2021 IL App (1st) 200378-U

THIRD DIVISION
Order filed January 13, 2021.
Modified upon denial of rehearing on June 23, 2021.

No. 1-20-0378



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| *In re* N.R., a Minor, | ) | Appeal from the |
| | ) | Circuit Court of |
| (The People of the State of Illinois, | ) | Cook County. |
| | ) | |
| Petitioner-Appellee, | ) | |
| | ) | |
| v. | ) | No. 19 JD 1686 |
| | ) | |
| N.R., | ) | |
| | ) | Honorable |
| Respondent-Appellant). | ) | Joanne Rosado, |
| | ) | Judge Presiding. |

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JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Howse and Justice Ellis concurred in the judgment.

**ORDER**

¶ 1 *Held*: Judgment of the circuit court adjudicating the minor respondent delinquent affirmed where the State proved beyond a reasonable doubt that he knowingly possessed the recovered firearm.

¶ 2 Following a bench trial, the respondent, N.R., was adjudicated delinquent for aggravated unlawful use of a weapon (AUUW) and unlawful possession of a firearm (UPF). In this appeal, respondent contends that the evidence was insufficient to sustain the adjudication of delinquency.

¶ 3 The record shows that the State filed a petition for adjudication of wardship charging respondent with two counts of AUUW, the first for knowingly carrying a firearm while under 21 years of age, and the second for knowingly carrying a firearm without a valid Firearm Owner's Identification Card. Respondent was also charged with a single count of UPF.

¶ 4 Prior to trial, respondent filed a motion to suppress evidence recovered from his cell phone. At the hearing on respondent's motion to suppress, Chicago police officer Matthew Martenson[1] testified that on October 21, 2019, he detained respondent and subsequently recovered two cell phones from respondent's person. Officer Martenson did not press any buttons or examine the phones other than removing them from respondent's pocket.

¶ 5 Chicago police officer Vincent Turner testified that he received an "iPhone" from fellow officers pursuant to the arrest of respondent. Officer Turner testified that the practice of the 7th District where he worked when inventorying phones was to power them off before putting them in a locker to avoid disturbances. The moment Officer Turner received the phone to power it off, he looked at it and the screen "popped on," surmising that the screen was activated by motion. Officer Turner observed an image on the phone's screen of respondent holding "what resembled the same firearm" that was recovered at respondent's arrest. Officer Turner took a photo of the image using a department cell phone. Officer Turner did not press any buttons, swipe, attempt to unlock the phone, or otherwise attempt to look through the phone any further. Officer Turner did not attempt to get a warrant because the image "was in plain view; it was right there." Officer Turner described the recovered firearm as a "[b]lack, Smith & Wesson -- like 3 inches[,] *** smaller handgun, M&P shield. *** [Y]ou could see the magazine kind of sticking out. Not an

[1] The officer's last name was spelled in two different ways—"Martinson" and "Martenson,"—in the record on appeal. We will refer to him using the spelling "Martenson."

extended magazine but it was still sticking out." Officer Turner testified that the cell phone image looked "exactly" like the recovered firearm.

¶ 6 During Officer Turner's testimony, the defense introduced a photograph of the cell phone as an exhibit. Officer Turner testified that he believed the photo depicted the cell phone that was recovered from respondent, but that respondent's phone looked different from the photograph when he viewed it because "it was on."

¶ 7 After hearing argument, the trial court denied respondent's motion, finding, in relevant part:

> "We are all very clear that on a custodial search, a phone can be taken and it can be inventoried.
>
> ***
>
> The officer testified here that he did not press any buttons; he never swiped; he never made any attempts to unlock the phone. He said that the phone was activated by motion.
>
> Although it's true that iPhones do go into sleep mode, the—there is motion that will set off the phone. And this picture is not a picture that is something that's inside of his phone where you have to actually open the phone and go through it and look for it. This picture is a wall saver or screen saver and so it can be activated by mere motion on the iPhone.
>
> ***
>
> And at that point, that picture is in plain view.
>
> Therefore, based upon the evidence, this was not a search of the phone, which required a warrant. Rather, it was an inventory of the phone. When the officer

> said he had it in the tact office, which resulted in some type of motion activation that opened the phone, revealed the screen saver, which allowed the officer to take *** that picture. So the motion will be denied."

¶ 8 The matter proceeded to trial, at which Officer Turner testified that on October 21, 2019, he was working with two other officers in the area of "70th and Ashland" in Chicago. Around 11:54 a.m., they received a call and "relocated to the area where the call came up," near 69th and Paulina. While traveling in an unmarked police vehicle and wearing street clothes, Officer Turner observed respondent, whom he identified in open court, walking near 7000 South Ashland. The officers passed respondent, then backed up the vehicle. At that point, respondent stopped, looked in the direction of the officers, held the side or front of his waistband, and "took off running" westbound across Marshfield.

¶ 9 Officer Turner got out of the vehicle and pursued respondent on foot. After a couple seconds, Officer Turner lost sight of respondent. He then relayed a description of respondent and the direction of his flight to other responding officers. Respondent was apprehended by another officer within about 15 seconds. Once respondent was detained, the officers on scene canvassed the area, retracing the path in the direction that respondent fled. Within two minutes, a firearm was located "in the path" of respondent's flight, one street over from where respondent was detained. Officer Turner recovered the firearm, which he described as a "black, Smith & Wesson M&P, kind of compact three inch *** loaded with an unknown amount of rounds inside of it." His body cam captured him recovering the weapon, and was published for the court.

¶ 10 Respondent was searched subsequent to his detainment and a phone was recovered. Officer Turner testified that he subsequently observed the screen saver of the phone, which showed an

image of respondent with a female, with respondent holding a firearm in his hand above the female's head.

¶ 11 Officer Turner alerted other officers and his sergeant about the image, and attempted to preserve it by using a department-issued phone to take photos of the screen saver image. Officer Turner stated that the firearm that was recovered "match[ed] the *** firearm that was in the photo"—both were small black "Smith & Wesson M&P's" with a "chrome magazine extending out of the butt of the gun." On cross examination, Officer Turner acknowledged that he could not read the serial number or see certain markings on the firearm in the image taken of respondent's screen saver.

¶ 12 The State introduced "People's Exhibits No. 1 and 2." Officer Turner identified Exhibit 1 as a "picture of [the] firearm [recovered from respondent], one round and a cell phone with a screen saver on showing [respondent] with the firearm in hand." Officer Turner identified Exhibit 2 as a "a close up picture of the phone on and with the screen saver shown [and] [a] more in-depth picture of the firearm that was recover [*sic*] on-scene." Officer Turner further testified that when taking the photos, he placed the recovered firearm in the same position as the firearm was displayed in the screenshot, and that doing so "helped [him] determine that this was most likely the same firearm."

¶ 13 The State rested. Respondent moved for a directed verdict, arguing, specifically as to Count 2, that the State had not proven that a Firearm Owner's Identification Card was not issued. The court granted respondent's motion as to Count 2, and respondent rested.

¶ 14 Following argument, the trial court found respondent delinquent of one count of AUUW (under 21) and UPF.

¶ 15 In making its findings, the court specifically noted that it found Officer Turner to be "very credible," stating:

> "I had an opportunity to observe the officer, listen to his testimony. Officer Turner was very credible. He talked about what exactly he saw; about the fact that he didn't see him with anything in his hand; that they drove a little bit past him and then they see him grabbing at his waistband.
>
> Officer's experience of five years tells him something is going on and definitely when the minor takes off and starts running, the officer gives chase and the weapon is recovered.
>
> And the weapon, it appears from the photo, to be the same weapon that is recovered out of the photo out of his phone. And it is in his flight path. Therefore, the minor will be found guilty on both counts."

¶ 16 On January 8, 2020, the trial court adjudged respondent a ward of the court, committed him to the Department of Juvenile Justice for an indeterminate period not to exceed seven years or his 21st birthday, and continued the case "with a three-month bring-back" date, informing respondent that if the report of his behavior was positive, the court would convert his sentence to intensive probation. Respondent timely filed a notice of appeal on February 4, 2020.

¶ 17 In this appeal, respondent challenges the sufficiency of the evidence to sustain his delinquency adjudication.

¶ 18 Here, respondent was found adjudged delinquent of both AUUW and UPF. The AUUW count for which respondent was found guilty provides that a person commits the offense of AUUW if he knowingly possesses a firearm while under the age of 21 years, unless he is "engaged in lawful activities under the Wildlife Code." 720 ILCS 5/24-1.6(a)(1)/(3)(I) (West 2018). A person

is guilty of UPF where he is under 18 years of age and knowingly possessed a firearm of a size that may be concealed upon his person. 720 ILCS 5/24-3.1(a)(1) (West 2018).

¶ 19 Respondent does not challenge the elements of the above offenses as to his age, the size of the firearm, or that he was engaged in lawful activities under the Wildlife Code. Instead, respondent asserts only that the evidence at trial failed to prove that he knowingly possessed the recovered firearm. Respondent contends that the State filed to prove beyond a reasonable doubt that he knowingly possessed a firearm, where he was never seen in physical possession of the weapon, and "no evidence connected him to the location where the weapon was found."

¶ 20 When a minor respondent challenges the sufficiency of the evidence in a delinquency proceeding, the reviewing court applies the reasonable doubt standard used in criminal cases. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 47. Under that standard, "this court considers whether, in viewing the evidence in the light most favorable to the State, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) (Quotations omitted.) *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007). A reviewing court must allow all reasonable inferences from the record in favor of the prosecution; however, where "only one conclusion may reasonably be drawn from the record, a reviewing court must draw it even if it favors the defendant." *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). The critical inquiry is whether the record evidence could reasonably support a finding of guilty beyond a reasonable doubt. *Wheeler*, 226 Ill. 2d at 114. A reviewing court

> "will not retry a defendant when considering a sufficiency of the evidence challenge. [Citation.] The trier of fact is best equipped to judge the credibility of witnesses, and due consideration must be given to the fact that it was the trial court *** that saw and heard the witnesses. [Citation.] Accordingly, a [trial court's]

findings concerning credibility are entitled to great weight. [Citation.]" *Id.* at 114-15.

"A conviction will only be reversed where the evidence is so unreasonable, improbable, or unsatisfactory that it justified a reasonable doubt of defendant's guilt." *Id.* at 115.

¶ 21 As an initial matter, we note that our review is severely hindered by respondent's failure to provide this court with a complete record on appeal. Significantly absent from the record are the two photograph exhibits that Officer Turner identified as depicting the "firearm [recovered from respondent], one round and a cell phone with a screen saver on showing [respondent] with the firearm in hand," as well as the "close up picture of the phone on and with the screen saver shown [and] [a] more in-depth picture of the firearm that was recover [*sic*] on-scene."

¶ 22 In respondent's opening brief, he asserted that "the exhibits [we]re in the process of being supplemented to the record." Respondent did supplement the record thereafter, however the only photograph included in the supplement is a photocopy of a defense's exhibit, a photograph of the cell phone. However, as testified to by Officer Turner, the cell phone screen appears to be off in that photograph, and no screen saver is visible. The only other exhibit included in the supplemental record were recordings of the officers' body cam videos.

¶ 23 An appellant has the duty to present a complete record of proceedings in the circuit court to support a claim of error. *People v. Gilbert*, 2013 IL App (1st) 103055. In the absence of a complete record on appeal, it will be presumed that the order entered by the trial court conformed with law and had a sufficient factual basis. *People v. Johnson*, 285 Ill. App. 3d 307 (1996). Any doubts which may arise from the incompleteness of the record will be resolved against the appellant. *People v. Leeper*, 317 Ill.App.3d 475 (2000).

¶ 24 Despite failing to include these exhibits in the record, respondent has based many of his appellate arguments on those exhibits, and the trial court's alleged errors in concluding that the firearm in the screen saver was the same as the recovered firearm. Respondent contends that the photos were insufficient to show that the firearms were the same because the screen saver photo did not show the same markings that were visible on the recovered firearm. Needless to say, this court cannot consider such arguments, where the exhibits they are based on were not included in the record on appeal.

¶ 25 We note that Officer Turner testified that the firearm that was recovered "match[ed] the *** firearm" that was in the screen saver photo. He explained that both firearms were small black "Smith & Wesson M&P's" with a "chrome magazine extending out of the butt of the gun," and the State entered photographs of the recovered firearm and the cell phone with the screen saver into evidence. Moreover, in making its findings, the court relied on those photographs, and determined that the firearm recovered appeared to be the same firearm that was displayed on respondent's screen saver.

¶ 26 Due to respondent's failure to include the photographs in the record, this court does not have the benefit of viewing them to compare the recovered firearm to the firearm held by respondent in his cell phone screen saver, as the trial court was able to do. In the absence of a complete record on appeal we must presume that the order entered by the circuit court was in conformity with the law and had a sufficient factual basis. *People v. Deleon*, 227 Ill.2d 322, 342 (2008). Since the trial court reviewed the photographs and determined that the firearm recovered from respondent's flight path matched the firearm that respondent was holding in the cell phone screen saver, we are required to presume that the court's finding was in conformity with the law and had a sufficient factual basis. Accordingly, we cannot find respondent's delinquency

adjudication to be so unreasonable, improbable, or unsatisfactory that it justified a reasonable doubt of his guilt.

¶ 27 Respondent's failure to include in the appellate record some of the most compelling evidence against him tying him to the recovered firearm, and the presumptions arising therefrom, could end our analysis of respondent's challenge. Nonetheless, even without the missing photographs, the evidence in this case, taken in the light most favorable to the State, established that respondent knowingly possessed the firearm recovered.

¶ 28 A defendant's knowledge can be established by evidence of defendant's acts or conduct, from which it may be inferred that he knew the gun existed in the location where it was found. *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 17. Such conduct may include gestures or movements made by defendant that suggest an effort to conceal the firearm. *People v. Nesbit*, 398 Ill. App. 3d 200, 209 (2010). "Whether there is knowledge and whether there is possession or control are questions to be determined by the trier of fact." *People v. Schmalz*, 194 Ill. 2d 75, 81 (2000).

¶ 29 Officer Turner testified that, upon seeing him and other officers, respondent stopped, grabbed his waistband, and "took off running." Officer Turner then chased respondent on foot. Although Officer Turner lost sight of respondent after a few seconds, the officer was able to see the direction that he fled. Officer Turner relayed that information to other responding officers, who detained respondent approximately 15 seconds later. After respondent was detained, officers canvassed respondent's "path of flight" in the area where the foot chase occurred, and recovered a loaded firearm within approximately two minutes. Officer Turner's testimony was uncontradicted, and it was specifically found to be credible by the trial court. The officer's account was also significantly corroborated by the body cam video footage, which was included in the

record on appeal. That footage, which this court has reviewed, shows the recovery of two cell phones from respondent's person, as well as the recovery of the firearm shortly after respondent was taken into custody.

¶ 30 Although respondent places much emphasis on the fact that Officer Turner lost sight of respondent and did not actually see him dispose of the firearm, he has provided this court with no authority imposing such a requirement. To the contrary, in *People v. Peete*, 318 Ill. App. 3d 961 (2001), this court rejected a challenge to the sufficiency of the evidence in similar circumstances.

¶ 31 In *Peete,* the defendant fled from police officers, and two officers pursued. *Id*. at 963. During the chase, one of the officers noticed that the defendant was "dig[ging]" at his waistband, before losing sight of him for approximately ten seconds. When the officer caught sight of the defendant again, he was no longer tugging at his waistband. *Id*. After the defendant was taken into custody, the officers returned back to the area of pursuit to look for any contraband that the defendant may have discarded. *Id.* at 964. During that search, they were approached by a resident who informed the officers that he had found a gun in his hedges which had not been there earlier. *Id*.

¶ 32 The defendant was convicted of unlawful possession of a weapon by a felon, and on appeal, he argued that the evidence was insufficient to prove him guilty beyond a reasonable doubt. *Id.* at 965. The reviewing court rejected his arguments, finding that there was sufficient circumstantial evidence for a rational trier of fact to have found beyond a reasonable doubt that he possessed the gun, and that defendant's flight was "admissible as a circumstance tending to show a consciousness of guilt." *Id.* at 966.

¶ 33 Here, similar to *Peete*, respondent stopped, grabbed his waistband, and "took off running" upon observing the responding officers. After respondent was detained, the officers canvassed the area of pursuit and recovered the firearm.

¶ 34 Additionally, although Officer Turner did not actually see respondent dispose of the firearm, the evidence presented showed that Officer Turner was able to see the direction of respondent's flight, and that other officers apprehended respondent approximately 15 seconds later. Moreover, after respondent was apprehended, officers canvassed respondent's "path of flight" in the area where the foot chase occurred, and recovered a loaded firearm along that path within approximately two minutes.

¶ 35 Viewing the evidence in the light most favorable to the State, and resolving all reasonable inferences in favor of the State, the trial court, as the trier of fact, could have reasonably found that respondent's grabbing his waistband and his flight upon seeing police evinced his knowledge of the firearm on his person. The trial court could also have reasonably found that the weapon recovered in the yard was disposed of by respondent as he fled. Accordingly, the State presented sufficient evidence of respondent's knowledge of the recovered firearm, and a rational trier of fact could have adjudicated him delinquent of AUUW and UPF.

¶ 36 Following the initial filing of the decision above, respondent, through counsel, filed a petition for rehearing. In that petition, counsel contends that despite the incompleteness of the record, she exercised "due diligence in ensuring the record was complete," pointing out that she requested and obtained an order from this court directing the Circuit Court clerk to deliver exhibits to this court. Counsel does not dispute that the record was incomplete, but instead claims that she presumed that everything was included in the record, faulting the Circuit Court clerk for failing to transmit the State's exhibits. Counsel also faults this court for "erroneously den[ying] [respondent]

his right to a full and fair appeal," and for failing to consider respondent's arguments that were not based on the State's exhibits.

¶ 37 We note, initially, that counsel did not undertake the proper procedures to ensure that the record was complete. Because this case involved a trial, the relevant exhibits were impounded by order of the Circuit Court on December 3, 2019, under 19 JD 1686, to preserve those exhibits for further review. Thereafter, on September 1, 2020, the Office of the State Appellate Defender filed a "Motion to Direct Circuit Court Clerk to Prepare Exhibits in Original Form and upon Receipt File Instanter," and this court allowed that motion on September 8, 2020. Counsel, however, never requested a specific order requesting the release of the impounded exhibits from the Circuit Court to the Clerk of the Circuit Court. The Clerk of the Circuit Court has no authority to release impounded exhibits without a specific court order, and therefore, they were never transmitted to this Court as part of the record. See *Doe v. Carlson*, 250 Ill. App. 3d 570, 574 (1993) (explaining that an impoundment order "impose[s] restricted access to the court files and require[s] those seeking access to obtain an appropriate court order." A clerk "properly denie[s] access to the documents," if the request is made without a specific court order).

¶ 38 Moreover, even if counsel's failure to request the release of impounded exhibits could be attributed to a good faith oversight or a misunderstanding of the applicable rules, it is still incumbent upon counsel to review the record before its filing to ensure its completeness. Had counsel done so, and determined that the relevant exhibits were missing, this court would have allowed an extension for purposes of remedying their absence.

¶ 39 Although counsel has made repeated attempts to shift the blame for the incompleteness of the record, and for the outcome resulting from that incompleteness, the fault rests solely with counsel. We reiterate that it is respondent and his counsel's obligation to ensure that the record is

complete. Moreover, this court did not deny respondent appellate consideration of his other arguments. Where a record is incomplete, we must indulge all inferences against respondent, as appellant, and in favor of the circuit court's judgment. *People v. Fair*, 193 Ill. 2d 256, 264 (2000). In those circumstances, we were required to presume that the exhibits depicted the same firearm, as the trial court determined. Because respondent's adjudication was properly affirmed on that basis alone, it was unnecessary for this court to consider respondent's alternative arguments as to why there was insufficient evidence to support his delinquency adjudication.

¶ 40 Nevertheless, after reviewing respondent's petition for rehearing, this court entered an order on its own motion directing the clerk of the circuit court to release and transmit People's Exhibits 1 and 2, which had been previously omitted from the record, so that this court could consider them. After reviewing those exhibits, our conclusion remains the same.

¶ 41 The photograph of the recovered firearm, and the photograph depicting respondent's screen saver, in which he wields a firearm, appear to depict the same weapon. They are the same color, same shape, with the same chrome colored magazine sticking out from the base. The guns also appear to have the same texture, grooves, and cut outs. The only difference apparent between the guns depicted in the two exhibits is that the photograph of respondent's screen saver is of a lesser quality, which prevents us from verifying that all markings and engravings on the firearms are identical. However, based on our review of these images, we do not find it unreasonable to conclude that they depict the same weapon. Indeed, this court's review of the exhibits confirms the reasonableness of the trial court's conclusions. As stated above, defendant's knowledge of the firearm may be proven through evidence of defendant's acts or conduct. *Spencer*, 2012 IL App (1st) 102094, ¶ 17; see also *People v. Beverly*, 278 Ill. App. 3d 794, 798 (1996). Defendant's possession of a cell phone with a screen saver showing him wielding a firearm that is

indistinguishable from the gun found in his flight path within minutes of his arrest, is strong circumstantial evidence of defendant's guilt. When the photographs are combined with evidence of respondent's flight, and the recovery of the firearm in respondent's flight path, we continue to conclude that a rational trier of fact could have adjudicated him delinquent of AUUW and UPF.

¶ 42 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 43 Affirmed.