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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CV-13-821

		Opinion Delivered April 30, 2014
J.J.	APPELLANT	APPEAL FROM THE BENTON COUNTY CIRCUIT COURT [No. J-2013-07-3]
V.		HONORABLE THOMAS E. SMITH, JUDGE
STATE OF ARKANSAS	APPELLEE	REVERSED and DISMISSED

LARRY D. VAUGHT, Judge

J.J., a minor, was adjudicated delinquent by the Circuit Court of Benton County, which found that he had committed the offense of accomplice to theft of property under Arkansas Code Annotated section 5-36-103, a Class A misdemeanor. He was placed on six months' supervised probation. On appeal, J.J. contends that (1) the trial court abused its discretion in denying his motion in limine to exclude testimony about what witnesses observed on a surveillance video; and (2) there was insufficient evidence supporting his adjudication. We find merit in J.J.'s second point and reverse and dismiss.

In the delinquency petition, the State charged J.J. with theft of property, alleging that on September 18, 2012, he knowingly took a cell phone belonging to Connie Horton with the purpose of depriving her of that property. Prior to the adjudication hearing, J.J.'s counsel filed a motion in limine, seeking to exclude testimony about what witnesses observed on a surveillance video from the Rogers Activity Center, where the theft allegedly occurred. Counsel

argued in the motion that despite several requests for the video, the police failed to secure a copy of it, and it was subsequently destroyed by the activity center. As such, neither J.J. nor his counsel saw the contents of the video. J.J.'s counsel contended that, under the circumstances, permitting other witnesses to testify about what they saw on the video would violate the best-evidence rule, create unfair prejudice, and constitute inadmissible hearsay. The trial court denied the motion.

At the adjudication hearing, Steven Sapp, a Rogers Activity Center employee, testified that while at work on September 18, 2012, he was approached by Horton, who told him that her cell phone was missing from the gym. After Horton showed him the bleachers where she last had her phone, he located the surveillance video for that area and viewed it. From his recollection of the video, he testified that Horton had been sitting in the gym watching volleyball practice. He saw her get up and leave her phone on the bleachers. Sapp, who said that he knew J.J. and another juvenile named F.C., identifying both in the courtroom, stated that he saw J.J. "kind of walk by with a phone and it looked like [F.C.] was over there looking out near the curtain that divides our gym in half." Sapp said that Horton's phone was not very far from J.J. and F.C. Sapp testified that he did not see anyone else go near her phone and that J.J. made two passes by the phone, which is why he (Sapp) thought one or both of the juveniles had taken it.

Sapp conceded on cross-examination that he had not witnessed anything live and that his knowledge of events was based solely upon his viewing of the surveillance video. He said he never saw anyone actually take the phone; there were other people in the middle of the volleyball court; and he just assumed the boys had taken the phone.

Horton testified that she and her daughter were in the Rogers Activity Center for volleyball practice. Horton said she was sitting on the front row of the bleachers in the gym; she was asked to help with the volleyball practice, which she did; and she laid her phone and car keys on the front row of the bleachers when she went to help with practice. She stated that she witnessed three juveniles come into the gym[1]—one juvenile sat a couple of rows behind where her phone was located; one stood by the curtain that separated the two gyms; and the third juvenile walked by the phone. She said she did not see the juveniles take her phone, but she did not see anybody else walk in during the practice time. At the end of practice, she realized her phone was missing, and she thought "those kids stole my phone and that is [why] they were hanging out . . . ."

Horton testified that she watched the video surveillance with Sapp and that she could not identify J.J. or F.C. from the video. However, she said the video showed three juveniles "walk in together," one boy sat down a couple of rows behind where her phone was resting, one stood by the curtain, and the third walked by and leaned toward the phone. She testified that the video did not show anyone taking the phone.

Horton also said practice lasted about an hour; she noticed her phone missing at the end of practice; and she did not always have her eyes on her phone. While she said that she did not observe the juveniles take her phone, she assumed they did because "those boys were the only ones on the video tape that were in the area," and on the video it looked like one of the boys

[1]Both J.J. and F.C. were identified, charged, and tried for theft. On June 20, 2013, F.C. was adjudicated delinquent by an order of the Benton County Circuit Court, which found that he was guilty of accomplice to theft of property. F.C. appealed the adjudication order to our court, and on March 19, 2014, we reversed, holding that there was insufficient evidence to support it. *F.C. v. State*, 2014 Ark. App. 196. The third juvenile was never identified or charged.

reached down and picked up something. However, she could not say that he picked up her phone.

At the conclusion of the hearing, the trial court determined that J.J. was an accomplice to the theft of Horton's phone. On June 20, 2013, the trial court entered an adjudication order. This appeal followed.

J.J.'s first point on appeal is that the trial court abused its discretion in denying his motion in limine to exclude testimony about what witnesses saw on the surveillance video. Secondly, he argues that there was insufficient evidence to support his adjudication. The prohibition against double jeopardy requires that we review the sufficiency-of-evidence challenge before we examine trial error. *Powell v. State*, 2013 Ark. App. 322, at 1, 427 S.W.3d 782, 783.

Our standard of review for determining the sufficiency of the evidence in a delinquency case is the same as that used in a criminal case: considering only the evidence that tends to support the finding of guilt and viewing it in the light most favorable to the State, we will affirm the juvenile court's ruling if it is supported by substantial evidence. *F.C. v. State*, 2014 Ark. App. 196, at 4–5. Substantial evidence is evidence, direct or circumstantial, that is of sufficient force and character to compel a conclusion one way or the other, without speculation or conjecture. *Id.* at 5. In considering the evidence presented below, we will not weigh the evidence or assess the credibility of witnesses, as those are questions for the finder of fact. *Id.*

A person commits theft of property by knowingly taking or exercising unauthorized control over the property of another person, with the purpose of depriving the owner of the property. Ark. Code Ann. § 5-36-103(a)(1) (Repl. 2013). Arkansas Code Annotated section 5-2-

403(a)(1)–(2) (Repl. 2013) provides that a person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating its commission, the person: (1) solicits, advises, encourages, or coerces the other person to commit the offense, or (2) aids, agrees to aid, or attempts to aid the other person in planning or committing the offense. When two or more persons assist one another in the commission of a crime, each is an accomplice and criminally liable for the conduct of both; one cannot disclaim accomplice liability simply because he did not personally take part in every act that made up the crime as a whole. *T.D. v. State*, 2012 Ark. App. 140, at 3. Mere presence at the scene of a crime is not enough to make a person an accomplice. *Id.* Except in extraordinary cases, even presence at the scene of the crime combined with actual knowledge that a crime is being committed is not sufficient to make a person an accomplice in the absence of any purpose to further the accomplishment of the offense. *Id.* Relevant factors in determining the connection of an accomplice to a crime are the presence of the accused in the proximity of a crime, the opportunity to commit the crime, and an association with a person involved in a manner suggestive of joint participation. *Id.*

Here, there is no direct evidence of J.J.'s guilt. Neither Sapp nor Horton testified that they saw J.J., or anyone else, take the phone—live or on the video. Both testified that they *assumed* the boys had taken the phone because on the video they were near it. Thus, this case is based on circumstantial evidence. For circumstantial evidence to be relied on, it must exclude every other reasonable hypothesis other than the guilt of the accused to amount to substantial evidence. *Tatum v. State*, 2014 Ark. App. 68, at 2. The question of whether circumstantial evidence excludes every other reasonable hypothesis consistent with innocence is for the finder

of fact to decide. *Id.* On review, this court must determine whether the finder of fact resorted to speculation and conjecture in reaching the verdict. *Id.*

On this evidence, we hold that a fact-finder could not, without resorting to speculation or conjecture, reasonably conclude that J.J. committed the act of accomplice to theft. There was no evidence that he solicited, advised, encouraged, or coerced anyone to take the phone, or that he aided, agreed to aid, or attempted to aid another person in planning or committing a theft. The only evidence supporting J.J.'s adjudication of guilt was testimony that J.J. and two other juveniles entered the gym together, that he was identified on the video as the person walking by Horton's phone, that he leaned down near the phone, and that the juveniles left together. This evidence is insufficient to support the adjudication.

Further, this evidence does not exclude every reasonable hypothesis other than J.J.'s guilt. Sapp and Horton, who saw the video, testified that they did not see J.J. take the phone. Therefore, the possibility that someone else took the phone remains. The evidence further demonstrates that there was an unidentified third juvenile with J.J. and F.C. who could have taken the phone without J.J.'s knowledge or involvement. It is possible that J.J. was in the gym to watch volleyball practice. Because these reasonable hypotheses exist and J.J.'s innocence cannot be ruled out as a possibility, the trial court could not have found beyond a reasonable doubt that J.J. had taken the phone. Accordingly, we hold that the trial court had to resort to speculation and conjecture to conclude that J.J. had stolen the phone or was part of a plan to steal it. Therefore, we reverse and dismiss. J.J.'s first point on appeal—involving the best-evidence rule—is moot.

Reversed and dismissed.
WYNNE and WHITEAKER, JJ., agree.
Brett D. Watson, Attorney at Law, PLLC, by: *Brett D. Watson*, for appellant.
Dustin McDaniel, Att'y Gen., by: *Ashley Argo Priest*, Ass't Att'y Gen., for appellee.