

FIRST DIVISION  
July 11, 2016

No. 1-16-0381

**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).

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**IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT**

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In the Interest of ANTHONY R., a minor	)	Appeal from the
	)	Circuit Court of
(THE PEOPLE OF THE STATE OF ILLINOIS,	)	Cook County.
	)	
Petitioner-Appellee,	)	
	)	No. 15 JD 03396
v.	)	
	)	
ANTHONY R., a minor,	)	Honorable
	)	Stuart Lubin,
Respondent-Appellant).	)	Judge Presiding.

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JUSTICE HARRIS delivered the judgment of the court.  
Presiding Justice Cunningham and Justice Connors concurred in the judgment.

**ORDER**

¶ 1 *Held:* Respondent's convicted offense is reduced from aggravated battery causing serious bodily harm to reckless conduct where the evidence does not support a finding that respondent knowingly caused serious bodily harm. This court reduces the degree of respondent's offense pursuant to Supreme Court Rule 615(b)(3) (Ill. S. Ct. R. 615(b)(3)) and the cause is remanded for resentencing.

¶ 2 Respondent-minor, Anthony R., appeals the judgment of the circuit court finding him guilty of aggravated battery causing great bodily harm. On appeal, respondent contends that his conviction should be reduced to simple battery where the State failed to prove beyond a reasonable doubt that he knowingly caused great bodily harm. For the following reasons, we reduce the degree of respondent's offense from aggravated battery to reckless conduct, and remand for resentencing.

¶ 3 JURISDICTION

¶ 4 The trial court sentenced respondent on February 17, 2016. He filed his notice of appeal on February 17, 2016. Accordingly, this court has jurisdiction pursuant to Article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, §6) and Illinois Supreme Court Rule 660 (eff. Oct. 1, 2001), governing appeals in juvenile court proceedings; and Rule 603 (eff. Oct. 1, 2010) and Rule 606 (eff. Mar. 20, 2009), governing appeals from a final judgment of conviction in a criminal case entered below.

¶ 5 BACKGROUND

¶ 6 Respondent was charged with one count of aggravated battery causing great bodily harm, one count of aggravated battery while on a public way, and one count of battery. The State filed an amended petition for adjudication of wardship on October 21, 2015, alleging that respondent was a delinquent minor. Respondent was tried simultaneously with his co-respondent, who is not a party to this appeal.

¶ 7 At trial, 14 year old Jose B. testified that on October 6, 2015, around 4:45 to 5 pm, he was walking from the store on his way to a friend's house when he saw respondent, co-respondent Ramiro R, and Emanuel G. He had been friends with them for about five years.

Jose B. stated that they came from behind and asked him where he was going. They engaged in a five-minute conversation after which Jose B. started to walk to his friend's house. As he walked, he turned around and saw respondent pull out a BB gun from "the front of his pants." Jose B. testified that he did not think respondent would shoot the gun. However, from a distance of about 15 to 18 feet, respondent pointed the BB gun towards Jose B.'s face and then Jose B. felt pain in his eye. He grabbed his eye and fell to the ground. Respondent and his friends walked toward him and asked if he was okay. They told Jose B., "Sorry." Respondent told him that he "was going to be all right" and Jose B. testified that "[t]hey were laughing." Jose B. "got back up, and [] just told them they do too much, like they play too much." He then went to his friend's house and respondent and the others left. Jose B. did not tell anyone about the incident immediately after it happened because he "didn't know it was a big issue at first."

¶ 8 When his mother returned from work later that evening, she took Jose B. to the hospital. His eye was bleeding and he could not see out of the eye. Jose B. went to the police station with his mother and uncle to report the incident the following day. He testified that prior to the incident he was able to see out of the eye and he felt no pain. The doctor gave him eye drops and he had follow-up appointments each day the following week. After a week, his vision in the eye was blurred and in December he had eye surgery. He testified that his vision in the eye is still blurred.

¶ 9 On cross-examination, Jose B. stated that after the incident he also laughed because he thought, "Oh, I'm going to laugh, too" since respondent and the others were laughing. When asked whether they said anything to him when he was shot, Jose B. answered, "They just said, 'Sorry.' " Respondent told him that he shot the BB gun accidentally. Jose B. also stated that although he did not see the BB gun prior to the shooting, Ramiro R. did mention the BB gun in

their conversation. He had known about the BB gun because he had seen it before on a different day. Jose B. denied that he was at the park when he first saw respondent and the others on the day of the incident. He acknowledged that he was friends with respondent and Emanuel G. at the time, and that they were "fine" prior to the incident.

¶ 10 Detective Patrick Munyon testified that he was assigned to investigate an aggravated battery with a BB gun. He spoke with Jose B. and approximately two weeks after the incident, respondent and Ramiro R. were taken into custody. After giving *Miranda* warnings, Detective Munyon spoke with respondent in the presence of his mother and father. Respondent stated that on the day of the incident, he saw Jose B. and approached him. They engaged in general conversation "about football and stuff like that." After they talked, Jose B. turned around to walk away and respondent called after him. Respondent then raised the BB gun in the direction of Jose B. Respondent stated that he thought the safety was on the gun at the time. Respondent did not specifically state that he pulled the trigger; only that it "went off" and struck Jose B. in the eye.

¶ 11 Detective Munyon also spoke with Ramiro R. after advising him of his *Miranda* rights. Ramiro R.'s mother was present and a translator was provided for her during the interview. Ramiro R. stated that he and respondent approached Jose B. and they engaged in a brief conversation. Afterwards, Jose B. turned around to walk away and respondent then called out his name. Jose B. turned around and respondent raised the BB gun in Jose B.'s direction. The BB gun fired and Jose B. was struck in the eye. Ramiro R. stated that he owned the BB gun and gave it to respondent to carry that day. He also indicated that he thought the safety on the BB gun was on at the time of the incident. He and respondent asked Jose B. if he was okay after it happened and he was not aware of any prior fight between respondent and Jose B.

When asked by the State whether Ramiro R. told him anything more about the incident, Detective Munyon stated that Ramiro R. told him "that he believed that [respondent] was trying to scare [Jose B]." Defense counsel objected to the response as speculation. The trial court stated that it "won't consider the statement against [respondent]."

¶ 12 Emanuel G. testified that he is 16 years old and has known respondent since elementary school. He has also known Jose B. for two or three years. On the day of the incident, Emanuel G. was with respondent and Ramiro R. They "went down to the park" at Nixon Elementary. They saw Jose B. walking past Nixon and he greeted them with a whistle. They went to Jose B. because they wanted to show him the BB gun they had. Respondent was holding the gun as they spoke. After about five or six minutes, Jose B. walked away. At some point, Emanuel G. heard the noise of "a ricochet of the BB gun flying off." Respondent was holding the BB gun but Emanuel G. testified that he did not see it go off. He stated that respondent "wasn't exactly pointing [the BB gun] at [Jose B.] but "was briefly holding it like in a weak-handed way. He was not holding it with force." When they saw that Jose B. had been hit, they approached him and asked if he was okay.

¶ 13 On cross-examination, Emanuel G. stated that he was "really good friends" with respondent and Ramiro R. and also friends with Jose B. He stated that when they approached Jose B., respondent had the BB gun in his right hand. He did not see respondent aim at Jose B. or fire the BB gun because he was behind respondent and Ramiro R. He denied that they were laughing after it happened, and stated that all three walked over to Jose B. and asked if he was alright. Emanuel G. testified that he held the BB gun prior to the incident and the safety was on at the time. He acknowledged that in order to fire the BB gun, the safety must be turned off.

¶ 14 Respondent testified that he is 14 years old and friends with Jose B. He had possession of the BB gun on the day of the incident and he "saw it was on safety." He and his friends saw Jose B. walking past Nixon Elementary and they "heard a whistle." They thought Jose B. was whistling at them so they approached him and started talking. They discussed the BB gun because they "had the BB gun with [them] at the moment." Respondent stated that he had the BB gun in his right hand and the safety was activated. There was no fighting at the time. After their conversation, Jose B. left. As he was leaving, respondent was "messing with the gun" and he "had it in [his] right hand." He called out to Jose B. who turned around. Respondent stated that he "pulled the trigger" but he "thought the safety was on. And [he] thought it wouldn't go off." When he pulled the trigger, "[f]ive of them came out. We heard them fly off the cars, and they hit him in the eye. All we heard was Jose screaming about his eye." Respondent did not want to shoot Jose B. He, Emanuel G. and Ramiro R. went to check on Jose B. because respondent wanted "to make sure he was okay. If anything happened, [respondent] was going to take the blame for it no matter what." Jose B. then left for his friend's house.

¶ 15 On cross-examination, respondent stated that he had the BB gun in his right hand, not in his front waistband, while he was riding his bicycle. Respondent denied that he pointed the BB gun at Jose B.'s face. He stated that the "gun was pointed around him, but I did not really mean to point it at him." Respondent did not tell anyone about the incident and he denied laughing at Jose B. after he was shot. He stated that Jose B. laughed after it happened. Respondent testified that he "didn't think it was really that serious" because he asked Jose B. if he was okay and "he said yes." Respondent stated that before the incident, they had planned to shoot cans in the alley with the BB gun.

¶ 16 The trial court asked respondent why he pulled the trigger. He stated that "[t]he only reason I pulled the trigger is because I thought the safety was on. If it wasn't on, I would have never pulled the trigger at all." When the trial court asked him again why he pulled the trigger, respondent answered, "I don't know." On redirect, respondent stated that he thought the BB gun would not go off if he pulled the trigger.

¶ 17 The trial court found respondent guilty of aggravated battery causing great bodily harm, reasoning that "when you point a gun at someone, and you pull the trigger, that is an intentional act. And [respondent] had two weeks to come up with this story." Defense counsel then asked the trial court to "make a finding on count 2" but it found that the other counts charged were lesser included offenses. At the dispositional hearing, the trial court made respondent a ward of the court and entered a disposition of delinquency. At sentencing, the trial court noted that this case was respondent's first arrest and first finding of delinquency, and sentenced him to the mandatory minimum of five years probation with specified conditions. Respondent filed this timely appeal.

¶ 18 ANALYSIS

¶ 19 On appeal, respondent argues that his conviction for aggravated battery should be reduced to simple battery. He contends the State failed to prove beyond a reasonable doubt that he had the requisite mental state for aggravated battery where the evidence shows only that the incident occurred while they were "goofing" around and respondent consistently testified that he believed the safety was on and that the BB gun would not go off. In a challenge to the sufficiency of the evidence on appeal, the relevant question is "whether, after 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." *People v. Perez*, 189 Ill. 2d 254,

265-66 (2000). It is not the function of the reviewing court to retry respondent. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Rather, it is the factfinder's responsibility to determine witness credibility and the weight given to witness testimony, and to draw reasonable inferences from the evidence. *People v. Steidl*, 142 Ill. 2d 204, 226 (1991). If findings of fact depend on the credibility of witnesses, this court will defer to those findings unless they are against the manifest weight of the evidence. *People v. McDonough*, 239 Ill. 2d 260, 266 (2010). The trial court's determination is against the manifest weight of the evidence only when an opposite conclusion is apparent or the findings are unreasonable, arbitrary, or not based on the evidence. *People v. Whiting*, 365 Ill. App. 3d 402, 406 (2006).

¶ 20 Pursuant to section 12-3.05(a)(1) of the Criminal Code of 2012 (Code) (720 ILCS 5/12-3.05(a)(1) (West 2015)), a person commits the offense of aggravated battery "when, in committing a battery, other than by the discharge of a firearm, he or she knowingly \*\*\* [c]auses great bodily harm or permanent disability or disfigurement." A person acts knowingly if he is consciously aware that his conduct is practically certain to cause great bodily harm. *People v. Psichalinos*, 229 Ill. App. 3d 1058, 1067 (1992). However, the State need not prove that respondent intended the specific consequence that occurred. *People v. Isunza*, 396 Ill. App. 3d 127, 132 (2009). "Rather, where someone in the commission of a wrongful act commits another wrong not intended, or where in the execution of an intent to do wrong an unintended act resulting in a wrong ensues as a natural and probable consequence, the one acting with a wrongful intent is responsible for the unintended wrong." *Id.*

¶ 21 The trial court found respondent guilty of aggravated battery, concluding that "when you point a gun at someone, and you pull the trigger, that is an intentional act." The court therefore determined that respondent's act of pulling the trigger of the BB gun while pointed at Jose B. was



done with knowledge that his conduct is practically certain to cause great bodily harm. Although a BB gun is not necessarily considered a firearm under statutory definitions (see 430 ILCS 65/1.1(1) (West 2012)), it functions much like a firearm in that an object is forcefully propelled at a target when a person aims and pulls the trigger. Accordingly, we consider cases discussing whether pulling the trigger on a firearm that fired a shot knowingly caused great bodily harm.

¶ 22 In *People v. Vazquez*, 315 Ill. App. 3d 1131, 1133 (2000), the defendant testified that the victim kept asking him for money and when the victim put his hands in his jacket the defendant thought he was going to pull out a gun. The defendant testified that he fired his gun four times "pointed up" in order to scare the victim, but he did not intend to hurt the victim. *Id.* Three shots struck the victim. On appeal, the defendant argued that his conviction for aggravated battery should be reversed because he acted recklessly, not knowingly, when he fired the gun. This court affirmed the defendant's conviction because the evidence supported the trial court's finding that the defendant acted with knowledge that the victim would be hurt if he fired the gun. *Id.* See also *People v. Figures*, 216 Ill. App. 3d 398, 402 (1991) (trial court's finding that the defendant committed aggravated battery affirmed where the evidence showed that the defendant, who was in a fight with a member of the victim's club earlier, pointed his gun at the victim and pulled the trigger several times).

¶ 23 Unlike the defendants in *Vazquez* and *Figures*, who testified that they pulled the trigger intending to fire shots, respondent here testified that he thought the safety was on, that he did not think it would fire a shot as a result, and that if he knew the safety was not on he "would have never pulled the trigger at all." Ramiro R., who owned the BB gun, and Emmanuel G., who had held the gun prior to the incident, both testified that they thought the safety was activated.

There is no evidence in the record that respondent intended for the BB gun to actually fire a shot when he pulled the trigger. We cannot say, as the trial court found, that respondent was consciously aware that in pointing the BB gun at Jose B. and pulling the trigger, he was practically certain to cause great bodily harm.

¶ 24 However, where the respondent denies the requisite intent, such intent may be shown through circumstantial evidence. *People v. Phillips*, 392 Ill. App. 3d 243, 259 (2009). "Intent can be inferred from the surrounding circumstances, the defendant's words, the weapon used, and the force of the blow." *People v. Steele*, 2014 IL App (1st) 121452, ¶23. Here, Jose B. testified that the boys were all friends. They were not fighting before the incident. After he was shot, they came to him and asked if he was okay. They told him they were sorry and respondent told him he shot the BB gun accidentally. Jose B. testified that he did not think respondent would shoot the gun.

¶ 25 Detective Munyon spoke with respondent and Ramiro R., and both told him they believed the safety was on the BB gun, and that there was no fighting between them prior to the incident. At trial, Emanuel G. testified that that they were all friends, and that he had seen the BB gun prior to the incident and thought the safety was activated. Respondent testified that they were all friends and they were not fighting before the incident. He testified that he was "messing with the gun" and he "had it in [his] right hand." He called out to Jose B. who turned around. Respondent stated that he "pulled the trigger" but he "thought the safety was on. And [he] thought it wouldn't go off." Respondent did not want to shoot Jose B. He stated that he did not seek help immediately because Jose B. told him he was okay. Jose B corroborates respondent's testimony, stating that he "told them they do too much, like they play too much," and that he did not tell anyone about the incident immediately after it happened because he

"didn't know it was a big issue at first." He also testified that respondent told him it was an accident.

¶ 26 The trial court, however, did not believe respondent's claim that the shooting was accidental. Although we give due deference to the trial court's determinations of witness credibility, such deference "does not excuse this court from its duty to examine the evidence to determine whether guilt has been established beyond a reasonable doubt." *People v. Butler*, 28 Ill. 2d 88, 91 (1963); see also *People v. Bailey*, 265 Ill. App. 3d 262, 271 (1994) (a reviewing court must consider whether the credibility of the witnesses is "so improbable or so unsatisfactory as to raise a reasonable doubt of guilt"). Here, the circumstantial evidence does not support a finding that respondent knowingly caused serious bodily injury to Jose B. The evidence shows that respondent was showing off and playing around with a BB gun when he pointed it in the direction of Jose B. and pulled the trigger. They were friends and were not fighting before the incident. Respondent believed the safety was on and did not mean to actually shoot the BB gun when he pulled the trigger. Furthermore, respondent did not flee after striking Jose B. Instead, he, Emanuel G. and Ramiro R. went to check on Jose B. because respondent wanted "to make sure he was okay. If anything happened, I was going to take the blame for it no matter what." Jose B. similarly testified, stating that they came to him after he was struck and asked if he was okay.

¶ 27 The State argues, however, that respondent's statement makes little sense because people pull the trigger on guns for no other reason than to fire a shot. While we acknowledge the State's argument, we are also mindful that we have here a 14 year old respondent and a 14 year old victim. The United States Supreme Court has recognized that juveniles lack fully matured levels of judgment and impulse control. *Roper v. Simmons*, 125 S. Ct. 1183 (2005). Our

supreme court has acknowledged and agreed with *Roper's* analysis regarding juveniles, urging the General Assembly to review the mandatory transfer provision of the Juvenile Court Act of 1987 to take into account "the effect that the unique qualities and characteristics of youth may have on juveniles' judgment and actions." *People v. Patterson*, 2014 IL 115102, ¶ 111. Considering respondent's age, it is entirely plausible that he was "messaging" around with the BB gun when he pulled the trigger, but he did not intend to fire the BB gun at Jose B. because he believed the safety was activated. Although respondent stated that he knew the BB gun would fire a shot if the safety was off, this statement does not contradict respondent's testimony that he thought the safety was on and the BB gun would not fire if he pulled the trigger. The evidence supports respondent's statement with no evidence or testimony to the contrary. Based on the evidence at trial, the State failed to prove beyond a reasonable doubt that respondent knowingly caused serious bodily harm to Jose B.

¶ 28 Respondent acknowledges that his actions resulted in Jose B.'s injury, and therefore he does not request an outright reversal of his conviction; rather, respondent asks this court to reduce his conviction from aggravated battery to simple battery, a Class A misdemeanor. However, knowledge that one's conduct will lead to bodily harm is also an element of battery. See 720 ILCS 5/12-3(a)(1) (West 2015). Although the evidence does not show that respondent had the requisite knowledge, it does show that in pulling the trigger when he thought the safety was on, respondent consciously disregarded a substantial and unjustifiable risk that a result would follow. Such conduct is reckless conduct. *People v. Lattimore*, 2011 IL App (1st) 093238, ¶ 43. "Recklessness is a 'less culpable mental state' than knowledge, and evidence of recklessness is insufficient to prove that a person acted knowingly." *Id.* quoting *People v. Fornear*, 176 Ill. 2d 523, 531 (1997).

¶ 29 In *People v. Kennebrew*, 2013 IL 113998, ¶ 21, our supreme court addressed Supreme Court Rule 615(b)(3) (Ill. S. Ct. R. 615(b)(3)), which provides that "[o]n appeal the reviewing court may \*\*\* reduce the degree of the offense of which the appellant is convicted. Under Rule 615(b)(3), '[a] reviewing court has the authority to reduce the degree of the offense of which a defendant was convicted when the evidence fails to prove beyond a reasonable doubt an element of the greater offense.' " *Id.* quoting *People v. Rowell*, 229 Ill. 2d 82, 98 (2008). The court found that " '[t]he authority to order the entry of judgment on the lesser-included offense is both statutory and based on the common law; the constitutionality of the practice has never been seriously questioned.' " *Id.* quoting *People v. Knaff*, 196 Ill. 2d 460, 477-78 (2001).

¶ 30 When a reviewing court convicts a defendant on an uncharged offense through its authority under Rule 615(b)(3), it must first determine whether the offense is a lesser-included offense of the charged offense and then examine whether the evidence supports conviction on the lesser offense. *Kennebrew*, 2013 IL 113998, ¶ 30. A lesser included offense is "established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged." 720 ILCS 5/2-9(a) (West 2015). Reckless conduct is a lesser-included offense of aggravated battery with a firearm. *People v. Roberts*, 265 Ill. App. 3d 400, 403 (1994). Further, as discussed above, the evidence in this case supports a finding of reckless conduct. Accordingly, we reduce the degree of respondent's offense from aggravated battery causing serious bodily harm to reckless conduct, which is a Class A misdemeanor, (see 720 ILCS 5/12-5 (West 2015)), and remand the cause for resentencing.

¶ 31

CONCLUSION

¶ 32 For the foregoing reasons, respondent's conviction for aggravated battery is vacated, and judgment of conviction is entered on the charge of reckless conduct.

¶ 33 Vacated in part; judgment modified and cause remanded.