MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

William Washburn,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

July 18, 2023

Court of Appeals Case No. 22A-CR-2739

Appeal from the Warrick Circuit Court

The Honorable Greg A. Granger, Judge

Trial Court Cause No. 87C01-2007-F6-293

Memorandum Decision by Judge Crone
Judge Kenworthy and Senior Judge Robb concur.

Crone, Judge.

Case Summary

[1] William Washburn appeals his conviction for level 6 felony pointing a firearm at another person, asserting that the State failed to prove beyond a reasonable doubt that the firearm was loaded. We conclude that the State was not required to prove that the firearm was loaded because Washburn did not place the fact that the firearm was unloaded at issue by producing evidence that it was unloaded.[1] Therefore, we affirm.

Facts and Procedural History

[2] On July 19, 2020, Washburn was in a relationship with Julie Washburn f/k/a Julie Howlett. Julie had been married to Mark Aaron Howlett (Aaron), and they had children together. Aaron was in a relationship with Sarah Howlett f/k/a Sarah White. That day, Julie and Aaron exchanged a series of text messages concerning their children. The messages became contentious. Julie became angry and texted Aaron that Washburn wanted to talk to him if Aaron was "a man." Tr. Vol. 4 at 48. Aaron texted, "bring it." *Id*. at 37. Julie woke up Washburn and told him about the text messages. She texted Aaron that Washburn was on his way to Sarah's house. Washburn, who had a handgun in his glove compartment, got in his vehicle and drove to Sarah's house. Julie followed him in her car.

[1] Because of our resolution of this issue, we need not address the other issues raised by Washburn.

[3] When Washburn and Julie arrived at Sarah's house, they began screaming profanities and honking their car horns. Sarah called 911 and remained on the phone during the entire incident. Washburn and Julie got out of their cars, and Washburn said, "[C]ome out here pussy, get out here." Tr. Vol. 2 at 171. Sarah told Aaron not to go outside, but he did anyway. Sarah followed him out. Washburn pulled a handgun from behind his back and pointed it "sideways" at Aaron and Sarah. *Id*. at 175. Sarah exclaimed several times that there was a gun being pointed toward her, and she begged the 911 dispatcher to send the police. Washburn said that he brought the gun to show Aaron that he was "for real" and that "he plays for keeps." Tr. Vol. 3 at 181. Sarah was "very scared," and she and Aaron ran away. Tr. Vol. 2 at 201. Washburn and Julie returned to their vehicles, but the police quickly arrived and arrested them. Newburgh Police Department Officer Damian Gourley found a black semiautomatic pistol with a magazine in it in the glove compartment of Washburn's car. Officer Gourley could not see what was in the magazine.

[4] The State charged Washburn with level 6 felony pointing a firearm. In June 2022, a bench trial was held. In defense counsel's opening statement, he argued, "They didn't charge the case properly. Pointing a firearm is an A Misdemeanor if it is unloaded." *Id*. at 164. During the State's case-in-chief, Sarah testified and a recording of her 911 call was admitted into evidence. On cross-examination, defense counsel asked, "[Y]ou have no idea whether a firearm was loaded or not do you?" *Id*. at 243. She replied that she assumed that all guns are loaded and she believed it was loaded and that is why she "ran for [her] life." *Id*.

Defense counsel asked her, "[W]hat evidence do you have other than guessing and speculating that [Washburn] had a loaded gun?" *Id*. at 244. She answered that the police told her and Aaron that it was loaded. Defense counsel moved to strike the statement as inadmissible hearsay. Sarah testified, "They showed it to me." *Id*. The court adjourned for the day without ruling on the defense's objection. The following day when Sarah's cross-examination resumed, defense counsel asked her how she knew that Washburn had a "loaded 9mm gun," and she testified that the police told her and Aaron that "it was a loaded 9mm" and showed them the gun. Defense counsel moved to strike her testimony as hearsay, and the trial court granted the motion. Tr. Vol. 3 at 39.

[5] Officer Gourley also testified for the State. The State attempted to introduce a box of evidence that contained a handgun. *Id*. at 144-45. Washburn objected based on lack of foundation and was granted permission to ask preliminary questions to support his objection. Defense counsel asked Officer Gourley whether he took the gun from Washburn's vehicle. Officer Gourley replied that he handed the gun to another officer. *Id*. at 146. Defense counsel inquired whether Officer Gourley was involved with what that officer did with the gun, and he answered that he was not. Defense counsel asked Officer Gourley whether he would expect a property record receipt to reflect a magazine and bullets, and he said that he would. *Id*. at 157. Defense counsel then asked whether the incident/investigation report, which had been admitted as Defendant's Exhibit I, identified either a magazine or ammunition as being collected, to which Gourley answered no. *Id*. at 157-58. The trial court

sustained Washburn's objection to the admission of the handgun but permitted its use as a demonstrative exhibit regarding what Officer Gourley saw at the crime scene. *Id*.

[6] Washburn testified on his own behalf. On direct examination, defense counsel asked him whether he pointed a gun at Aaron or Sarah, and he said no. On cross-examination, Washburn testified that he did not have a gun on his person or outside of his vehicle at Sarah's house on July 19, 2020, and admitted that he had a gun in the glove compartment of his vehicle.

[7] In closing, the prosecutor asked to read a jury instruction based on *Adkins v. State*, 887 N.E.2d 934 (Ind. 2008), which provided that the State must prove all the elements of the instant offense but is not required to prove that the gun was loaded, and if the defendant offers evidence that the gun was unloaded, then the State must prove beyond a reasonable doubt that the firearm was loaded. Defense counsel objected that the instruction did not apply to the facts of the case because there was no gun in evidence and Washburn "ha[d] not offered any evidence that there was a gun that was held or pointed let alone suggested that it was pointed but unloaded." Tr. Vol. 4 at 100. The trial court permitted the prosecutor to read the instruction.

[8] The trial court found Washburn guilty of level 6 felony pointing a firearm. Washburn filed a motion to correct error contending that the court could not find him guilty of a felony unless the State proved that the gun was loaded and that no such evidence had been admitted. The court denied the motion. The

trial court sentenced Washburn to one year suspended to probation. This appeal ensued.

Discussion and Decision

[9] In reviewing a claim of insufficient evidence, we do not reweigh the evidence or judge the credibility of witnesses, and we consider only the evidence that supports the judgment and the reasonable inferences arising therefrom. *Hall v. State*, 177 N.E.3d 1183, 1191 (Ind. 2021). It is "not necessary that the evidence 'overcome every reasonable hypothesis of innocence.'" *Drane v. State*, 867 N.E.2d 144, 147 (Ind. 2007) (quoting *Moore v. State*, 652 N.E.2d 53, 55 (Ind. 1995)). "We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt." *Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009).

[10] Washburn claims that his conviction for level 6 felony pointing a firearm must be reduced to a class A misdemeanor because the State failed to prove beyond a reasonable doubt that his firearm was loaded. The crime of pointing a firearm at another person is defined by Indiana Code Section 35-47-4-3, which provides, "A person who knowingly or intentionally points a firearm at another person commits a Level 6 felony. However, the offense is a Class A misdemeanor if the firearm was not loaded."

[11] Our supreme court clarified the elements of felony pointing a firearm and the State's burden of proof in *Adkins v. State*. There, Adkins was convicted of felony pointing a firearm. On appeal, he challenged a jury instruction that advised the

jury that misdemeanor pointing a firearm required the defendant to prove that the firearm was unloaded. The *Adkins* court explained that a loaded weapon is not an element of felony pointing a firearm, and therefore, in general, the State "has no responsibility to prove that a gun is loaded to secure a conviction" for felony pointing a firearm. 887 N.E.2d at 937. The *Adkins* court reasoned that the fact that a gun is unloaded is a mitigating factor analogous to sudden heat in a prosecution for murder that reduces a defendant's culpability. *Id*. at 938. The court observed, "[T]he defendant bears no burden of proof with respect to the mitigating factor of sudden heat, only the burden of placing the issue in question where the State's evidence has not done so." *Id*. The *Adkins* court held,

> [I]f a defendant charged with … Felony Pointing a Firearm seeks instead to be convicted of Class A Misdemeanor Pointing a Firearm, the defendant must place the fact of the gun having been unloaded at issue if the State's evidence has not done so. Once at issue, the State must then prove beyond a reasonable doubt that the firearm was loaded.

Id. The court concluded that although the challenged instruction was not in accord with its holding, the error was harmless because "Adkins offered no evidence to suggest that the firearm was unloaded" and there was ample evidence that his gun was loaded. *Id*. The court concluded, "Adkins did not place the question of whether his gun was unloaded at issue, so the State had no obligation to prove that it was loaded." *Id*. at 939.

[12] Here, Washburn does not contend that the State's evidence placed the fact of the gun being unloaded at issue, so it is undisputed that he had the burden to

place the fact at issue. The State asserts that Washburn did not present any evidence that the gun was unloaded and therefore did not place the fact at issue. Washburn contends that "*Adkins* does not require the defendant to produce evidence that the gun was unloaded," and that he raised the issue through non-evidentiary means. Reply Br. at 6. Specifically, he asserts that he "placed the matter of whether the gun was loaded at issue" by asserting in his opening statement that the State did not charge the case properly, noting during preliminary questioning that no bullets were listed on the inventory, repeatedly questioning Sarah whether the gun was loaded, objecting to speculative testimony regarding whether there were bullets in the magazine, and arguing in closing that no evidence had been entered to show that the gun was loaded. *Id*. at 7-8.

[13] We disagree with Washburn's interpretation of *Adkins*. Our supreme court's conclusion that Adkins did not place the question of whether his gun was unloaded at issue was based on its observation that Adkins offered no evidence to suggest that the firearm was unloaded. 887 N.E.2d at 938.[2] Further, the court stated in its introduction that "had there been *any* evidence that his gun was unloaded," Adkins would be correct that the jury was improperly instructed. *Id*. at 936 (emphasis added). Therefore, to place the status of the gun at issue, a

[2] The *Adkins* court compared Adkins's failure to produce any evidence that the gun was unloaded to *Watts v. State*, 885 N.E.2d 1228, 1234 (Ind. 2008), where it "held that is was error for a trial court in a murder prosecution to instruct a jury on the option of convicting defendant of voluntary manslaughter in the absence of any evidence of sudden heat." 887 N.E.2d at 938 n.5.

defendant must provide some evidence that the gun was unloaded if the State's evidence has not done so.

[14] Our conclusion that there must be some evidence that the firearm is unloaded to place the fact at issue is supported by *Scott v. State*, 924 N.E.2d 169 (Ind. Ct. App. 2010), *trans. denied*, *cert. denied* (2011). There, this Court considered whether the trial court erred by refusing to give Scott's tendered jury instruction that the jury could find him guilty of misdemeanor pointing a firearm, instead of felony pointing a firearm, if the gun he allegedly pointed at a police officer was unloaded. Scott asserted that the fact was placed at issue based on the officer's testimony that Scott appeared surprised when he pulled the trigger on his firearm and it failed to discharge. The *Scott* court observed that the misdemeanor offense "is at issue *if there is some evidence* from which the jury can draw a conclusion that the weapon was unloaded." *Id*. at 176 (emphasis added). The *Scott* court concluded that although it was unlikely that the jury would have found the gun unloaded, the officer's testimony could have "support[ed] a reasonable inference to the contrary." *Id*. Based on the officer's testimony, the *Scott* court concluded that the "question of whether the gun was unloaded was at issue, and there was evidence to support the giving of Scott's tendered instruction." *Id*. at 176-77.

[15] We observe that at trial, Washburn did not seek to be convicted of class A misdemeanor pointing a firearm. Rather, he claimed that he never had the handgun on his person or pointed it at anyone and was innocent of the offense. In fact, defense counsel objected to the prosecutor providing the jury instruction

based on *Adkins* and argued that Washburn "ha[d] not offered any evidence that there was a gun that was held or pointed let alone suggested that it was pointed but unloaded." Tr. Vol. 4 at 100. Significantly, Washburn had ample opportunity during his own testimony to put in evidence that his gun was unloaded, and he did not do so. We conclude that there was no evidence that the gun was unloaded, and therefore the State was not required to prove that the gun was loaded.[3] Accordingly, we affirm Washburn's conviction for level 6 felony pointing a firearm.

[16] Affirmed.

Kenworthy, J., and Robb, Sr.J., concur.

[3] We observe that if this had been a jury trial, it would have been improper to instruct the jury that Washburn could be convicted of misdemeanor pointing a firearm because there was no evidence that the gun was unloaded.