*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2006-515

AUGUST TERM, 2007

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| State of Vemont | } | APPEALED FROM: |
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| | } | |
| v. | } | District Court of Vermont, |
| | } | Unit No. 3, Franklin Circuit |
| Anthony Bray | } | |
| | } | DOCKET NO. 299-4-06 FrCr |
| | | Trial Judge: Ben W. Joseph |

In the above-entitled cause, the Clerk will enter:

Defendant appeals his jury conviction of petit larceny, arguing that (1) the admission of hearsay evidence was reversible error; and (2) the trial court erred by denying his motion for judgment of acquittal because the State failed to prove that he was the person who stole the missing money. We affirm.

Defendant was attending his last special education class of the day when approximately $75 was stolen from the purse of a teacher located across the hall from where defendant was studying. After the teacher discovered that the money was missing and that defendant had been seen in the hall outside her classroom, she and others confronted defendant about the missing money. Although a search of defendant's person did not turn up the missing money, the money was found later that afternoon under the desk in which defendant had been sitting when he was searched. Defendant was eventually charged, and convicted by a jury, of petit larceny.

Defendant first argues on appeal that the trial court committed reversible error by admitting hearsay evidence indicating that no other students in nearby classrooms had been excused during the period in which the money was taken. The prosecutor elicited testimony from the victim about her effort to determine if any students in nearby classrooms had been excused during the time period in which her money was taken. In response to the prosecutor's question whether she learned if any other students had been excused, the victim stated that she "did learn that" and none had. The trial court admitted the testimony, notwithstanding defendant's objection on hearsay grounds. On appeal, defendant argues that the testimony was hearsay despite the phrasing of the question and the answer, and further that admission of the evidence was not harmless because the State had a weak case based solely on circumstantial evidence. According to defendant, the testimony was elicited for the sole purpose of demonstrating that he was the only student who had the opportunity to commit the offense. The State responds that the testimony was elicited not for its truth, but rather to show why

school officials decided to stop and question defendant. The State also argues that the testimony was not hearsay because the teacher was merely stating what she knew and did not indicate where she had gained this knowledge.

We conclude that admission of the challenged testimony was harmless, assuming that it was hearsay and elicited to show that defendant was the only person who had an opportunity to steal the money. See Johnson v. Moore, 109 Vt. 282, 286 (1938) (witness's testimony that he "learned" certain information from unidentified persons was "too plainly hearsay to merit discussion"); see also United States v. Evans, 216 F.3d 80, 85-89 (D.C. Cir. 2000) (FBI agent's testimony that FBI "had received information" that defendant was involved in drug trafficking was inadmissible hearsay); United States v. Reyes, 18 F.3d 65, 69 (2d Cir. 1994) (witness's testimony as to what he concluded from his conversation with others was hearsay even though the declarant's words were not repeated because testimony plainly conveyed what the others had said). Notwithstanding an error in admitting hearsay testimony, we may uphold a defendant's conviction if we determine that the error was harmless beyond a reasonable doubt. State v. Oscarson, 2004 VT 4, ¶ 29, 176 Vt. 176; see V.R.E. 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ."). "For the error to be harmless, the reviewing court must find beyond a reasonable doubt that the jury would have returned a guilty verdict regardless of the error." Oscarson, 2004 VT 4, ¶ 30. If the error concerns the improper admission of evidence, the error is not harmless if there is a reasonable possibility that the challenged evidence might have contributed to the conviction. Id. Thus, "we must assess harmlessness by considering the likelihood of the conviction in the absence of the offending testimony." Id. ¶ 31. The United States Supreme Court has cited several factors that courts might consider in assessing whether erroneously admitted evidence was harmless: (1) the importance of the testimony to the prosecution's case; (2) whether the testimony was cumulative; (3) the presence or absence of corroborating or contradicting testimony; (4) the extent of cross-examination permitted; and (5) the overall strength of the prosecution's case. Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

Examining the evidence presented in this case, we conclude that, even without the challenged testimony, there is no reasonable doubt that the jury would have convicted defendant of the charged offense. The testimony of the victim and two other teachers revealed the following. The victim knew that the stolen money was still in her purse when she left her classroom unlocked for seven-to-ten minutes to run an errand. During that same time period, defendant's teacher excused defendant from his classroom on two occasions, the first time to get a drink of water and the second time to go to the bathroom. On the second occasion, defendant was gone long enough that his teacher eventually left the classroom to look for him. A teacher in a classroom across the hall from where defendant was located observed defendant leave his classroom and head down the hall in the direction of the victim's classroom. The teacher also observed defendant pass by her classroom about ten minutes later after talking briefly to another student in the hall. The other student walked up the stairway after the conversation. Upon returning to her unlocked classroom from her errand, the victim noticed that her wallet was hanging out of her purse and her money was missing. She immediately went to the teacher across the hall, who mentioned having seen defendant in the hall. Defendant was confronted about, but denied taking, the missing money. Back in his classroom, defendant turned out his pockets and offered his backpack to be searched. When the money did not turn up, the victim asked to look in defendant's shoes. At that suggestion, defendant quickly kicked

off his right shoe, but then fell halfway off of his chair, claiming that he had some sort of heart problem. This caused some delay in defendant removing his left shoe, but he eventually kicked it off from under the desk in which he was sitting. Nothing was found in the shoe, and defendant was taken to the nurse. At the nurse's office, defendant asked to return to his room to retrieve a pencil, but his teacher assured him that he had not left anything there. Later, when defendant's teacher was putting on her boots to leave the classroom, she noticed a roll of money under the desk in which defendant had been sitting at the time he was being searched.

The testimony revealing these facts was circumstantial but strong evidence of defendant's guilt. See State v. Olds, 141 Vt. 21, 26 (1982) ("There is but one standard of proof for criminal convictions, and the test is the same whether the evidence be circumstantial or direct."). Although the jury also heard testimony suggesting that others conceivably could have stolen the money and planted it under the chair in which defendant had been sitting when he was searched—for example, testimony that other nearby classrooms were in session at the time the money was taken, that at least one other student was seen in the hall during that period, and that one of the three doors to defendant's classroom was unlocked between the time of the search and the time the money was discovered—the evidence overwhelmingly indicated that defendant stole the money. Further, although the testimony suggesting that nearby teachers had reported not having excused other students from class during that period may have confirmed the remote possibility that someone else theoretically could have stolen the money and planted it in defendant's classroom, such testimony did not undercut the strong evidence against defendant. Accordingly, any error in admitting the testimony was harmless. Moreover, because of the strength of the State's case, defendant's second argument—that the trial court erred by denying his motion for judgment on the pleadings—must fail. See State v. Prior, 174 Vt. 49, 53 (2002) (reviewing court must determine whether the evidence, when viewed most favorably to the State and excluding modifying evidence, would fairly and reasonably convince a reasonable jury that the defendant is guilty beyond a reasonable doubt).

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice