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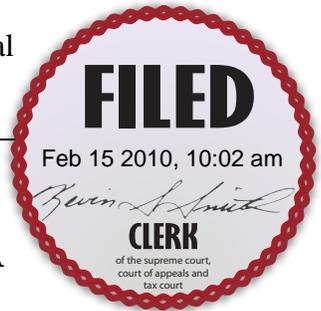
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**IN THE  
COURT OF APPEALS OF INDIANA**

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J.B., )  
 )  
Appellant-Defendant, )  
 )  
vs. ) No. 49A02-0908-JV-717  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Geoffrey Gaither, Commissioner  
The Honorable Gary Chavers, Judge Pro Tempore  
The Honorable Marilyn A. Moores, Judge  
Cause No. 49D09-0901-JD-293

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**February 15, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BROWN, Judge**

J.B. appeals the juvenile court's true finding that he committed a delinquent act, an act which, if committed by an adult, would constitute criminal recklessness as a class D felony.<sup>1</sup> J.B. raises two issues, which we revise and restate as:

- I. Whether the evidence is sufficient to support the juvenile court's true finding that J.B. committed a delinquent act, which would have constituted criminal recklessness if committed by an adult; and
- II. Whether the juvenile court's true finding that J.B. committed a delinquent act, i.e., an act which, if committed by an adult, would constitute criminal recklessness, violates the Proportionality Clause, Article 1, Section 16 of the Indiana Constitution.

We affirm.

The facts most favorable to the juvenile court's true finding follow. On October 23, 2008, B.B., who was thirteen years old, and his brother M.B., who was eight years old, were playing catch with a football in the backyard and heard "[s]omebody [shoot] out [their] auntie[']s window."<sup>2</sup> Transcript at 13. B.B. and M.B. observed J.B. on the porch of a house across an alley and noticed that J.B. "had a gun and . . . was pointing at [B.B. and M.B.] and smiling." *Id.* The gun "was a rifle," was brown, and "had a scope on it." *Id.* at 14. J.B. "look[ed] through [the scope]" and pointed the rifle "at," "towards," and "around" B.B. and M.B. *See id.* at 4, 13, 15. At the time B.B. and M.B. observed J.B., J.B. was approximately "25 to 30 feet" away from B.B. and M.B. *Id.* at 5. B.B. and M.B. ran into the house and were scared. B.B. and M.B. had been outside for a

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<sup>1</sup> Ind. Code § 35-42-2-2 (Supp. 2006).

<sup>2</sup> J.B.'s last name is not the same as the last name of B.B. and M.B.

total of approximately five to ten minutes. The following day, B.B. and M.B. went outside and observed two bullet holes in the window of their aunt's car.

On February 4, 2009, the State filed a delinquency petition alleging in two counts that J.B. knowingly or intentionally pointed an unloaded firearm at B.B. and M.B.<sup>3</sup> On February 24, 2009, the State filed a motion to add a count to the delinquency petition, which the trial court granted, alleging as Count III that J.B. “did recklessly, knowingly or intentionally perform an act while armed with a deadly weapon, that is: a rifle, which created a substantial risk of bodily injury to [M.B.] and [B.B.], by pointing the rifle at [M.B.] and [B.B.]” Appellant's Appendix at 37. The juvenile division of the Marion Superior Court held a denial hearing on April 20, 2009 and entered findings of true with respect to each of the three counts. On April 22, 2009, the juvenile court issued a *nunc pro tunc* order and entered findings of not true with respect to Count I and Count II and a finding of true with respect to Count III, criminal recklessness as a class D felony when committed by an adult. On June 23, 2009, the juvenile court awarded wardship to the Department of Correction, but suspended the commitment to probation, placed J.B. at the Kokomo Academy Placement, and set a review of the suspended commitment for ninety days.

I.

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<sup>3</sup> Count I related to B.B. and Count II related to M.B.

The first issue is whether the evidence is sufficient to support the juvenile court's true finding that J.B. committed a delinquent act which would have constituted criminal recklessness if committed by an adult.

In juvenile delinquency adjudication proceedings, the State must prove every element of the offense beyond a reasonable doubt. A.B. v. State, 885 N.E.2d 1223, 1226 (Ind. 2008). On appeal, we do not reweigh the evidence or judge the credibility of witnesses. Id. (citing Al-Saud v. State, 658 N.E.2d 907, 909 (Ind. 1995)). Reviewing solely the evidence and the reasonable inferences from that evidence that support the fact finder's conclusion, we decide whether there is substantial evidence of probative value from which a reasonable fact finder could find beyond a reasonable doubt that the defendant committed the crime. Id. We will not disturb the fact finder's conclusion if the fact finder could reasonably find, beyond a reasonable doubt, that the defendant committed the charged crime. Id. We affirm if there is substantial probative evidence to support the conclusion. K.S. v. State, 849 N.E.2d 538, 543 (Ind. 2006).

The offense of criminal recklessness is governed by Ind. Code § 35-42-2-2(b), which provides that “[a] person who recklessly, knowingly, or intentionally performs . . . an act that creates a substantial risk of bodily injury to another person . . . commits criminal recklessness.” Ind. Code § 35-42-2-2(c) provides that “[t]he offense of criminal recklessness as defined in subsection (b) is . . . a Class D felony if . . . it is committed while armed with a deadly weapon . . . .”<sup>4</sup> Thus, the State was required to prove that J.B.

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<sup>4</sup> A “deadly weapon” is defined by statute to include either a loaded or unloaded firearm. Ind. Code § 35-41-1-8; see also Al-Saud v. State, 658 N.E.2d 907, 908 (Ind. 1995).

recklessly, knowingly, or intentionally performed an act while armed with a rifle that created a substantial risk of bodily injury to B.B. and M.B.

J.B. argues that the evidence was insufficient to support his adjudication for criminal recklessness because “there is no clear evidence of an actual gun.” Appellant’s Brief at 4. J.B. further argues that there was no evidence of “a substantial risk of bodily injury.” Appellant’s Brief at 5. J.B. also argues that “[i]nferring that J.B. discharged a firearm . . . is not a reasonable inference” and that “the State never argued in the trial court that the alleged firearm was loaded, much less that J.B. had fired it.” Appellant’s Reply Brief at 2. The State argues that “the evidence in the record most favorable to the verdict was that J.B. discharged a loaded rifle into the car window, then pointed it at the two boys, which is sufficient to sustain the true finding.” Appellee’s Brief at 4.

With respect to J.B.’s argument that there was no evidence of a gun, the record reveals that B.B. and M.B. described J.B.’s gun at the denial hearing. B.B. testified that the gun “was brown” and “was big with a handle, a trigger and it was long with a scope.” *Id.* at 3, 11. M.B. testified that J.B. “had a gun,” that the gun “was a rifle,” “had a scope on it,” and was “brown and black.” *Id.* at 13-14. When asked on cross-examination how he knew J.B. had a gun, M.B. testified “[b]ecause it . . . looked like a gun.” *Id.* at 18. In addition, B.B. and M.B. heard “[s]omebody [shoot] out” the window of their aunt’s car, and the following day B.B. and M.B. observed two bullet holes in the car’s window. Transcript at 13. The evidence is sufficient for the trier of fact to conclude that J.B. used “an actual gun” on October 23, 2008. *See Young v. State*, 493 N.E.2d 455, 457 (Ind. 1986) (holding that the testimony of one witness alone was sufficient to support the

conclusion that the defendant used a deadly weapon in a thwarted robbery where searches by police did not uncover the gun); see also McFarland v. State, 179 Ind. App. 143, 146-147, 384 N.E.2d 1104, 1107 (1979) (finding that there was sufficient evidence from which the jury could infer that a gun was used in the commission of a crime based upon the fact that the victim had a gunshot wound of some type even though the shell casing was not found).

We observe that the Indiana Supreme Court has determined that an unloaded firearm can under certain circumstances create a substantial risk of bodily injury under Indiana's criminal recklessness statute. See D.B. v. State, 658 N.E.2d 595, 595-596 (Ind. 1995) (affirming delinquency finding where no evidence was presented that the defendant's gun was loaded); Al-Saud v. State, 658 N.E.2d 907, 908-910 (Ind. 1995) (affirming delinquency finding where the defendant pulled the trigger, but the gun was unloaded and did not discharge). Thus, J.B. could have performed an act while armed with a rifle which amounted to criminal recklessness even if the rifle observed by B.B. and M.B. had not been loaded or discharged. Nevertheless, in this case, the facts most favorable to the delinquency finding reveal that B.B. and M.B. were outside "for five to ten minutes," heard "[s]omebody [shoot] out [their] auntie[']s window," observed J.B. on the porch of a house across an alley, which was "like 25 to 30 feet" away, pointing a rifle towards them and "smiling," and later observed two bullet holes in the window of their aunt's car. See Transcript at 5, 8, 13. M.B. testified that J.B. had a "rifle" with "a scope on it," and that J.B. pointed the rifle "at" and "towards" B.B. and M.B. Id. at 13-15.

B.B. testified that he observed J.B. “look through [the scope]” and “point it at . . . [the] backyard.” Id. at 4.

Based upon our review of the facts in the record most favorable to the true finding, we conclude that evidence of probative value exists from which a reasonable fact finder could conclude beyond a reasonable doubt that J.B. performed an act while armed with a rifle which created a substantial risk of bodily injury to another person and thus that J.B. committed a delinquent act, i.e., an act which, if committed by an adult, would constitute criminal recklessness. See, e.g., D.B., 658 N.E.2d at 595-596 (holding that the evidence was sufficient to support the juvenile court’s finding that the defendant’s conduct created a substantial risk of bodily injury to another person where the evidence showed that the defendant stood across the street from another person’s front porch, that the defendant and the other person had a heated exchange, and that the defendant pulled out an unloaded gun and pointed it toward other persons who were standing on the porch across the street, but never discharged the gun, and observing that a firearm need not be loaded to create a substantial risk of bodily injury under Indiana’s criminal recklessness statute); see also Woods v. State, 768 N.E.2d 1024, 1027-1028 (Ind. Ct. App. 2002) (holding that the evidence was sufficient to support the defendant’s conviction for criminal recklessness where the defendant fired several shots in a residential area where adults were sitting on a nearby porch and children were playing outside of the house next door).

## II.

The next issue is whether the juvenile court’s true finding that J.B. committed a delinquent act, i.e., an act which, if committed by an adult, would constitute criminal

recklessness, violates the Proportionality Clause, Article 1, Section 16 of the Indiana Constitution, which provides that “[a]ll penalties shall be proportioned to the nature of the offense.”

As an initial matter, the State argues that J.B. waived his constitutionality claim because he failed to raise it by a motion to dismiss and failed to object to entry of the true finding. We have observed that the Indiana Supreme Court has held that the failure to file a proper motion to dismiss raising a constitutional challenge waives the issue on appeal. Price v. State, 911 N.E.2d 716, 719 (Ind. Ct. App. 2009) (citing Payne v. State, 484 N.E.2d 16, 18 (Ind. 1985)), trans. denied. Nevertheless, both the Indiana Supreme Court and this court have considered challenges to the constitutionality of statutes even where the defendant failed to file a motion to dismiss. Id. (citing Morse v. State, 593 N.E.2d 194, 197 (Ind. 1992) (concluding that “the constitutionality of a statute may be raised at any stage of the proceeding including raising the issue *sua sponte* by this Court”); Vaughn v. State, 782 N.E.2d 417, 420 (Ind. Ct. App. 2003) (deciding to address the defendant’s challenge to the constitutionality of a statute where the defendant failed to file a motion to dismiss and the State argued waiver), trans. denied.<sup>5</sup> Additionally, in Poling v. State, we addressed a defendant’s challenge of a criminal statute under the Proportionality Clause of the Indiana Constitution after noting that a party may raise the

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<sup>5</sup> We have also noted that “[e]ven in cases where waiver has been found, the court [has] proceeded to address the merits of the defendant’s constitutional challenge.” Price, 911 N.E.2d at 719 (citing Rhinehardt v. State, 477 N.E.2d 89, 93 (Ind. 1985) (concluding that “[e]ven assuming appellant had preserved this claim, it would not constitute reversible error”); Baumgartner v. State, 891 N.E.2d 1131, 1136 (Ind. Ct. App. 2008) (stating that “even if we were to consider [the defendant’s] argument upon the merits, he would not prevail because his challenge to the statute as unconstitutionally vague fails”).

issue of a statute's constitutionality at any stage of a proceeding and that this court may also raise the issue *sua sponte*. 853 N.E.2d 1270, 1274 (Ind. Ct. App. 2006), reh'g denied. Thus, we will address the merits of J.B.'s argument.<sup>6</sup>

Turning to the merits of J.B.'s argument, we note that challenges to the constitutionality of a statute begin with a presumption in favor of the statute's constitutionality and will not be overcome absent a clear showing to the contrary. Mann v. State, 895 N.E.2d 119, 122 (Ind. Ct. App. 2008) (citing Logan v. State, 836 N.E.2d 467, 470 (Ind. Ct. App. 2005), trans. denied). This standard arguably is more deferential where the challenge is based on the Proportionality Clause, as the Indiana Supreme Court has stated repeatedly that because criminal sanctions are a legislative prerogative, separation-of-powers principles require a reviewing court to afford substantial deference to the sanction the legislature has chosen. Id. (citing State v. Moss-Dwyer, 686 N.E.2d 109, 111 (Ind. 1997)). Accordingly, "[w]e will not disturb the legislative determination of the appropriate penalty for criminal behavior except upon a showing of clear constitutional infirmity." Moss-Dwyer, 686 N.E.2d at 111-112; see Pritscher v. State, 675 N.E.2d 727, 731 (Ind. Ct. App. 1996) (stating that a sentence violates the

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<sup>6</sup> Although we address the merits of J.B.'s constitutionality claim, as we have previously stated, we caution that our decision to reach the merits is not an invitation to neglect to file a motion to dismiss and then argue for the first time on appeal that a statute is unconstitutional. See Price, 911 N.E.2d at 719 n.2; Tooley v. State, 911 N.E.2d 721, 723 n.3 (Ind. Ct. App. 2009), trans. denied. This court has previously refused to address the merits after concluding that the defendant waived his constitutional challenge. Price, 911 N.E.2d at 719 n.2; Tooley, 911 N.E.2d at 723 n.3 (citing Adams v. State, 804 N.E.2d 1169, 1172 (Ind. Ct. App. 2004) (holding that the defendant waived his challenge to the constitutionality of a statute because he failed to file a motion to dismiss in the trial court); Wiggins v. State, 727 N.E.2d 1, 5 (Ind. Ct. App. 2000) (holding that the defendant waived his argument that the statute was unconstitutionally vague even though he had filed a motion to dismiss because the motion alleged only that the statute violated the prohibition against ex post facto laws), trans. denied).

Proportionality Clause “if it is so severe and entirely out of proportion to the gravity of the offenses committed as ‘to shock public sentiment and violate the judgment of reasonable people’”) (quoting Cox v. State, 203 Ind. 544, 549, 181 N.E. 469, 472 (1932)). The Indiana Supreme Court also held that a finding of unconstitutionality under the Proportionality Clause should be reserved for “penalties so disproportionate to the nature of the offense as to amount to clear constitutional infirmity sufficient to overcome the presumption of constitutionality afforded to legislative decisions about penalties.” Moss-Dwyer, 686 N.E.2d at 112 (internal quotation marks and citations omitted).

J.B. argues that “[a]t worst, J.B. committed an offense the General Assembly has criminalized as a misdemeanor.” Appellant’s Brief at 5. Citing to Poling v. State, 853 N.E.2d 1270 (Ind. Ct. App. 2006), reh’g denied, J.B. argues that under Indiana criminal statutes, a defendant may be convicted of either criminal recklessness as a class D felony or pointing an unloaded firearm as a class A misdemeanor “[b]ecause each offense could be proven by identical elements.” Id. at 6.

In Poling, this court found a statute regarding neglect of a dependent violated the Proportionality Clause because “the crimes of neglect of a dependent as a class C felony and neglect of a dependent as a class D felony, each carrying a different sentencing range, can be proven with identical elements. Prosecutors would likely pursue the C felony charge, and thus a longer sentence, for defendants charged with this crime.” 853 N.E.2d at 1277.

Here, there is no such proportionality issue. With respect to the offense of pointing an unloaded firearm, Indiana Code § 35-47-4-3(b) provides that “[a] person who

knowingly or intentionally points a firearm at another person commits a Class D felony. However, the offense is a Class A misdemeanor if the firearm was not loaded.” With respect to the offense of criminal recklessness, Ind. Code § 35-42-2-2(b) provides that “[a] person who recklessly, knowingly, or intentionally performs . . . an act that creates a substantial risk of bodily injury to another person . . . commits criminal recklessness.” Ind. Code § 35-42-2-2(c) makes the offense of criminal recklessness a Class D felony if it “is committed while armed with a deadly weapon,” and Ind. Code § 35-41-1-8 provides that a deadly weapon may include either a loaded or unloaded firearm.

We note that Ind. Code § 35-42-2-2(b) requires the additional elements that the act performed by the defendant “creates a substantial risk of bodily injury to another person” and that the defendant perform the act “recklessly, knowingly, or intentionally.” The Indiana legislature is at liberty to allow for more severe penalties for the offense of recklessly, knowingly, or intentionally performing an act that creates a substantial risk of bodily injury to another person than for pointing an unloaded firearm.

Accordingly, and in light of the fact that our review of a legislatively-sanctioned penalty is very deferential and that we will not disturb the Indiana legislature’s determination except upon a showing of clear constitutional infirmity, see Moss-Dwyer, 686 N.E.2d at 111-112, we conclude that the juvenile court’s true finding that J.B. committed a delinquent act, an act which if committed by an adult would constitute criminal recklessness, does not violate the Proportionality Clause. See Mann, 895 N.E.2d at 124 (observing that class B felony aggravated battery involved the same type of injury as class C felony battery, but that the class B felony required the defendant to knowingly

or intentionally inflict the injury on another, noting that the legislature could rationally conclude that defendants who intend to inflict injury on another are more blameworthy than defendants who do not, and holding that the defendant's more severe punishment did not violate the Proportionality Clause); see also Manigault v. State, 881 N.E.2d 679, 688 (Ind. Ct. App. 2008) (holding that a statute "clearly requires an additional element before possession of cocaine may be charged as a class B felony" and thus does not violate the Proportionality Clause).

For the foregoing reasons, we affirm the juvenile court's true finding that J.B. committed a delinquent act, i.e., an act which, if committed by an adult, would constitute criminal recklessness.

Affirmed.

KIRSCH, J., concurs.

BARNES, J., concurs in result.