2012 IL App (5th) 110045-U

NO. 5-11-0045

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re GEORGE L., an Alleged Delinquent Minor	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	St. Clair County.
	)	
Petitioner-Appellee,	)	
	)	
v.	)	No. 10-JD-228
	)	
GEORGE L.,	)	Honorable
	)	Walter C. Brandon, Jr.,
Respondent-Appellant).	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Welch and Wexstten concurred in the judgment.

ORDER

¶ 1 *Held*: The juvenile respondent did not receive a fair delinquency adjudicatory hearing where evidence that he was implicated by a co-assailant was improperly admitted and considered by the judge. There was sufficient evidence to support adjudication of delinquency; thus, retrial is appropriate.

¶ 2 The respondent, George L., was adjudicated delinquent based on charges of attempt (aggravated robbery) (720 ILCS 5/8-4, 18-5 (West 2010)) and aggravated battery (720 ILCS 5/12-3 (West 2010)). The court admitted evidence that a co-assailant implicated him in a statement to police. The respondent appeals, arguing that (1) he was denied a fair hearing because the improper evidence was considered by the court in finding him delinquent, and (2) the evidence was not sufficient to support the court's ruling beyond a reasonable doubt. We reverse and remand for a new adjudicatory hearing.

¶ 3 The respondent was 15 years old when the events at issue took place. He attended

school with both the victim, Jacob S., and a co-assailant, William L. The incident at issue occurred on July 8, 2010. Jacob testified at the hearing that he was walking home from his friend's house at approximately 9 o'clock that evening when he noticed two individuals following him. Both were "wearing all black." Jacob testified that he did not recognize them immediately. However, he turned around and saw William holding a gun. Jacob recognized William from school. He testified that he recognized William's face as well as his shoes. Jacob testified that William said, "Give me your stuff." Jacob emptied his pockets and told William he had nothing on him. William hit Jacob in the face with the gun and told Jacob that he knew he was lying. The blow caused Jacob's head to go back. At this point, Jacob saw the respondent and recognized him from school.

¶ 4 Jacob was questioned in detail about his ability to recognize the respondent. He testified that when he first saw William and then George, there was enough light from a nearby street lamp for him to see each of them. Although Jacob recognized both boys from his school, he did not have classes with either of them, and did not spend time with either socially. He also testified that George had attended school for only a portion of the school year, and Jacob did not see him outside of school. Jacob noted that George's hair was different when Jacob had last seen him in school than it was on the night of the attack, but testified that he otherwise looked the same as he did in school. In school, George wore his hair in "little twisties," but on the night of the attack, his hair was short.

¶ 5 Jacob testified that he normally wore glasses for distance vision, but he was not wearing them when the incident took place because they were broken. He testified, however, that the respondent was close enough to him that he could see him clearly. Jacob initially testified that when he first noticed George, the distance between George and William was about eight feet, and William was close enough to Jacob to strike him with the gun. Later, however, Jacob testified that George was approximately four feet away from Jacob when he

first saw him. Asked to clarify this discrepancy, he replied: "No. I don't know exactly how far away from me he was but like I don't know."

¶ 6 Jacob further testified that after William hit him with the gun, he tried to run, but he tripped. The two assailants then picked him up over a retaining wall and dragged him across a lawn. Jacob was lying on his stomach as he was dragged across the lawn. He testified that they then began going through his pockets and took off his shoes looking for things to steal. As they did this, one or both assailants hit him with their fists. At some point, Jacob was sitting up in the grass with his back leaning against William's knees while the respondent was in front of him. It is not clear from Jacob's testimony whether he was positioned facing the respondent the entire time they were going through his pockets and shoes.

¶ 7 Jacob next testified that at this point, he noticed a third individual who he had not seen earlier. Jacob saw that he was wearing a gray sweatshirt, but did not recognize him. He testified that the individual told William and the respondent to run because cars were coming, and all three took off running. Jacob testified that the entire attack lasted approximately 2½ to 3 minutes.

¶ 8 Jacob then testified to what occurred after the attack. He stated that the first car he saw was a police car. He approached the car, but the officer told him to back away from the car because he did not want Jacob (whose forehead was bleeding where William had hit him with the gun) to get blood on the car. Jacob backed away and told the officer which direction the assailants had run, but the officer told Jacob that he could not do anything about it. Jacob waited for his mother to arrive to take him to the hospital. There, he was treated and then released. He required stitches to close the gash caused when William struck him with the gun.

¶ 9 Before leaving the hospital, Jacob spoke to Officer Marvin Henderson. The following day, he went to the police station, where he identified William L. and George L. from

photographs. Asked how many photographs he was shown, Jacob stated that he did not remember, but he thought he was shown four photographs.

¶ 10 Officer Henderson testified that he interviewed Jacob S. at the discharge area of Memorial Hospital. Jacob gave him the full name of one suspect, William L. However, he identified the second suspect only as George. Jacob told Officer Henderson that he went to school with both suspects.

¶ 11 Detective Karl Kraft testified that he interviewed Jacob at the police station the following day. He testified that he showed Jacob only two photographs–one of William L. and one of George L. He explained that he showed Jacob only photographs of the two suspects, rather than a full photo array, because this was common practice when a witness knows the suspects. Asked why he showed Jacob a picture of the respondent, Detective Kraft replied, "I spoke with the juvenile detectives [and] *** I asked them basically since it was maybe younger males if they knew anybody named George and they gave me the name of George L. that [was] somebody they were familiar with."

¶ 12 Detective Kraft further testified that he interviewed the respondent on July 21, nearly two weeks after the incident. The respondent denied any involvement in the crime. The following day, he interviewed William L. The State's Attorney asked Detective Kraft, "Did William L. admit to the offense or did he deny involvement?" The respondent objected on the basis of hearsay. The State's Attorney argued that she was offering the testimony "just to show subsequent police action." The court overruled the objection, and the following exchange took place:

> "THE WITNESS [(Detective Kraft)]: He said that he was there that evening on West F with George.
>
> Q. (By [State's Attorney] Ms. Schrempp) So it was–William actually did implicate George?

A. Yes."

¶ 13 Detective Dan Collins was the juvenile detective who told Detective Kraft that the suspect identified as "George" by Jacob S. might be George L. He testified that when Detective Kraft told him the second suspect was named George and attended Pathways School, he thought it might be George L. Detective Collins was familiar with George L. from previous encounters. Contrary to Jacob's testimony, Detective Collins testified that George had worn his hair in a short hairstyle ever since he had known of him.

¶ 14 Detective Collins interviewed the respondent with Detective Kraft on July 21, 2010. He testified that the respondent denied involvement, but told them that he knew Jacob S. from school. In addition, the respondent told them that he was not in school during the final month of the school year, and he had not seen either Jacob or William since he was last in school. Detective Collins further testified that the end of the school year is in May, "so it would have been since April." He further testified that the respondent said he was home all day and all night with a girl named either Kiki or Mimi. The respondent said that his mother came home at some point; however, he did not mention spending time with anyone else, including his uncle, Erran McCray, who testified as an alibi witness at the respondent's hearing. In addition, Detective Collins testified regarding other investigations involving George L.

¶ 15 Erran McCray testified that he was with the respondent from 4:30 in the afternoon onward on the night of the crime. At the time, McCray lived in the same apartment as George L. and his mother (who is McCray's sister). McCray testified that on the evening in question, he and George were hanging out in the hallway of the building next door. They were drinking and smoking marijuana with people named Jay and Jessica and a girl whose name begins with an S. McCray testified that he went into the family's apartment at 8:50 p.m., leaving George outside. George came in with one of his friends at "about 9:10, 9:15,

you know, 9:20, something like that." McCray testified that with the exception of this brief period, he was with George all evening.

¶ 16 The respondent likewise testified that he was with McCray all day because McCray lived with him and his mother. They spent the evening with friends named Jessica and Millie in the evening. The respondent explained that Millie's real name begins with an S, but he calls her Millie because that is her nickname. The respondent admitted that he did not tell Detectives Kraft and Collins that he was with anyone other than Millie. The respondent further testified that he knew both Jacob and William from school, but he did not have any classes with either of them. He stated that he had never had any problems with Jacob, but he did not like William. On cross-examination, the respondent was asked if Jessica and Millie were present to testify. He replied, "No." He was also asked if his ability to remember events was impaired because he had smoked marijuana that evening. The respondent replied, "Not really."

¶ 17 The court found that the State met its burden of proving that the respondent was delinquent. From the bench, the court explained its ruling as follows:

> "Okay. I've taken notes as everyone was testifying and I did have an opportunity to review my notes. In particular[,] I did note that when the victim did testify, *** one thing that did stand out [was] that the victim did state *** that Mr. [George L.] was in front of me going through my pockets. I noticed that. And then also Mr. [S.] stated that he knew William [L.] from school, saw him when he first turned around. *And I go back to the information that was provided by Mr. William [L.] when he identified who was along with him*.
>
> Now, this does boil down to the credibility of the witnesses. I do note for the record that the victim did identify *** the one gentleman that he knew the first and last name of, and he gave the officer a first name of the other individual that he said

he knew, and he said he knew both of them from school. So I did note that [it] was brought to the court's attention that there was sufficient lighting in the area where this incident occurred, that the victim did have an opportunity to identify the one who he identified as [George L.] because there was nothing that obstructed or hindered his vision. Also, that the victim knew both of the parties who were in front of him and who were involved outside of the third individual." (Emphasis added.)

¶ 18 The court adjudicated the respondent delinquent. After a sentencing hearing, the court sentenced him to detention with the Department of Juvenile Justice for an indeterminate period or until his twenty-first birthday. This appeal followed.

¶ 19 The respondent argues that the court abused its discretion in admitting Detective Kraft's testimony that William L. told him the respondent was with him when he attacked Jacob S. He further contends that the trial court considered this inadmissible hearsay testimony for substantive purposes. We agree.

¶ 20 Under the hearsay rule, testimony about the substance of an out-of-court statement is inadmissible if it is offered to prove the truth of the matter asserted. Hearsay statements are not admissible to corroborate the testimony of witnesses who testify at trial. *People v. Mims*, 403 Ill. App. 3d 884, 897, 934 N.E.2d 666, 677 (2010). Here, the prosecutor told the court that she was offering the statement to explain the officer's course of conduct. However, as the State acknowledges, when an officer testifies regarding the course of conduct followed in an investigation, the officer may only testify that he received information during an interview and then acted on that information. The officer may not testify to the substance of the conversation. *Mims*, 403 Ill. App. 3d at 897, 934 N.E.2d at 678 (quoting *People v. Johnson*, 199 Ill. App. 3d 577, 582, 557 N.E.2d 446, 449 (1990)). Admission of a co-defendant's hearsay confession that also implicates a defendant is particularly troublesome because it infringes on the defendant's constitutionally protected right to confront and cross-

examine witnesses against him. See *Bruton v. United States*, 391 U.S. 123, 137 (1968).

¶ 21 The State concedes that the statement was admitted in error. The State argues, however, that reversal is not required because (1) the record does not establish that the court considered the statement, and (2) even assuming the court considered the statement, the error was harmless. We reject both arguments.

¶ 22 In a bench trial, we presume that the court considered only admissible evidence in reaching its verdict. *People v. Gilbert*, 68 Ill. 2d 252, 258, 369 N.E.2d 849, 852 (1977). Conversely, we presume that the court disregarded any evidence that was not properly admitted. *People v. Martin*, 285 Ill. App. 3d 623, 634, 674 N.E.2d 90, 98 (1996). These presumptions can be rebutted if the record affirmatively shows that the court considered the improperly admitted evidence. *Gilbert*, 68 Ill. 2d at 258-59, 369 N.E.2d at 852.

¶ 23 Here, the court explained its ruling from the bench in the statement we quoted earlier. Among other things, the court stated, "I go back to the information that was provided by [co-assailant William L.] when he identified who was along with him." This statement certainly appears to indicate that the court considered William's statement as substantive evidence. The State argues, however, that the first paragraph of the court's explanation–which contains the relevant statement–should be interpreted as the court "simply stating aloud its notes rather than identifying evidence that swayed it towards a decision." The State contends that the heart of the court's rationale can be found in the second paragraph, in the comments that follow its statement noting that the credibility of witnesses was the key issue before it.

¶ 24 We are not persuaded by the State's argument. The court pointed to only three pieces of evidence before stating that the determinative issue was the credibility of witnesses. Specifically, the court pointed out that (1) Jacob testified that George was in front of him at one point, (2) Jacob knew William from school, and (3) William told police that George was with him. These three statements do not form a very comprehensive synopsis of the evidence

before the court.

¶ 25 Moreover, two of the statements contain language indicating that the court considered them relevant to its determination. The court stated that "in particular" it "noticed" that the respondent was in front of Jacob. More importantly, the court referred to William's out-of-court statement as information that William provided, and the court specifically stated that it was "going back to" this information.

¶ 26 In addition, we note that all of the evidence the court highlighted–both before and after noting that the credibility of witnesses was the crucial issue–related to Jacob's credibility. In essence, William's statement to police corroborated Jacob's identification of the respondent, and the rest of the evidence discussed by the court related to Jacob's ability to correctly identify the two suspects. We thus conclude that the record does affirmatively show that the court considered the improper hearsay in reaching its decision.

¶ 27 This does not end our inquiry. As the State correctly argues, even where the court considers improper evidence, the error can be harmless beyond a reasonable doubt. See *People v. Schmitt*, 131 Ill. 2d 128, 140, 545 N.E.2d 665, 670 (1989). Factors to be considered in determining whether an error was harmless include (1) whether the error itself may have contributed to the verdict, (2) whether the properly admitted evidence overwhelmingly supports the verdict, and (3) whether the inadmissible evidence merely duplicates properly admitted evidence. *In re Rolandis G.*, 232 Ill. 2d 13, 43, 902 N.E.2d 600, 617 (2008). Applying these principles to the case before us, we cannot conclude that the error was harmless beyond a reasonable doubt.

¶ 28 Here, we may readily conclude that the first and third of these factors support our conclusion. As we have already discussed, the court expressly considered William L.'s statement in reaching its decision. Thus, the error may have contributed to the ruling. In addition, William L.'s statement corroborates Jacob's testimony in a trial where, as the court

below noted, the credibility of witnesses was the most crucial issue. We therefore find that it was more than cumulative or duplicative evidence.

¶ 29 The second factor–whether the properly admitted evidence overwhelmingly supports the verdict–merits further discussion. The evidence in this case raised questions about Jacob's ability to correctly identify George L. as one of his assailants. Jacob was not wearing the glasses he needs to see clearly at a distance when he first saw the respondent. In addition, he saw the young man he identified as George only briefly in a well-lit area before being dragged into a nearby yard. There was no testimony regarding the lighting in the yard. Jacob did not know George well from school, and admitted that George's hair was in a different style when he last saw him at school. This fact is particularly significant in light of Detective Collins' testimony that George's hair had been short as long as he had known him. There was no physical evidence in this case, only Jacob's testimony and his statements to the police. We do not believe this evidence so overwhelmingly supports the verdict that we may conclude that the error was harmless beyond a reasonable doubt.

¶ 30 The respondent raises additional arguments related to the fairness of his adjudicatory hearing and his sentence. He argues that (1) the court erred by admitting significant evidence of other crimes, (2) the prosecutor shifted the burden of proof to the respondent by asking if Jessica and Millie were present to corroborate his alibi defense, (3) the cumulative effect of these errors denied him a fair hearing, and (4) the sentence imposed was an abuse of discretion. Because we reverse on the basis of the hearsay statement of William L., we need not consider these arguments. However, we must briefly discuss the respondent's argument that the evidence was not sufficient. See *In re L.L.*, 295 Ill. App. 3d 594, 604, 693 N.E.2d 908, 916 (1998).

¶ 31 We review challenges to the sufficiency of the evidence in the light most favorable to the prosecution. We must determine whether any reasonable trier of fact could find all the

elements of the crimes charged beyond a reasonable doubt. *People v. Sanchez*, 115 Ill. 2d 238, 260, 503 N.E.2d 277, 284 (1986). We will only reverse if "the evidence is so improbable or unsatisfactory that a reasonable doubt of the guilt of the defendant remains." *People v. McLaurin*, 184 Ill. 2d 58, 79, 703 N.E.2d 11, 21 (1998). Although we do not believe the evidence in this case was overwhelming, we also do not find it to be "so improbable or unsatisfactory" that a reasonable trier of fact could not find the respondent delinquent based on the charges of aggravated battery and attempted aggravated robbery. A reasonable trier of fact could have found that Jacob correctly identified the second suspect as the respondent. We will therefore remand this matter for a new adjudicatory hearing rather than reversing outright.

¶ 32 For the foregoing reasons, we reverse the order of the court and remand for a new adjudicatory hearing.

¶ 33 Reversed and remanded.