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THIRD DIVISION  
May 25, 2016

NOS. 1-15-3287 & 1-16-0362 (cons)

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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IN THE INTEREST OF:	)	
	)	Appeal from the
MALIK P., a Minor,	)	Circuit Court
	)	of Cook County,
(PEOPLE OF THE STATE OF ILLINOIS,	)	Illinois.
	)	
Petitioner-Appellee,	)	No. 15JD03432
	)	
v.	)	The Honorable
	)	Lori Wolfson,
MALIK P.,	)	Judge Presiding.
	)	
Minor Respondent-Appellant).	)	

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JUSTICE FITZGERALD SMITH delivered the judgment of the court.  
Justices Lavin and Pucinski concurred in the judgment.

**ORDER**

¶ 1 Held: The State failed to prove the minor respondent guilty of AUUW (FOID) beyond a reasonable doubt where it did not offer any evidence that minor respondent was without a firearm owner's identification card; the minor was found guilty of AUUW (under 21) and

UPF based on age beyond a reasonable doubt where the State provided sufficient testimony at trial to prove the minor respondent's age; minor respondent's sentence was entered in error because the sentence was for an indeterminate term until age 21, and if the minor respondent were to serve the sentence until his 21st birthday, he would serve a longer sentence than would an adult convicted of the same crime. Affirmed in part; vacated in part; remanded for resentencing.

¶ 2 This appeal arises from the trial court's November 2015 order following a delinquency adjudication hearing adjudicating 17 year-old respondent-appellant Malik P. guilty of committing the offenses of aggravated unlawful use of a weapon (under 21), aggravated unlawful use of a weapon (no FOID card), and unlawful possession of a firearm (UPF).

¶ 3 Respondent was adjudicated delinquent based on a three-count petition alleging that he was delinquent for committing the offenses of aggravated unlawful use of a weapon (AUUW) based on his lack of a valid Firearm Owner's Identification (FOID) card; AUUW based on his age (under 21 years old); and for unlawful possession of a firearm. Respondent was found guilty of all three offenses. The trial court sentenced respondent to the Department of Juvenile Justice for an indeterminate period of time not to exceed his 21st birthday. Respondent appeals, contending: (1) the State failed to prove his delinquency as to AUUW (FOID) beyond a reasonable doubt where it failed to present evidence that respondent did not possess a valid firearm owner's identification card; (2) the State failed to prove his delinquency as to AUUW (under 21) beyond a reasonable doubt because it failed to prove respondent's age; (3) the State failed to prove his delinquency as to UPF where it failed to prove respondent's age; and (4) the court erred when it sentenced respondent to the Department of Juvenile Justice for an indeterminate term, where the sentence he would serve were he released upon turning 21 would be longer than the statutory maximum for his offense of conviction were he to be convicted as an adult. The State properly concedes that it failed to prove respondent delinquent of AUUW (FOID), and asks this court to vacate only

that conviction. The State also concedes, and we agree, that respondent's sentence should be modified such that the sentence does not exceed that which he would have served had he been convicted as an adult.

¶ 4

#### BACKGROUND

¶ 5

The record before us reveals the following facts and procedural history. On October 26, 2015, the State filed a petition for adjudication of wardship against the minor respondent, alleging that he committed the offenses of: (1) aggravated unlawful use of a weapon based on his lack of a valid Firearm Owner's Identification card; (2) AUUW based on his age (under 21 years old); and (3) unlawful possession of a firearm for carrying a loaded semi-automatic handgun on October 24, 2015.

¶ 6

The State filed a motion to quash arrest and suppress evidence. After a hearing during which respondent and two police officers testified, the court denied the motion. The delinquency adjudication hearing was then held.

¶ 7

Chicago Police officer Anton Little testified that he was not working in his capacity as a Chicago police officer on October 24, 2015. At approximately 3:00 p.m. that day, he was on South State Street in Chicago when he saw respondent walking on the sidewalk. Another police officer, Officer Houston, drew Little's attention to respondent when he asked Officer Little to detain respondent. Officer Little did so by grabbing respondent by the chest and arm. When respondent struggled, Officer Little told him to "calm down" because he was a police officer. During the struggle, respondent was "[g]rabbing towards his waistband and trying to pull away from" Officer Little. Officer Little "kept removing [respondent's] hands from his waistband" and respondent said, "I'll give it to you, I'll give it to you, I'll give you the weed," as he continued to reach for his waistband. When respondent would not stop

reaching for his waistband, another off-duty officer, Officer Roberts, "came over [to] assist" Officer Little. The two officers then performed an "emergency takedown" on respondent, culminating with respondent, handcuffed behind his back, face-first on the ground. Respondent continued to struggle and the men lifted him up off of the ground. As they did so, Officer Little heard the sound of metal hitting concrete. He did not immediately see what had hit the ground, but within five seconds he observed a gun.

¶ 8 Chicago Police officer Michael Roberts testified that he, too, was off-duty on the date in question when he observed a struggle occurring involving respondent and "a couple of officers," including Officer Little. Officer Roberts assisted in handcuffing respondent. Respondent continued to struggle and escape after he was handcuffed. Officer Roberts and another officer then grabbed respondent's arms and lifted him up. At that time, Officer Roberts heard the "thump" of metal hitting the ground. He looked down and saw a silver handgun on the concrete. Another officer retrieved the gun. He testified that, prior to hearing the "thump," he did not see a weapon on the ground, but admitted that the scene was "chaotic and hectic" and that he did not "look all over the ground" for weapons. Officer Roberts testified he was told respondent was being detained for possession of marijuana, but to his knowledge no marijuana was recovered from respondent.

¶ 9 Cook County Sheriff's Department Investigator Kimtrina McClelland was also in the relevant area on the day of the incident, but also off-duty. She saw that Officers Little and Roberts were apprehending respondent, and she stood by to "mak[e] sure that everything was okay." She was within an arm's reach of respondent while the officers were apprehending him. She saw respondent on the ground and the officers lifting him up from the ground. When the gun was recovered, an officer handed it to Investigator McClelland, who disarmed

the weapon. To do so, she released the magazine clip, and found a bullet in the chamber. Investigator McClelland acknowledged that the officers involved, including her, were off-duty and working security nearby, and were dressed in all black.

¶ 10 Chicago Police officer Vicari testified that he was on-duty on the day in question. He and his partner, Officer Alvarez, arrived on the scene and took custody of respondent. Respondent was transported to the hospital and then to the police station where he was processed. Officer Vicari testified that he confirmed respondent was under 18 years of age while he was being processed:

"[ASSISTANT STATE'S ATTORNEY HOWES:] Q. At some point [respondent] arrived at the district for processing?

[OFFICER VICARI:] A. Yes.

Q. And during processing of the minor respondent, did you learn that his age was under 18 years of age?

A. Yes."

¶ 11 Following Officer Vicari's testimony, respondent's attorney made a motion for a directed verdict. After hearing arguments, the court denied the motion. Respondent rested without presenting evidence on his own behalf.

¶ 12 Ultimately, the court found there was sufficient evidence that "this minor...possessed the 9mm handgun and there will be a finding of guilty as charged."

¶ 13 At the sentencing hearing, the State asked for an order committing respondent to the Department of Corrections due to his contacts with the juvenile system, his pending attempted murder case, the fact that he had warrants for failure to appear on the current case, and the seriousness of the present offense. Defense counsel argued that respondent had not

been offered the benefit of probation services and reminded the court that respondent's probation officer had said he was a good candidate for probation services. Counsel argued that respondent needed drug treatment, that there were no previous findings of delinquency, that he had a mental health diagnosis, and that he had been doing well in pre-trial detention.

¶ 14

The court noted that respondent had already violated his terms of release, stating:

"THE COURT: \* \* \* The concern that I have with you, Malik, if you didn't have the other case pending and I didn't release you once and have you violate the terms, have another judge pick you up on the warrant, release you again and violate the terms again, I would consider a release pending trial on the other matter. The nature of the other case is important in determining what's appropriate in this case. That's because when you pick up a serious case, if you respect the rules of the Court, I approach things differently than if you don't respect the rules of the Court. So that's why that other case - - not only because it's an arrest but also because I gave you a chance to be out of custody and frankly, you blew it.

Not only did you disrespect the rules of the release, but you picked up this other case. I think the evidence is clear on this case. I don't have any question that I made the right decision in the ruling that I made and now in trying to decide what the fair and just sentence is for you, I have to not only look at this case itself but at the person, how you've been in custody, how you've been out of custody.

As your lawyer so correctly pointed out, you have no findings in court. You just have two very serious cases one on which you've been found guilty. So I don't send kids to the Department of Corrections lightly, and I don't send them

based on how many times they've violated probation; okay, now it's time to go. Sometimes it's just the nature of the charge and the behavior that I've seen so far that justified my decision to send somebody to the Department of Corrections.

So it's frankly, I think you will work well in the system as you did upstairs. I think it's important that you understand the consequences of carrying a little gun on the streets of Chicago carries a time in custody. It is not a situation where you just stole something from the store or where you even stole a car or something that is a more serious case, but you made a decision to walk around the streets of this city, in a public place, with a loaded handgun. And for that I feel a sentence to the Department of Corrections is justified."

The court then sentenced respondent to an indeterminate period in the Department of Juvenile Justice, not to exceed his 21st birthday.<sup>1</sup>

¶ 15 Respondent appeals his adjudication and sentence.

¶ 16 ANALYSIS

¶ 17 Respondent first contends the State failed to prove his delinquency beyond a reasonable doubt of AUUW (FOID) where the State failed to present any evidence that respondent did not possess a valid FOID card. The State concedes this shortcoming in the prosecution, and asks this court to vacate the AUUW (FOID) count. Because our review of the record shows the State did not present evidence regarding whether respondent possessed

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<sup>1</sup> Specifically, the Order of Commitment shows that respondent was committed to the Illinois Department of Juvenile Justice and given sentence credit for 67 days in custody, with the sentence set to "terminate upon the minor attaining the age of 21 years or in \_\_\_\_\_, whichever occurs first, unless the minor is sooner discharged from parole or custodianship or is otherwise terminated or vacated as provided for by the law." Respondent was 17 years old at sentencing.

a valid FOID card, we agree with respondent, accept the State's concession, and vacate the AUUW (FOID) count.

¶ 18 Next, respondent contends the State also failed to prove his delinquency beyond a reasonable doubt of AUUW (under 21) and UPF (under age 18). Respondent does not challenge the evidence presented to prove he possessed the firearm in question. Instead, respondent argues that, to prove his delinquency as to AUUW (under 21) and UPF (under age 18), the State was required to present sufficient evidence of his age, and it failed to do so. Respondent points to the testimony of Officer Vicari, who testified that he confirmed respondent was under age 18 during processing at the police station, and argues, essentially, that this testimony was insufficiently detailed to be considered reliable. We disagree.

¶ 19 Juvenile delinquency proceedings consist of the findings phase, the adjudicatory phase, and the dispositional phase. *In re Nasie M.*, 2015 IL App (1st) 151678, ¶ 22. "During the findings phase, the court holds a trial applying the rules of evidence for a criminal case, and the State presents proof beyond a reasonable doubt of every necessary fact to find a respondent delinquent." *In re Nasie M.*, 2015 IL App (1st) 151678, ¶ 22. If the court enters a finding of delinquency, the matter then goes on to sentencing, where, if the court makes the minor a ward of the court, it then fashions an appropriate sentence that will best serve both the minor and the public. *In re Nasie M.*, 2015 IL App (1st) 151678, ¶ 22 (citing *In re Samantha V.*, 234 Ill. 2d 359, 365-66 (2009)).

¶ 20 "When considering a challenge to the sufficiency of the evidence, a reviewing court must determine whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v. Campbell*, 146 Ill. 2d 363, 374 (1992); *In re S.M.*, 2015 IL App



(3d) 140687, ¶ 13 ("Similarly, when a finding of delinquency is challenged on appeal regarding sufficiency of the evidence, the applicable standard of review is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the delinquency petition were proved beyond a reasonable doubt."). The State must prove each essential element of a crime beyond a reasonable doubt. *In re Nasie M.*, 2015 IL App (1st) 151678, ¶ 22 ("During the findings phase, the court holds a trial applying the rules of evidence for a criminal case, and the State presents proof beyond a reasonable doubt of every necessary fact to find a respondent delinquent").

¶ 21 We will not substitute our judgment for that of the trier of fact. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). A reviewing court must construe all reasonable inferences from the evidence in favor of the prosecution. *People v. Bush*, 214 Ill. 2d 318, 326 (2005). We will not set aside a criminal conviction unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *Ortiz*, 196 Ill. 2d at 259. This standard applies equally to a minor in a delinquency hearing. See *In re Nasie M.* 2015 IL App (1st) 151678, ¶ 23 ("A delinquency finding will only be reversed when the proof was so improbable, implausible, or unsatisfactory that reasonable doubt exists as to the respondent's guilt").

¶ 22 Here, the State's petition for adjudication of wardship charged respondent with committing the offense of aggravated unlawful use of a weapon in violation of section 24-1.6(a)(1) of the Criminal Code by carrying a .9 mm semi-automatic pistol at a time when he was not on his own land, in his own abode, or a fixed place of business, and alleged respondent was under 21 years at the time of the offense, a required element of that offense. 720 ILCS 5/24-1.6(a)(1) (West 2012). The applicable criminal statute provides:

"(a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:

(1) Carries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission, any pistol, revolver, stun gun or taser or other firearm;

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and

(3) One of the following factors is present:

\* \* \*

(I) the person possessing the weapon was under 21 years of age and in possession of a handgun as defined in Section 24-3, unless the person under 21 is engaged in lawful activities under the Wildlife Code [520 ILCS 5/1.1 *et seq.*] or described in subsection 24-2(b)(1), (b)(3), or (24-2(f))." 720 ILCS 5/24-1.6(A)(1) (West 2012).

¶ 23

The State's petition for adjudication of wardship also charged respondent with committing the offense of unlawful possession of a firearm in violation of section 24-3.1(a)(1) of the Criminal Code by possessing a firearm the size of which may be concealed upon the person, and alleged that respondent was under 18 years of age on the date of the occurrence, a required element of that offense. 720 ILCS 5/24-3.1(a)(1) (West 2012). The applicable criminal statute provides:

"(a) A person commits the offense of unlawful possession of firearms or firearm ammunition when:

(1) He is under 18 years of age and has in his possession any firearm of a size which may be concealed upon the person[.]"<sup>2</sup> 720 ILCS 5/24-3.1(a)(1) (West 2012).

¶ 24 Respondent does not challenge the sufficiency of the evidence as to possession. Instead, he raises a challenge only to the statutory age requirement of AUUW and UPF.

¶ 25 Our review of the record convinces us that the State properly proved respondent guilty of both AUUW and UPF. At the adjudication hearing, off-duty police officer Little testified he detained respondent on an urban street in response to another officer's request to do so. Respondent struggled and continually reached for his waistband. Eventually, Officer Little and another officer lifted respondent up from the ground and, as they did so, Officer Little heard the sound of metal hitting concrete. He then saw a gun on the ground. Off-duty Officer Roberts also testified that he assisted Officer Little in lifting respondent up from the ground and, as he did so, heard the "thump" of metal hitting the ground. He looked down and saw a gun on the concrete. Chicago Police Officer Vicari, who was on-duty on the day of the incident, testified that he and his partner took custody of respondent at the scene. Respondent was transported first to the hospital and then to the police station where he was processed. Officer Vicari testified that he confirmed respondent was under 18 years of age while he was being processed, testifying:

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<sup>2</sup> Section 24-3.1(c) of the UPF statute contains an express exception for persons under the age of 18 who are "participating in any lawful recreational activity with a firearm such as, but not limited to, practice shooting at targets upon established public or private target ranges or hunting, trapping, or fishing in accordance with the Wildlife Code of the Fish and Aquatic Life Code." 720 ILCS 5/24-3.1(c) (West 2012).

"[ASSISTANT STATE'S ATTORNEY HOWES:] Q. At some point [respondent] arrived at the district for processing?

[OFFICER VICARI:] A. Yes.

Q. And during the processing of the minor respondent, did you learn that his age was under 18 years of age?

A. Yes."

¶ 26 The Third District of this court has recently expounded upon methods of proving a person's age in court, noting:

"A person's age may be established, beyond a reasonable doubt, as an element of a given offense in several ways. In some cases, the State introduces a certified birth record or offers the testimony of a close relative during a trial in order to establish the age of either an offender or a victim. In other cases, a police officer testifies before the court about an offender's response to inquiries from law enforcement officers regarding his age. Such testimony from the officer is admissible and may satisfy the State's burden of proof on the issue of the accused's age. See *People v. Dalton*, 91 Ill. 2d 22, 30 (1982)." *In re S.M.*, 2015 IL App (3d) 140687, ¶ 29 (emphasis omitted).

¶ 27 Here, where respondent's challenge is based on the sufficiency of the evidence and where, under that standard, we must consider the evidence in the light most favorable to the State, determining whether "any rational trier of fact could have found the elements of the delinquency petition were proved beyond a reasonable doubt" (*In re S.M.*, 2015 IL App (3d) 140687, ¶ 13), we find that the State proved respondent's age through the testimony of Officer Vicari. We note that the State could have avoided this confusion by, for example,

further questioning Officer Vicari, introducing respondent's certified birth record into evidence, or by offering the testimony of a close relative in order to establish respondent's age. We anticipate that it will do so in the future. Nonetheless, on these specific facts, and with the applicable standard of review, we find this evidence sufficient to adjudicate respondent guilty of both AUUW (under 21) and UPF.

¶ 28 We now consider respondent's sentence. Respondent contends that his indeterminate sentence in the Department of Juvenile Justice with a release date not to exceed his 21st birthday is error because the sentence potentially exceeds the adult maximum for the crime. The State concedes that the sentence is error and agrees that respondent's order of commitment should be modified to reflect his incarceration to an indeterminate period of time not exceeding three years. We agree.

¶ 29 Respondent was 17 years old at the time he was sentenced, December 29, 2015. He will turn 21 on July 29, 2019. Therefore, he could potentially be incarcerated for more than three years. The offense for which he was sentenced was AUUW, a class 4 felony that carries a sentence of 1 to 3 years' incarceration for an adult convicted of the same offense. 720 ILCS 5/24-1.6(a) (West 2012); 720 ILCS 5/24-1.6(a)(1), (d)(1) (West 2012); 720 ILCS 5/5-4.5-45 (West 2012). A minor shall not be committed to the Department of Juvenile Justice for a term longer than the period for which an adult could be committed for the same offense. 705 ILCS 405/5-710(7) (West 2012) ("(7) In no event shall a guilty minor be committed to the Department of Juvenile Justice for a period of time in excess of that period for which an adult could be committed for the same act. The court shall include in the sentencing order a limitation on the period of confinement not to exceed the maximum period

of imprisonment the court could impose under Article V of the Unified Code of Corrections.").

¶ 30 In situations such as this, we have the option to remand the case to the trial court for resentencing (see, *e.g.*, *In re Jesus R.*, 326 Ill. App. 3d 1070, 1074 (2002)) or to directly modify the commitment order without remand (see, *e.g.*, *In re S.M.*, 347 Ill. App. 3d 620, 626 (2004)). We choose to remand the cause to the trial court for resentencing for a term not to exceed three years.

¶ 31 CONCLUSION

¶ 32 For all of the foregoing reasons, the decision of the circuit court of Cook County is affirmed as to the adjudications of guilty of AUUW (under 21) and UWF, vacated as to the adjudication of guilty of AUUW (FOID), and remanded for resentencing.

¶ 33 Affirmed in part; vacated in part; remanded for resentencing.