

Following a jury trial, Christopher Huston (Huston) was convicted of Criminal Mischief¹ as a class B misdemeanor and Pointing a Firearm² as a class D felony. The trial court sentenced Huston to eighteen months with nine months suspended and to be served on work release. On appeal, Huston raises three issues, which we restate as:

1. Was the evidence sufficient to sustain his conviction for pointing a firearm?
2. Did the trial court err in denying Huston's motion for mistrial?
3. Is Huston's sentence inappropriate?

We affirm.

On November 19, 2008, Huston, accompanied by Logen Rensel, Morgan Stigall, Samantha Huston (Samantha), Kyle Bell, and Jeff Huston (Jeff), decided to confront Trey Messer "because Trey had done something." *Transcript* at 32–33. Rensel contacted Dara Badgley, Messer's girlfriend, under the pretense of viewing Badgley's new apartment. Because Rensel did not know the apartment's location, Badgley waited for Rensel in Badgley's truck. Rensel, Bell, Stigall, and Samantha drove to the apartment complex first, and Huston and Jeff soon followed suit. When Rensel arrived, she got into Badgley's truck and spoke with Badgley for a moment. Suddenly, Huston smashed the passenger side window of the truck, pointed a gun at Badgley, and demanded to know Messer's location. Before Huston could obtain the information, the group decided to leave the scene.

¹ Ind. Code Ann. § 35-43-1-2(a)(1) (West, Westlaw through 2011 Pubs. Laws approved & effective through 06/28/2011).

² Ind. Code Ann. § 35-47-4-3(b) (West, Westlaw through 2011 Pubs. Laws approved & effective through 06/28/2011).

On January 20, 2009, the State charged Huston with criminal mischief and pointing a firearm. Huston's jury trial commenced on November 17, 2010. At the conclusion of the evidence, the jury found Huston guilty as charged. On December 16, 2010, the trial court sentenced Huston to the advisory sentence of eighteen months for pointing a firearm and six months for criminal mischief. The sentences were ordered to run concurrently. Huston now appeals.

1.

Huston contends that the evidence is insufficient to sustain his conviction for pointing a firearm as a class D felony. Our standard of review when considering a challenge to the sufficiency of the evidence is well settled.

When reviewing the sufficiency of the evidence needed to support a criminal conviction, we neither reweigh evidence nor judge witness credibility. *Henley v. State*, 881 N.E.2d 639, 652 (Ind. 2008). "We consider only the evidence supporting the judgment and any reasonable inferences that can be drawn from such evidence." *Id.* 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. *Id.*

Bailey v. State, 907 N.E.2d 1003, 1005 (Ind. 2009).

To sustain a conviction for pointing a firearm as a class D felony the State must have proven beyond a reasonable doubt that Huston knowingly pointed a firearm at Badgely. *See* I.C. § 35-47-4-3(b). If Huston had placed at issue the question of whether the firearm was loaded, the State would have then been required to prove that fact to support a class D felony conviction, otherwise Huston could only have been convicted of a class A misdemeanor. *See Adkins v. State*, 887 N.E.2d 934 (Ind. 2008) (if a defendant seeks the lesser included offense, he or she must place the question of the gun having been unloaded at issue, forcing the State

to prove beyond a reasonable doubt that the firearm was loaded). Huston, however, failed to place at issue the question of whether the firearm was loaded. At trial, Huston questioned several witnesses as to whether shots were fired, but did not question any witnesses as to whether the firearm was loaded. The fact that shots were fired is probative that a firearm was loaded, as was the case in *Adkins v. State*, 887 N.E.2d 934; however, here the fact that no shots were fired is not determinative of whether the firearm was loaded or unloaded. Therefore, by only inquiring as to whether shots were fired, Huston did not place at issue the question of whether the firearm was loaded.

The State's evidence that Huston pointed a firearm at Badgley after breaking one of the windows to her truck is sufficient to sustain Huston's conviction for class D felony pointing a firearm.

2.

During the State's case-in-chief, Huston submitted an oral motion for a mistrial based on a question asked by the prosecution. Huston argues the trial court erred in denying his motion for mistrial.

"A mistrial is an extreme remedy warranted only when no other curative measure will rectify the situation." *Burks v. State*, 838 N.E.2d 510, 519 (Ind. Ct. App. 2005) (quoting *Harris v. State*, 824 N.E.2d 432, 439 (Ind. Ct. App. 2005)), *trans. denied*. In order to prevail on appeal from the denial of a motion for mistrial, a defendant must establish that the questioned information or event was so prejudicial and inflammatory that he or she was placed in a position of grave peril to which he or she should not have been subjected. *Burks v. State*, 838 N.E.2d 510. "The gravity of the peril is determined by the probable and

persuasive effect on the jury's decision." *Id.* at 519 (quoting *Mote v. State*, 775 N.E.2d 687, 689 (Ind. Ct. App. 2002), *trans. denied*). Since the trial court is in the best position to gauge the circumstances and probable impact upon the jury, a trial court's decision whether to grant a mistrial is afforded great deference. *Burks v. State*, 838 N.E.2d 510.

The testimony that prompted Huston to move for a mistrial came during the prosecution's re-direct examination of Samantha Huston, as follows:

Q: Ma'am, were there any other items that were taken out of your brother's house?

A: No, sir.

Q: Wasn't any marijuana, dope taken out of his house?

A: Not that I recall.

Transcript at 55.

As reflected in the above excerpt, the question referencing marijuana was brief. Additionally, the witness testified that there was no marijuana stolen. *Id.* at 55–64. Huston failed to tender a contemporaneous objection and failed to request an admonishment. As for the motion for mistrial, the trial court specifically stated that the question was not so prejudicial as to taint the overall fairness of the proceedings. Huston has not explained to our satisfaction how this simple question, answered in the negative, was so prejudicial and inflammatory that he was placed in a position of grave peril. Therefore, we conclude a mistrial was not warranted and the trial court did not err.

The court imposed the advisory sentence upon Huston for his class D felony pointing a firearm conviction and to a concurrent term of six months for his class B misdemeanor criminal mischief conviction. Huston contends this sentence was inappropriate in light of his character and the nature of his offenses. Article 7, section 4 of the Indiana Constitution grants our Supreme Court the power to review and revise criminal sentences. Pursuant to Ind. Appellate Rule 7, the Supreme Court authorized this court to perform the same task. *Cardwell v. State*, 895 N.E.2d 1219 (Ind. 2008). Per App. R. 7(B), we may revise a sentence “if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” *Wilkes v. State*, 917 N.E.2d 675, 693 (Ind. 2009), *cert. denied*, 131 S.Ct. 414 (2010). “[S]entencing is principally a discretionary function in which the trial court’s judgment should receive considerable deference.” *Cardwell v. State*, 895 N.E.2d at 1223. Huston bears the burden on appeal of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006).

In the sentencing statement, the trial court noted that it considered Huston’s military service and the fact that he was the custodial parent of his son as mitigating circumstances, although the court indicated that it gave both minimal weight. The trial court found no aggravating circumstances. We agree with the trial court that there was nothing significant in terms of mitigators or aggravators. That is, there are no facts before us that render Huston’s conduct on the night in question deserving of a sentence deviating in either direction from the starting point that the advisory sentence represents. *See id.* We therefore conclude that the advisory sentence was appropriate.

Judgment affirmed.

DARDEN, J., and VAIDIK, J., concur.