

No. 1-12-0235

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent 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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<i>In re</i> SILAS R., a minor	)	Appeal from the
(THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
	)	Cook County.
Petitioner-Appellee,	)	
	)	No. 11 JD 3721
v.	)	
	)	
SILAS R.,	)	The Honorable,
	)	Andrew Berman,
Respondent-Appellant).	)	Judge Presiding.

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JUSTICE SIMON delivered the judgment of the court.  
Presiding Justice Harris and Justice Pierce concurred in the judgment.

**ORDER**

¶ 1 *Held:* The State did not prove that respondent committed the offense of aggravated unlawful use of a weapon beyond a reasonable doubt because the State did not present evidence showing that respondent was not an invitee in the legal dwelling of another when he possessed the firearm at issue. Respondent was adjudicated

delinquent beyond a reasonable doubt of unlawful possession of a firearm because the evidence, viewed in the light most favorable to the State, showed that respondent was in possession of a firearm which could be concealed on his person. Pursuant to the holding in *People v. Aguilar*, 2013 IL 112116, *modified upon denial of reh'g* (Dec. 19, 2013), the unlawful possession of a firearm statute does not violate respondent's constitutional right to bear arms.

¶ 2 Following a hearing, minor respondent Silas R. was adjudicated delinquent of aggravated unlawful use of a weapon (AUUW) and unlawful possession of a firearm (UPF) and sentenced to 18 months of probation. On appeal, respondent contends that (1) the State failed to prove him guilty of AUUW when it failed to present evidence that he was not a social invitee at the home where he was arrested; (2) his adjudication for AUUW must be reversed because the State charged him under an outdated version of the statute; (3) the State failed to establish beyond a reasonable doubt that the object in his possession was actually a firearm; (4) the statutes under which he was adjudicated delinquent are unconstitutional because they violate the state and federal guarantees of the right to bear arms; and (5) his adjudication for UPF must be vacated pursuant to the one-act, one-crime doctrine. We affirm in part and reverse in part.

¶ 3 In August 2011, the State filed a petition for adjudication of wardship alleging, *inter alia*, that respondent was delinquent in that he, a person under 18 years of age, had in his possession a firearm and did not possess a valid Firearm Owner's Identification (FOID) card.

¶ 4 At trial, Chicago police officer Gamez testified that when he arrived at 11611 South Lafayette, he saw respondent and four other individuals standing on the sidewalk. One of these individuals was holding a revolver with a pearl handle. Gamez and his partner then followed the group into the building. Once inside, Gamez saw one of the individuals try to hide a shotgun behind a door. Gamez was able to recover that weapon. Seconds later, he saw respondent, who was about 10 feet away, drop a "handgun, a revolver" and run into a bathroom. Gamez

recovered the revolver, determined that it was unloaded, and placed it in his pocket. Gamez then instructed another officer to go to the bathroom and take respondent into custody. The revolver was later inventoried. Gamez testified that the revolver's serial number had been removed. Gamez learned, while respondent was being processed, that respondent did not live at 11611 South Lafayette, did not have a place of business at that address, and was under 18 years of age. Respondent did not provide officers with a valid FOID card.

¶ 5 Respondent, who was 15 years old, testified that he was at 11611 South Lafayette visiting friends and playing a video game when he heard gunshots, at which point everyone got on the floor. Respondent and his friends then resumed playing the game. When respondent heard gunshots a second time, he ran into the bathroom. At this point, the friend who lived at the residence was not home because he had gone to the store. Respondent denied hanging out on the porch and dropping anything in the dining room. He also denied handling or possessing a revolver that day.

¶ 6 The court adjudicated respondent delinquent of AUUW based upon his possession of a handgun when he was not yet 21 years old and of UPF in that he was under 18 years old and possessed a firearm that, due to its size, could be concealed upon his person. Respondent was sentenced to 18 months of probation.

¶ 7 On appeal, respondent first contends that he was not adjudicated delinquent beyond a reasonable doubt of AUUW because the State failed to establish that he was not a social invitee of a resident of 11611 South Lafayette. A person under the age of 21 commits the offense of AUUW when he knowingly possesses a pistol or revolver, except when he is on his land, in his abode, in his legal dwelling, in a fixed place of business, or on the land or in the legal dwelling of another person as an invitee. 720 ILCS 5/24-1.6(a)(1), (a)(3)(I) (West 2010).

¶ 8 The constitutional safeguard of proof beyond a reasonable doubt applies during the adjudicatory stage of a juvenile delinquency proceeding. *In re Malcolm H.*, 373 Ill. App. 3d 891, 893 (2007). When a respondent challenges the sufficiency of the evidence, the relevant question on review is whether, after considering the evidence in the light most favorable to the State, any rational trier of fact could have found proof of the essential elements of the crime beyond a reasonable doubt. *In re W. C.*, 167 Ill. 2d 307, 336 (1995). Generally, the trier of fact is in the best position to judge credibility because it had the opportunity to hear and see the witnesses, and it is not the function of a reviewing court to retry the respondent. *People v. Austin M.*, 2012 IL 111194, ¶ 107. A delinquency finding will only be reversed when the proof was so improbable or unsatisfactory that reasonable doubt exists as to the respondent's guilt. *In re Keith C.*, 378 Ill. App. 3d 252, 257 (2007).

¶ 9 Respondent asserts that the exception for social invitees found in the AUUW statute is an element of the offense because it appears within the statutory definition of the offense and the State, therefore, bore the burden of disproving the exception. The State responds that it was respondent's burden to raise and prove the exception for invitees.

¶ 10 Our supreme court has held that the exceptions listed in the body of the AUUW statute are elements of the offense which the State must disprove. *People v. Laubscher*, 183 Ill. 2d 330, 335 (1998); see also *People v. Brisco*, 2012 IL App (1st) 101612, ¶ 16 (a defendant's status, or lack thereof, as an invitee is a necessary element of the offense of AUUW). When an exception appears as part of the body of a substantive offense, the State has the burden to disprove the exception beyond a reasonable doubt in order to sustain a conviction. *Laubscher*, 183 Ill. 2d at 335. While the State may rely on circumstantial evidence to sustain this burden, it must establish the essential elements of the offense beyond a reasonable doubt and may not leave such matters

to conjecture or assumption. *Id.* at 335-36. Thus, the issue of whether respondent was a social invitee at the time of his arrest does not concern an affirmative defense but, rather, an element of the offense which the State must establish beyond a reasonable doubt.

¶ 11 The State maintains that it met its burden to prove that respondent was not an invitee because the court could reasonably infer from the evidence showing that respondent dropped the gun that respondent did not have permission to possess a firearm at 11611 South Lafayette and had something he "wasn't supposed to have." The State conjectures that it is "more likely" that respondent was a member of a gang involved in a fight with a rival gang and that it is unlikely that the friend who resided at the address knew that respondent possessed a gun, let alone gave him permission to possess the gun, as the resident was not home when the police arrived.

¶ 12 However, the State did not present evidence showing that respondent belonged to a gang and the State's argument on appeal ignores respondent's testimony that he was at the residence, along with three or four others, visiting his friend and playing a video game at the time of his arrest. Absent any evidence as to whether respondent was a social invitee, this court cannot assume that respondent's actions of dropping the revolver and running to the bathroom established that he was not an invitee. See *Laubscher*, 183 Ill. 2d at 336 (permitting such an inference without any evidentiary basis would effectively shift the burden to a defendant to prove that he fell within an exception). As such, we reverse respondent's adjudication of delinquency for AUUW because the State failed to prove beyond a reasonable doubt that respondent was not the social invitee of a legal resident when he was arrested.

¶ 13 Having reversed respondent's adjudication of delinquency for AUUW, we need not address respondent's additional claims that he was charged under an outdated version of the AUUW statute, that the AUUW statute is unconstitutional (see *People v. Lee*, 214 Ill. 2d 476,

482 (2005) (a court "will not consider a constitutional question if the case can be decided on other grounds")), or that respondent's adjudication of delinquency for UPF must be reversed pursuant to the one-act, one-crime doctrine.

¶ 14 Respondent next contends that he was not adjudicated delinquent beyond a reasonable doubt of UPF because the State failed to present any evidence showing that the object recovered by the police was an actual firearm or that it was small enough to be concealed on his person. To sustain a charge of UPF, the State must prove that the respondent was younger than 18 years old and possessed a firearm of a size which could be concealed on his or her person. 720 ILCS 5/24-3.1(a)(1) (West 2010).

¶ 15 In *People v. Ross*, 228 Ill. 2d 255, 258 (2008), the defendant was convicted of armed robbery based, in part, on the victim's testimony that the defendant pointed a small black gun at him and demanded his wallet and that the gun was small and could be concealed. The defendant threw away a pellet gun when he was confronted by the police shortly after the crime and, while the pellet gun was not offered into evidence at trial, the officer who recovered it described it as a "4.5 BB caliber gun with a three inch barrel." *Id.* The court concluded that the State had failed to prove beyond a reasonable doubt that the gun used by the defendant was a dangerous weapon. *Id.* at 275-76. Although the victim testified that the gun was small, portable, and thin and a police officer testified as to its characteristics, the State did not present the gun or photographs of the gun at trial or any evidence showing that the gun was loaded or brandished as a weapon or which described its weight or composition. *Id.* at 276-77. The court explained that the trial court "incorrectly based its ruling on the subjective feelings of the victim, rather than the objective nature of the gun," and that the evidence was insufficient to prove that the gun was a dangerous weapon. *Id.* at 277.

¶ 16 In *People v. Washington*, 2012 IL 107993, our supreme court held that the evidence presented was sufficient to prove that the defendant possessed an actual gun. In *Washington*, 2012 IL 107993, ¶ 35, the victim testified that the defendant pointed a gun at his head in broad daylight and the evidence established that the victim had an unobstructed view of the weapon for several minutes. The court stated that, unlike in *Ross*, there was no dispute that the defendant possessed some type of gun when he committed the crimes and, given the victim's unequivocal testimony, the jury could have reasonably inferred that the defendant possessed a real gun when he committed the crimes at issue. *Id.* at ¶¶ 35-37.

¶ 17 In this case, Gamez testified that he saw respondent drop a "handgun, a revolver" and that he then recovered the gun, determined that it was unloaded, placed it in his pocket, inventoried the gun, and discovered that its serial number had been removed. Thus, similar to the victim in *Washington*, Gamez provided testimony showing that he had the opportunity to observe the gun from a close distance over an extended period of time and to determine that the weapon dropped by respondent was an actual gun. Unlike *Ross*, there was no evidence indicating that the weapon was a toy gun, a BB gun, or anything other than a "real gun." Further, Gamez testified that he put the gun in his pocket after he picked it up, and the court could have reasonably inferred from that testimony that the gun was small enough to be concealed on respondent's person. Although respondent claims the evidence did not establish the gun's size because Gamez did not testify regarding the size of his pocket or whether some portion of the gun stuck out of his pocket, the court was not required to disregard inferences which naturally flow from the evidence or search for all possible explanations consistent with respondent's claim of innocence and raise them to the level of reasonable doubt. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). As such, the State presented sufficient evidence to establish beyond a reasonable doubt that respondent committed

the offense of UPF.

¶ 18 Respondent further contends that his adjudication for UPF must be reversed because the relevant statute violates the federal and state guarantees regarding an individual's right to bear arms. In *People v. Aguilar*, 2013 IL 112116, *modified upon denial of reh'g*, (Dec. 19, 2013), ¶¶ 25-28, our supreme court rejected a second amendment challenge to the UPF statute, concluding that the possession of a handgun by a minor was conduct that fell outside the scope of the second amendment's protection and agreed with "the obvious and undeniable conclusion" that a minor's possession of a handgun falls outside the scope of the second amendment's protection. As such, we conclude that the UPF statute does not violate respondent's constitutional right to bear arms.

¶ 19 Accordingly, we reverse respondent's adjudication of delinquency for AUUW and affirm the order of the circuit court of Cook County in all other aspects.

¶ 20 Affirmed in part; reversed in part.