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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF J.E.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0907-JV-641
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn A. Moores, Judge
The Honorable Scott Stowers, Magistrate
Cause No. 49D09-0903-JD-000798

February 19, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

J.E. appeals from a child delinquency determination based upon true findings that he committed acts that would constitute criminal recklessness, a Class A misdemeanor if committed by an adult, criminal mischief, a Class A misdemeanor if committed by an adult, and driving without a license, a Class C misdemeanor if committed by an adult. J.E. raises the following issues: whether the evidence is sufficient to support a true finding of criminal recklessness and whether he was prejudiced by the trial court's improper use of a repealed driving without a license statute. Concluding that the true finding for criminal recklessness is supported by sufficient evidence and that the juvenile court's improper use of a repealed statute was not substantive and does not require vacation of the true finding, we affirm and remand to the juvenile court for proceedings consistent with this opinion.

Facts and Procedural History

At approximately 5:30 p.m. on March 11, 2009, Jessica Hildebran ("Hildebran") was driving a two-door coupe in Marion County when J.E., driving a gold SUV, approached quickly from behind. J.E. did not have a valid driver's license at the time. He was driving erratically, began to tailgate Hildebran, and he almost rear-ended Hildebran at a stop light. At a point where the road widened, J.E. drove up next to Hildebran. Hildebran saw that J.E.'s driver's side window was down and saw J.E. driving the vehicle. She then heard a pop, looked over and saw her passenger side window was shattered with only the interior tint film holding it together. Hildebran immediately stopped her car and saw J.E. driving in reverse down the street behind her. She called 911 and unsuccessfully attempted to follow J.E. She proceeded to a gas

station where she met police and filed a report. There was red, crumbling residue on her car door.

After filing the report, Hildebran began to head home when she saw J.E. driving the same SUV in the opposite direction. Hildebran and her husband, who was driving a separate vehicle, pursued J.E. During this pursuit, J.E. backed down several streets and temporarily lost control of his car, hitting a fence. He was able to proceed to his house where he ran from the vehicle to his house. There was damage to the front passenger side of J.E.'s vehicle and the front passenger tire was shredded. Hildebran called 911 and waited for police. When the police arrived, Hildebran identified J.E. as the person who had broken her car window.

The State filed a delinquency petition alleging that J.E. was a delinquent child for committing criminal recklessness, criminal mischief, and driving without a license. The petition alleged the offense of driving without a license was in violation of Indiana Code section 9-24-18-1. On May 20, 2009, the juvenile court held a denial hearing on delinquency and entered true findings on all allegations. The entry for the denial hearing stated in part that the court found J.E. violated "Oper. Veh.: Never Received License (I.C. 9-1-4-26.5), a Charge class C Misdemeanor when committed by an adult[.]" Appellant's App. p. 41. J.E. now appeals.

Standard of Review

When reviewing a juvenile delinquency determination, we view only the evidence favorable to the determination without reweighing the evidence or judging the credibility of the witnesses, and we will affirm unless we conclude that no reasonable fact-finder

could find the elements of the crime proven beyond a reasonable doubt. In re J.R., 820 N.E.2d 173, 176 (Ind. Ct. App. 2005).

Discussion and Decision

J.E. argues the evidence was insufficient to support the juvenile court's true finding that he had committed a delinquent act that would constitute a Class A misdemeanor criminal recklessness if committed by an adult. Specifically, J.E. contends that the State failed to show that J.E. created a substantial risk of serious bodily injury when he threw a brick from his car and shattered Hildebran's car window.

In order for the juvenile court to enter a true finding that J.E. committed acts that would constitute criminal recklessness if committed by an adult, the State was required to prove beyond a reasonable doubt that J.E. "recklessly, knowingly, or intentionally perform[ed] . . . an act that create[d] a substantial risk of bodily injury to another person . . . ." Ind. Code § 35-42-2-2 (2004). Normally a Class B misdemeanor, criminal recklessness is a Class A misdemeanor when the conduct includes the use of a vehicle. Id.

A risk is "substantial" if it has "substance or actual existence." Woods v. State, 768 N.E.2d 1024, 1027 (Ind. Ct. App. 2002). Indiana Code section 35-41-2-2 defines recklessly, knowingly, or intentionally as follows:

> (a) A person engages in conduct "intentionally" if, when he engages in the conduct, it is his conscious objective to do so.
> (b) A person engages in conduct "knowingly" if, when he engages in the conduct, he is aware of a high probability that he is doing so.
> (c) A person engages in conduct "recklessly" if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct.

J.E. contends that his "behavior presented no more risk than the myriad of other startling events that confront drivers everyday." Appellant's Br. pp. 11-12. This is absurd and ultimately irrelevant. Criminal recklessness focuses on the risk of serious bodily injury to the victim, not on the actual injury. In this case, J.E. acted recklessly when he threw a brick out of a moving vehicle at the window of another moving vehicle. The act of throwing the brick at a moving car evidences a plain, conscious, and unjustifiable disregard of the harm that <u>might</u> result and is a substantial deviation from acceptable standards of conduct. The act of throwing a brick at a moving car also creates a substantial <u>risk</u> of serious bodily harm. The evidence was sufficient to support the juvenile court's true finding that he had committed a delinquent act that would constitute a Class A misdemeanor criminal recklessness if committed by an adult.

J.E. also argues that the juvenile court's true finding for the Class C misdemeanor driving without a license should be vacated because the juvenile court entered its true finding pursuant to Indiana Code section 9-1-4-26.5 which was repealed by P.L.2-1991, SEC. 109. In the delinquency petition, the State properly alleged that J.E. committed Class C misdemeanor driving without a license, in violation of Indiana Code section 9-24-18-1 (2004). However, the denial hearing order stated that J.E. violated "Oper. Veh.: Never Received License (I.C. 9-1-4-26.5), a Charge class C Misdemeanor when committed by an adult. . . ." Appellant's App. p. 41. At the denial hearing, the juvenile court stated that "[c]ount three driving without a license court will enter a true finding." Tr. p. 57.

Indiana Code section 9-1-4-26.5 (repealed 1991, recodified as I.C. § 9-24-18-1) states:

> Any person, except those exempted under Section 27 of this chapter, who:
> (1) operates a motor vehicle upon a public highway; and
> (2) has never received a valid driving license;
> commits a Class C misdemeanor.

In 1991, Indiana Code section 9-1-4-26.5 was repealed and recodified in Indiana Code section 9-24-18-1. Indiana Code section 9-24-18-1(2004) states:

> A person, except a person exempted under IC 9-24-1-7, who:
> (1) operates a motor vehicle upon a highway; and
> (2) has never received a valid driving license;
> commits a Class C misdemeanor.

The language of the two sections is nearly identical. The delinquency petition put J.E. on notice of the crime he was accused of committing. At the denial hearing, the State submitted evidence showing J.E. did not have a valid driver's license at the time of the incident, and J.E.'s mother testified that she let him drive on the day he was arrested despite knowing that he did not have a valid driver's license. Tr. p. 41. In J.E.'s closing argument, his counsel stated, "you know you're going to have to find him true of driving without a license." Tr. p. 56. Thus, the error in the denial hearing order is not substantive and J.E. was not prejudiced by this error. However, we will remand to the juvenile court to correct this error.[1]

Conclusion

In conclusion, the evidence is sufficient to support the juvenile court's true finding that he had committed a delinquent act that would constitute a Class A misdemeanor

[1] The juvenile court also improperly cited to I.C. 9-1-4-26.5 on the Chronological Case Summary, Probation Officer's Report of Preliminary Inquiry, Initial Hearing Order, Denial Hearing Order, and Pre-Dispositional Order. Appellant's App. pp. 6, 7, 16, 29, 30, 41, 43.

criminal recklessness if committed by an adult. The juvenile court's improper citation to a repealed statute was not a substantive error and does not require vacation of the true finding. However, we remand this matter to the juvenile court for correction of this error in the record.

Affirmed and remanded to the juvenile court for proceedings consistent with this opinion.

BARNES, J., and BROWN, J., concur.