of fact.' " *Boling*, 2014 IL App (4th) 120634, ¶ 107, 8 N.E.3d 65 (quoting *People v. Simms*, 143 Ill. 2d 154, 174, 572 N.E.2d 947, 954-55 (1991)). Here, Bowers's testimony explained the course of conduct in his investigation as to who was a suspect in the attempted hijacking, namely defendant, and did not reveal unnecessary or prejudicial information. Accordingly, because such testimony is admissible, we reject defendant's argument.

¶ 32 In the alternative, presuming Bowers's testimony constituted improper hearsay and error, we find the error was harmless. The remedy for erroneous admission of hearsay is reversal unless the record clearly indicates the error was harmless. *People v. Miles*, 351 Ill. App. 3d 857, 867, 815 N.E.2d 37, 46 (2004). It is harmless error "only if properly admitted evidence is so overwhelming that no fair-minded trier of fact could reasonably have acquitted." (Internal quotation marks omitted.) *Miles*, 351 Ill. App. 3d at 867, 815 N.E.2d at 46.

¶ 33 In this case, when not considering Bowers's testimony regarding his conversation with Kezijon, we find the evidence to be overwhelming. Kezijon testified several times that defendant held an object which he perceived to be a gun, and stated defendant held that object to his head and chest. Further, we find nothing from the record which suggests the trial court's finding Kezijon's testimony to be consistent and credible was a

result of it considering Bowers's testimony. For these reasons, assuming Bowers's testimony constituted improper hearsay and error, we find the error was harmless.

¶ 34 Defendant further asserts Bowers's alleged hearsay testimony includes a different detail than Kezijon's testimony. Specifically, defendant indicates Bowers testified that Kezijon said "there was no light," while Kezijon testified, "I took off down the street in front of the street light." Because one of the trial court's key findings was based on there being no lights on the street where the exchange occurred, defendant alleges the trial court's judgment should be reversed.

¶ 35 After the defense rested, the trial court stated:

"I do believe that the key that I find in this, that the individuals didn't know that the car belonged to someone that they knew because there were no lights on this street. [Kezijon] ID'd [defendant] and Chris once they ran up to the car."

¶ 36 After a careful review of the record, we find defendant's argument is misplaced. The trial court's above statement merely suggests it was dark at the scene of the altercation. Further, Kezijon only testified regarding a street light after he drove away from the incident:

"And I told [police] I took off down the street in front of the street light. And I began to check myself, my—because I dropped my phone when me and him was tussling because he tried to get my phone because he couldn't get the car. So I dropped the phone, checked myself, because my phone case broke off."

¶ 37 There is nothing which suggests a discrepancy as to whether there was light near the scene of the incident. When Kezijon was asked why he slowed his vehicle down

immediately prior to the altercation, he replied, "Because it was, like, dark." Bowers testified that immediately prior to defendant and Chris approaching Kezijon's vehicle, Kezijon advised him "there was no light." The only reference to light arises after Kezijon drove away from the incident. For this reason, we do not find the trial court relied on improper evidence in its finding of guilt. Accordingly, we reject defendant's argument.

¶ 38

CONCLUSION

¶ 39 In sum, after viewing the evidence in the light most favorable to the prosecution, we find the trier of fact could find the essential elements of the crime beyond a reasonable doubt. Further, the trial court did not admit improper hearsay. Accordingly, we find that defendant was found guilty of attempted aggravated vehicular hijacking beyond a reasonable doubt. For the reasons stated herein, the judgment of the circuit court of St. Clair County is affirmed.

¶ 40 Affirmed.