

# **Third District Court of Appeal**

## **State of Florida, July Term, A.D. 2011**

Opinion filed November 16, 2011.  
Not final until disposition of timely filed motion for rehearing.

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No. 3D10-1431  
Lower Tribunal No. 09-4477

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**L.M., a juvenile,**  
Appellant,

vs.

**The State of Florida,**  
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Orlando A. Prescott, Judge.

Carlos J. Martinez, Public Defender, and Michael T. Davis, Assistant Public Defender, for appellant.

Pamela Jo Bondi, Attorney General, and Nikole Hiciano, Assistant Attorney General, for appellee.

Before SALTER and EMAS, JJ., and SCHWARTZ, Senior Judge.

SCHWARTZ, Senior Judge.

The juvenile appellant was adjudicated delinquent on the basis of several violations of the law only one of which is challenged on this appeal. We uphold

his contention that he was improperly found guilty of carrying a concealed weapon under section 790.01(1), Florida Statutes (2009). The so called “weapon” was a BB gun which lacked a CO<sub>2</sub> air cartridge, was not loaded with pellets, and as to which there was no testimony describing its operation or the nature and characteristics of the injuries, if any, it was capable of inflicting. As we held in the virtually identical case of E.S. v. State, 886 So. 2d 311 (Fla. 3d DCA 2004), this showing was insufficient as a matter of law to establish, as required, that the instrument was indeed a “deadly weapon.” § 790.001(13), Fla. Stat. (2009) (defining “weapon” as any of several enumerated items not including a BB gun or “other deadly weapon”). There, as here, the BB gun had no cartridge or pellets, and, although it was introduced in evidence, there was no testimony regarding its operation.<sup>1</sup> We follow E.S. in reversing the challenged adjudication. Accord K.C. v. State, 49 So. 3d 841, 843 (Fla. 4th DCA 2010) (reversing adjudication on the ground that “there was no evidence that [the BB gun] was loaded and no testimony describing the BB gun’s operation or the nature and character of injuries it was capable of inflicting”).

The remaining adjudications are affirmed.

Affirmed in part, reversed and remanded for dismissal in part.

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<sup>1</sup> On this issue, the arresting officer testified only that a BB gun “[i]s propelled by an air cartridge,” and “the bullets for this gun are actually pellets that are loaded from the top.”