Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-185

JANUARY TERM, 2003

In re D.G., Juvenile	}	APPEALED FROM:
	}	Washington Family Court
	}	DOCKET NO. 42-3-02 Wnjv
	}	Trial Judge: Mark J. Keller

In the above-entitled cause, the Clerk will enter:

D.G. appeals from an adjudication of delinquency based on a finding that he recklessly placed another person in danger of death or serious bodily injury. D.G. contends: (1) the evidence failed to demonstrate that he consciously disregarded a substantial and unjustifiable risk of injury; and (2) the court erred in applying an adult rather than an adolescent standard. We agree with the first claim, and therefore reverse.

Viewed in a light most favorable to the judgment, the record evidence may be summarized as follows. D.G., who was fourteen years old at the time of the events in question, lived in a foster home with three other boys. On the date in question, he entered the bedrooms of two of the other boys and used a lighter to ignite the spray from an aerosol can of deodorant. Both of the boys were playing on their Playstations at the time. One of the boys, C.C., testified that he felt the heat from the flame, but otherwise ignored D.G. until he left. The other boy also stated that he felt some heat and told D.G. to stop, but also continued to play uninterrupted. Both testified that D.G. was fooling around. D.G. testified in his own behalf, asserting that he was " just fooling around [and] didn' t think I' d actually hurt anybody." He explained that he had sprayed his own hands and pants with the lit flame, without experiencing any pain. He testified further that he was not aware the can could explode, and had no intention to hurt anyone. A fourth boy, M.S., also apparently ignited the aerosol spray, but was not charged.

The boys' foster mother later learned of the incident and called the Department of Social and Rehabilitation Services. The State subsequently filed a delinquency petition, alleging that D.G. had engaged in reckless endangerment, under 13 V.S.A. § 1025. At the conclusion of the evidentiary hearing, the court entered oral findings as follows: " [Y]ou consciously disregarded the dangers. You knew it was a dangerous thing to do, you knew that the can could blow up. You knew that you were quote playing with fire. Close enough to other people, so that they felt the heat. And you knew that you were putting them in danger, and you did it anyway." Based on these findings, the court concluded that D.G. had recklessly placed others in danger of serious bodily injury or death, and entered a finding of delinquency. This appeal followed.

The reckless endangerment statute applies to any " person who recklessly engages in conduct which places or may place another person in danger of death or serious bodily." 13 V.S.A. § 1025. We have endorsed the Model Penal Code definition of recklessness, which provides, in part, as follows: " A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct." State v. Brooks, 163 Vt. 245, 251 (1995) (quoting Model Penal Code § 2.02(c) (defining recklessly)). Thus, as we explained in Brooks, " recklessness requires a conscious disregard of the risk," while

criminal negligence " results when an actor is unaware of the risk which the actor should have perceived." Id. (emphasis added). Thus, to establish recklessness the State must prove the defendant knew of the risk of death or serious bodily injury, although courts have held that such knowledge " may be inferred from circumstances such as the actor' s knowledge and experience, or from what a similarly situated reasonable person would have understood about the risk under the particular circumstances." People v. Hall, 999 P.2d 207, 211 (Colo. 2000) (en banc); see also State v. R.H.S., 974 P.2d 1253, 1256 (Wash. Ct. App. 1999) (trier of fact may find subjective knowledge " if there is sufficient information that would lead a reasonable person" to know the risk).

All of the record evidence in this case tended to show that D.G. was unaware of any risk " much less a risk of serious bodily injury or death B from igniting the aerosol spray. He testified that he did not think he was putting anyone at risk, and claimed that he did not experience any pain when he sprayed himself with the flame. His playful demeanor as described by the other boys plainly supported his assertion that he did not believe there was any serious risk, and the boys' response to D.G.' s behavior " they simply ignored him or told him to go away " would not have alerted him to any more serious danger. Nor was there any evidence suggesting that any reasonable person in D.G.' s circumstances would have known that his behavior created a substantial and unjustifiable risk of death or serious bodily injury. Although we must affirm the court' s findings if supported by credible evidence, State v. Corliss, 168 Vt. 333, 341 (1998), here the record contains no evidence to support the court' s findings that D.G. knew of, and consciously disregarded, the risks that the can could blow up or otherwise cause death or serious bodily injury. Accordingly, we conclude that the judgment must be reversed. Our holding renders it unnecessary to address D.G.' s other claims.

Reversed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice