FILED BY CLERK
AUG 28 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

	)	2 CA-JV 2009-0074
	)	DEPARTMENT A
	)	
IN RE JAKE V.	)	MEMORANDUM DECISION
	)	Not for Publication
	)	Rule 28, Rules of Civil
	)	Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF GRAHAM COUNTY

Cause No. JV 6084

Honorable D. Corey Sanders, Judge Pro Tempore

REVERSED

Kenneth A. Angle, Graham County Attorney
By Leslie J. Auberger
Safford
Attorneys for State

Harriette P. Levitt
Tucson
Attorney for Minor

E S P I N O S A, Judge.

¶1 Jake V. appeals from the juvenile court's order adjudicating him delinquent for having committed criminal damage, placing him on probation for six months, and ordering him to pay restitution in the amount of $354.35. He contends the evidence was insufficient

to establish the court's finding of responsibility for the offense beyond a reasonable doubt. We agree.

Background

¶2 We view the evidence and reasonable inferences therefrom in the light most favorable to sustaining the adjudication. *See In re Jessi W.*, 214 Ariz. 334, ¶ 11, 152 P.3d 1217, 1219 (App. 2007). In June 2008, Jake had received a pump-action BB gun as a gift for his eleventh birthday and had been seen the following day shooting the gun on his family's four- to five-acre property in a semi-rural area. James C. testified that he lived directly north of Jake's family, and although he had not seen Jake shooting in the direction of James's home or property, he had seen Jake "up and down [his own family's] property shooting at various things" that day. A neighbor who lived some distance away had seen Jake shooting when she went outside to calm her barking dog and testified that Jake had turned and aimed the gun at her. According to Jake's grandmother, Pat B., in the late morning, Jake had walked along a canal on the south end of their property, shooting at various targets to the west. She testified that, at other times during the day and until about 6:30 that evening, he had been shooting at two stationary targets that had been set up in the family's front and back yards, toward the west and toward the south of her home.

¶3 Pat's testimony was consistent with what Jake had told Graham County Sheriff's Sergeant Jacob Carpenter late the same night. Carpenter had interviewed Jake after responding to a call from James reporting that, between the time his family had gone out to

dinner at 4:45 p.m. and the time they returned home after 10:00 p.m., the outer glass panel of their sliding glass door had been damaged, with a small, BB-sized hole appearing in the center of the shattered tempered glass. He estimated the door was seventy-five yards directly north of Jake's backyard and opined that a BB shot from that distance could have caused the damage. Carpenter explained that, based on his own experience with a pump-action BB gun, it was possible to increase the velocity of a BB by pumping the gun "up to . . . 20 to 30 times."

¶4 At the close of the hearing, the juvenile court found the state had proven beyond a reasonable doubt that Jake had committed criminal damage and adjudicated him delinquent. The court stated it was "apparent . . . that only Jake V[.] could have had the opportunity or the ability to cause the damage to [James's] door." Jake argues on appeal that the evidence was insufficient to establish either that it was he who caused the damage or that he had acted recklessly. The state contends the evidence against Jake was "circumstantial, yet compelling" and was sufficient to support the court's delinquency adjudication.

¶5 When reviewing the sufficiency of the evidence to support an adjudication of delinquency, we test the evidence "against the statutorily required elements of the offense." *State v. Pena*, 209 Ariz. 503, ¶ 8, 104 P.3d 873, 875 (App. 2005). We do not reweigh the evidence, *In re John M.*, 201 Ariz. 424, ¶ 7, 36 P.3d 772, 774 (App. 2001), but examine de novo "whether the evidence 'existed in sufficient quantity so that any rational trier of fact' could find beyond a reasonable doubt that the juvenile had committed the offense." *Jessi W.*,

214 Ariz. 334, ¶ 11, 152 P.3d at 1219, *quoting In re William G.*, 192 Ariz. 208, 212, 963 P.2d 287, 291 (App. 1997).

¶6 To establish the allegations in the delinquency petition, the state was required to prove beyond a reasonable doubt that Jake had damaged James's door and had done so recklessly. *See* A.R.S. § 13-1602(A)(1). To prove Jake acted recklessly, the state needed to show he acted in a way he knew would create a substantial and unjustifiable risk of damage to James's property and consciously disregarded that risk, grossly deviating from the standard of conduct a reasonable person in the same situation would observe. *See* A.R.S. § 13-105(10)(c); *see also William G.*, 192 Ariz. at 213-15, 963 P.2d at 292-94 (distinguishing civil negligence from criminal recklessness).

¶7 The state argues it proved Jake caused the damage through James's testimony that Jake was the only person who had been seen shooting a BB gun in the vicinity of James's property that day and through the testimony of James and Carpenter that the hole in the glass appeared to have been caused by a BB. But even if this evidence was arguably sufficient to prove Jake caused the damage, we conclude the evidence failed to prove beyond a reasonable doubt that Jake acted recklessly.

¶8 Of course, "absent a person's outright admission regarding his state of mind, his mental state must necessarily be ascertained by inference from all relevant surrounding circumstances"—including, in particular, the allegedly reckless conduct itself. *William G.*,

192 Ariz. at 213, 963 P.2d at 292.[1] Although circumstantial evidence of motive and opportunity may provide sufficient proof to convict a defendant of an intentional crime, *see State v. Fulminante*, 193 Ariz. 485, ¶¶ 27-28, 975 P.2d 75, 84 (1999), we are aware of no case in which evidence that someone had the opportunity to engage in reckless conduct, standing alone, has been sufficient to conclude that he did so. Because the record contains no evidence of any specific conduct of Jake's that caused damage to James's door or of the circumstances under which such unspecified conduct might have occurred, we do not find the "'sufficient quantity'" of evidence, *Jessi W.*, *supra*, necessary to support a finding that Jake "gross[ly] deviat[ed]" from the standard of conduct a reasonable person would have observed in the same situation. § 13-105(10)(c).

¶9 "Mental states cannot be assumed." *In re Robert A.*, 199 Ariz. 485, ¶ 14, 19 P.3d 626, 629 (App. 2001) (insufficient evidence that juvenile was aware of or consciously disregarded substantial and unjustifiable risk of disturbing peace, required to show recklessness, when he discharged flare gun at football game). And, as Division One of this court has observed, the state may not establish a person's state of mind by inference from "speculation about facts as to which it, the State, has the burden of proof." *In re Christopher*

---

[1]In *William G.*, Division One of this court found the evidence insufficient to adjudicate a juvenile delinquent for criminal damage based on damage he had caused to a parked vehicle while riding a shopping cart in a parking lot. 192 Ariz. at 213-15, 963 P.2d at 292-94. The court reasoned that, to infer the mental state of recklessness from someone's conduct, the conduct must have created a substantial risk. The court then found the juvenile's conduct did not create a substantial risk, as required for criminal culpability, although it may have created an unreasonable risk that could result in civil liability.

R., 191 Ariz. 461, 463, 957 P.2d 1004, 1006 (App. 1997) (evidence insufficient to establish mental state necessary to prove juvenile knowingly facilitated criminal damage by hosting party in vacant home; no inference could be drawn from juvenile's conduct where record silent about what juvenile "did or did not do to stop the damage").

¶10 The state contends Jake's recklessness can be inferred from his limited experience with BB guns and from the review of gun safety rules his uncle had provided him the day before. But Jake's youth and lack of experience suggest a lack of knowledge, not a conscious disregard of a known risk. Specifically, as Jake points out, there is no evidence in the record to suggest he knew a shot fired from his BB gun in his grandmother's yard could create a substantial risk of harm to James's door, seventy-five yards away, or that he consciously disregarded such a risk.[2] If Jake fired the BB gun without appreciating the risk of damage, he would have acted with criminal negligence, not recklessness.[3] *Compare* § 13-105(10)(c) (recklessness) *with* § 13-105(10)(d) (same conduct upon failure to perceive risk constitutes criminal negligence). And criminal negligence is not sufficient to support a

---

[2]The only evidence of Jake's experience with a BB gun was supplied by Pat's testimony. She told the court the furthest target she had seen him hit with the BB gun had been "thirty, [forty] feet [away] at the most." She added that, if she had had "any idea it would shoot [seventy-five yards,]" she would not have allowed him to shoot at the target in the backyard. She explained her daughter's house was about that distance from where Jake was shooting and his target was in between the two, about twenty-five to thirty feet from Jake, so Jake "was shooting right towards her window."

[3]We reject the state's suggestion that it may be inferred Jake was reckless that evening merely because he had "previously handled the weapon in a reckless way" when he aimed the gun toward a neighbor earlier in the day.

finding of culpability for criminal damage. Section 13-1602(A)(1) specifically requires proof of reckless conduct.

¶11 Because the state failed to prove Jake acted recklessly, the evidence was insufficient to support a finding of responsibility for criminal damage. *See Robert A.*, 199 Ariz. 485, ¶ 14, 19 P.3d at 629 (when disorderly conduct requires proof of recklessness, "state must prove mental states in addition to . . . conduct"). Accordingly, we reverse the juvenile court's delinquency adjudication and disposition order.

_____
PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

_____
JOHN PELANDER, Judge

_____
JOSEPH W. HOWARD, Chief Judge