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ATTORNEY FOR APPELLANT:

CLARENCE C. FRANK
Monroe County Chief Deputy Public Defender
Bloomington, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MARJORIE LAWYER-SMITH
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

LANA L. THOMAS,)

Appellant-Defendant,)

vs.)

No. 53A05-0707-CR-384

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Marc R. Kellams, Judge
Cause No. 53C02-0602-FD-72

April 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Lana Thomas appeals following a jury trial in which she was tried *in absentia* and convicted of two counts of Pointing a Firearm as a Class D felony (Counts I and II),¹ Criminal Recklessness as a Class D felony,² and Carrying a Handgun Without a License as a Class A misdemeanor,³ for which she received an aggregate sentence of three years in the Department of Correction. Upon appeal, Thomas challenges the sufficiency of the evidence to support her convictions for pointing a firearm in Count I and criminal recklessness. We affirm.

FACTS AND PROCEDURAL HISTORY

On February 14, 2006, at approximately 8:30 a.m., Rob Havron, a maintenance worker at the Arlington Park Apartments in Bloomington, called a towing company to remove Thomas's vehicle from a handicapped parking space, where it was parked illegally. After the vehicle was removed, Thomas, who was cursing, approached Havron at the maintenance shop and demanded that he return her vehicle. The building housing this maintenance shop also housed the apartment complex's office and a Head Start preschool, where fifteen children were in attendance. When Havron indicated he could not help her, Thomas pulled a handgun from her pocket. Thomas held the gun "about half way up and half way down in front of [Havron] and [Thomas]." Tr. p. 99. Thomas moved the gun nervously, causing it to pass in front of Havron and cross his body. Havron directed Jake Engle, his co-worker who was standing inside the shop approximately eight to nine feet behind Havron, to call 911. As Engle attempted to call

¹ Ind. Code § 35-47-4-3 (2005).

² Ind. Code § 35-42-2-2 (2005).

³ Ind. Code § 35-47-2-1 (2005).

for help, Thomas approached him, pointed the gun to his head, and dared him to call the police. Engle hung up the phone and backed off a half step from Thomas. Engle then ran out of the shop and away from Thomas, causing Thomas to follow him. Havron followed Thomas, who was cursing while holding the handgun, and observed her turn around, run past him, and fire the handgun toward the ground within feet of the shop. At the point Thomas fired at the ground, Havron was approximately ten to fifteen feet away from her.

Bloomington Police Officers James Haverstock and George Connolly, who responded to the scene at approximately 8:50 a.m., apprehended Thomas and found a gun inside her purse. After Officer Haverstock advised Thomas of her Miranda warnings, she admitted that she had threatened two persons with a handgun and had fired a shot into the ground. Officer Connolly subsequently observed a divot in the nearby sidewalk and a dent in a conduit located on the side of the building, both of which indicated the trajectory of the fired round. Officer Haverstock took Thomas into custody.

On February 16, 2006, the State charged Thomas with two counts of pointing a firearm, one count of criminal recklessness, and one count of carrying a handgun without a license. On September 22, the State amended its criminal recklessness charge to allege that Thomas was armed with a deadly weapon while performing an act creating a substantial risk of bodily injury to another person in an occupied apartment complex. On September 28, 2006, Thomas did not appear for her scheduled jury trial, so the cause was tried in her absence. The jury found Thomas guilty on all counts. The trial court entered judgment of conviction and sentenced Thomas on June 13, 2007 to concurrent sentences of eighteen months in the Department of Correction on each of her two counts of pointing

a firearm; eighteen months in the Department of Correction for criminal recklessness; and one year in the Department of Correction for carrying a handgun, with these latter sentences to be served concurrent to one another and consecutive to her sentence for pointing a firearm. This appeal follows.

DISCUSSION AND DECISION

On appeal, Thomas challenges the sufficiency of the evidence to support her convictions for pointing a firearm at Havron (Count I) and criminal recklessness. Our standard of review for sufficiency-of-the-evidence claims is well settled. We do not reweigh the evidence or judge the credibility of the witnesses. *Kien v. State*, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), *trans. denied*. We consider only the evidence which supports the conviction and any reasonable inferences which the trier of fact may have drawn from the evidence. *Id.* We will affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. *Id.* It is the function of the trier of fact to resolve conflicts of testimony and to determine the weight of the evidence and the credibility of the witnesses. *Jones v. State*, 701 N.E.2d 863, 867 (Ind. Ct. App. 1998).

I. Pointing a Firearm

In challenging her conviction for pointing a firearm under Count I, Thomas points to Havron's testimony in which he states that Thomas did not directly point the handgun at him, but that she instead held it "half way up and half way down" in front of him and moved it around such that it passed in front of him and crossed his body. Tr. p. 99.

Indiana Code section 35-47-4-3 provides that “[a] person who knowingly or intentionally points a firearm at another person commits a Class D felony.” As the State argues, in *Brown v. State*, 790 N.E.2d 1061, 1066 (Ind. Ct. App. 2003), this court upheld a defendant’s convictions for pointing a firearm when he was alleged to have waved it at the three occupants of a vehicle. In upholding these convictions, this court observed that the purpose of the statute was “to protect individuals from being placed in danger of death or bodily injury from the discharge of a firearm.” *Brown*, 790 N.E.2d at 1066 (quoting *Armstrong v. State*, 742 N.E.2d 972, 976 (Ind. Ct. App. 2001)). Here, Thomas was within approximately two feet of Havron when she held a gun and moved it around in front of him. Unlike the victims in *Brown*, Havron did not even have the protection of being inside a vehicle. We are unconvinced that Havron was not in danger of death or bodily injury simply because Thomas did not aim her gun at a certain point on his body. Indeed, her indiscriminate waving of a gun with the potential to discharge over any part of his body arguably placed him in more danger. We therefore conclude that the facts establishing Thomas, who was angry at Havron and moved her gun in front of him from a distance of two feet such that it passed over his person, were adequate to sustain her conviction in Count I of pointing a firearm.

II. Criminal Recklessness

Thomas also challenges her conviction for criminal recklessness by claiming that the shot she fired was aimed at the ground and that it did not create a substantial risk of bodily injury, a necessary element of criminal recklessness.

Indiana Code section 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.”⁴ In support of her argument that her shot into the ground did not create a substantial risk of bodily injury to another person under section 35-42-2-2, Thomas refers to *Elliott v. State*, 560 N.E.2d 1266, 1267 (Ind. Ct. App. 1990) and *Boushehry v. State*, 648 N.E.2d 1174, 1177 (Ind. Ct. App. 1995).

In *Elliott*, this court held that a defendant’s act of firing a gun into the air from his lot toward adjacent uninhabited fields and woodlands did not constitute criminal recklessness because there was no substantial risk of bodily injury to another person. 560 N.E.2d at 1267. Similarly, in *Boushehry*, this court concluded that a defendant who fired shots at geese in a vacant lot in the direction of Shelbyville Road, which bordered the lot, did not create a substantial risk of bodily injury to another person. 648 N.E.2d at 1177.

Here, in contrast, Thomas was not firing into a vacant field. She was instead within the confines of a residential apartment complex and within ten to fifteen feet of Havron when she angrily fired a shot into the ground, causing it to apparently ricochet off of the sidewalk and hit a conduit on the side of a building housing a Head Start classroom with fifteen children inside. The jury was within its discretion to conclude that this action created a substantial risk of bodily injury to another person. *See Woods v. State*, 768 N.E.2d 1024, 1028 (Ind. Ct. App. 2002) (holding reasonable jury could conclude that

⁴ Indiana Code section 35-42-2-2(c) further provides that the above act is a Class D felony if committed while armed with a deadly weapon. Thomas does not challenge her conviction on this basis.

shots fired in residential area in close proximity to other persons presented substantial risk of bodily injury).

The judgment of the trial court is affirmed.

BARNES, J., and CRONE, J., concur.