MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT

Christopher Kozelichki
South Bend, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Daylon L. Welliver
Deputy Attorney General
Indianapolis, Indiana

IN THE

COURT OF APPEALS OF INDIANA

Scott A. Marvin,

Appellant-Defendant,

v.

State of Indiana,

Appellee-Plaintiff.

December 6, 2022

Court of Appeals Case No. 22A-CR-1647

Appeal from the St. Joseph Superior Court

The Honorable Jeffrey L. Sanford, Judge

Trial Court Cause No. 71D03-2110-F5-238

Tavitas, Judge.

Case Summary

[1] Scott Marvin appeals his conviction for intimidation, a Level 5 felony. Marvin argues that the State presented insufficient evidence to rebut his claim of self-defense.[1] We affirm.

Issue

[2] Marvin raises one issue on appeal, which we restate as whether the State presented sufficient evidence to rebut his claim of self-defense.

Facts

[3] On October 5, 2021, at around 6 p.m., Byron Jackson, his wife, Vanessa (the "Jacksons"), and their three young children were parked outside the post office on Edison Road in South Bend. As Vanessa exited the car to enter the post office, Marvin "aggressively" pulled into the parking lot and began yelling and cursing at Byron for cutting him off in traffic. Tr. Vol. II p. 40. At one point, Marvin "gave [Byron] the middle finger." *Id.* at 74. Still seated in his car, Byron exchanged words with Marvin. Marvin then exited his car and approached Byron while continuing to yell and curse.

[4] Vanessa heard the exchange from inside the post office and ran back to step between Marvin and the Jacksons' vehicle. She put her hands up and told

---

[1] Marvin also appears to appeal his conviction for pointing a firearm, a Level 6 felony, but as we explain below, that count was dismissed by the trial court at sentencing.

Marvin that he needed to "get away from her car with her kids." *Id*. at 42. Marvin continued to approach and yell, and Vanessa pushed him backwards. Marvin then smacked her on the face.

[5] At that point, Byron exited his car, pushed Marvin back, and attempted to deescalate the situation by telling Marvin, "[W]e're not doing this." *Id*. at 24. Marvin then pulled out a revolver, pointed it at Byron's head, and stated, "Pow. Just like that m****r f****r." *Id*. According to Byron, Marvin held the gun to his head for approximately two minutes. Eventually, Marvin lowered the weapon and fled the scene in his car. A few hours later, South Bend Police Department Officer Jeffrey Diggins located Marvin and recovered a loaded revolver from Marvin's vehicle.

[6] On October 7, 2021, the State charged Marvin with three counts: Count I, intimidation, a Level 5 felony; Count II, pointing a firearm, a Level 6 felony; and Count III, battery, a Class B misdemeanor.

[7] The trial court held a jury trial on May 12, 2022. The Jacksons, Officer Diggins, and two witnesses testified regarding the incident. Marvin testified that he is disabled and has nerve damage to the right side of his body. He further testified that he pointed his firearm at Byron because he thought Byron was going to attack him. The trial court instructed the jury on Marvin's claim of self-defense.

[8] The jury found Marvin guilty of Counts I and II and found Marvin not guilty of Count III. The trial court held a sentencing hearing on June 16, 2022. The trial

court entered a judgment of conviction on Count I and sentenced Marvin to three years in the Department of Correction, all suspended, with two years of probation.[2] Marvin now appeals.

Discussion and Decision

[9] Marvin argues that the State presented insufficient evidence to rebut his claim of self-defense. We disagree.

[10] The standard of review for a challenge to the sufficiency of the evidence to rebut a claim of self-defense is the same as the standard for any claim of sufficiency of the evidence. *Stewart v. State*, 167 N.E.3d 367, 376 (Ind. Ct. App. 2021) (citing *Hughes v. State*, 153 N.E.3d 354, 361 (Ind. Ct. App. 2020), *trans. denied*), *trans. denied*. When analyzing a claim of insufficient evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the jury's verdict. *Id.* (citing *Sallee v. State*, 51 N.E.3d 130, 133 (Ind. 2016)). It is the jury's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether the evidence is sufficient to support a conviction. *Id.* If a defendant is convicted despite his claim of self-defense, an appellate court will reverse only if no reasonable person could say that self-defense was negated by the State beyond a reasonable doubt. *Id.* (citing *Wilson v. State*, 770 N.E.2d 799, 800-01 (Ind. 2002)).

---

[2] The trial court dismissed Count II due to double jeopardy concerns.

[11] "Self-defense is a legal justification for an otherwise criminal act." *Id.* (citing *Gammons v. State*, 148 N.E.3d 301, 304 (Ind. 2020)). Indiana Code Section 35-41-3-2 governs the defense of self-defense and provides, in relevant part:

> (c) A person is justified in using reasonable force against any other person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force. However, a person:
>
> (1) is justified in using deadly force; and
>
> (2) does not have a duty to retreat;
>
> if the person reasonably believes that that force is necessary to prevent serious bodily injury to the person or a third person or the commission of a forcible felony. . . .

In *Nantz v. State*, 740 N.E.2d 1276, 1280-81 (Ind. Ct. App. 2001), *trans. denied*, this Court held that pointing a loaded firearm constitutes use of deadly force.

[12] Our Supreme Court has held that "'[t]o employ self-defense[,] a defendant must satisfy both an objective and subjective standard; he must have actually believed deadly force was necessary to protect himself, and his belief must be one that a reasonable person would have held under the circumstances.'" *Washington v. State*, 997 N.E.2d 342, 349 (Ind. 2013) (quoting *Littler v. State*, 871 N.E.2d 276, 279 (Ind. 2007)). "Nevertheless, a defendant is not justified in using force if 'the person has entered into combat with another person or is the initial aggressor unless the person withdraws from the encounter and communicates to the other

person the intent to do so and the other person nevertheless continues or threatens to continue unlawful action.'" *Huls v. State*, 971 N.E.2d 739, 747 (Ind. Ct. App. 2012) (quoting Ind. Code § 35-41-3-2(g)(3)), *trans. denied*. "Thus, in order to prevail on a claim of self-defense, the defendant must show that he or she: (1) was in a place where he or she had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) [when using deadly force,] had a reasonable fear of death or great bodily harm." *Id*. (citing *Wilson v. State*, 770 N.E.2d 799, 800 (Ind. 2002)). "Furthermore, an initial aggressor must withdraw from the encounter and communicate the intent to do so to the other person before he or she may claim self-defense." *Id*. (citing *Tharpe v. State,* 955 N.E.2d 836, 844 (Ind.Ct.App.2011), *trans. denied*).

[13] If a defendant raises a self-defense claim that finds support in the evidence, the State has the burden of negating at least one of the necessary elements. *Stewart*, 167 N.E.3d at 376 (citing *Hughes*, 153 N.E.3d at 361). The State may meet this burden by rebutting the defense directly—by affirmatively showing the defendant did not act in self-defense—or by simply relying on the sufficiency of its evidence in its case-in-chief. *Id.* (citing *Miller v. State*, 720 N.E.2d 696, 700 (Ind. 1999)).

[14] Marvin first argues that the State failed to present sufficient evidence that he was the initial aggressor. We disagree. Marvin contends he produced his firearm only after Byron pushed him. Testimony revealed, however, that as a result of an alleged traffic incident, Marvin followed the Jacksons, made a rude gesture at Byron, exited his own car, approached Byron's car shouting and

cursing, and smacked Byron's wife, Vanessa, on the face. The jury could have reasonably concluded that Marvin was the initial aggressor, and we will not reweigh the evidence.

[15] Even if Marvin was not the initial aggressor, the jury could have reasonably concluded that he was a willing participant in the encounter. Marvin instigated the exchange of words with Byron by following the Jacksons and making a rude gesture. Marvin refused to retreat when Vanessa told him to stop approaching the Jacksons' car. Furthermore, when Byron exited the car and told Marvin "we're not going to do this," Tr. Vol. II p. 24, Marvin pointed a loaded firearm at Byron's head. *See Cole v. State*, 28 N.E.3d 1126, 1137 (Ind. Ct. App. 2015) (defendant was a willing participant when he continued fighting the victim after the victim told him he did not want to fight Cole and told Cole to leave). Marvin never communicated an intent to withdraw but instead needlessly escalated and prolonged the encounter.

[16] Finally, Marvin argues that his use of force was reasonable because he is partially disabled, and he feared Byron would attack him. We are not persuaded. Whether or not Marvin *subjectively* believed that his use of force was reasonable, the jury could reasonably conclude that such a belief was not *objectively* reasonable. The Jacksons were unarmed, and Marvin does not suggest that they appeared otherwise. In fact, they tried to deescalate the situation. Marvin responded by pointing a loaded firearm at Byron's head for approximately two minutes and stated, "Pow. Just like that m****r f****r." Tr. Vol. II p. 24. Nothing suggests Marvin was at risk of serious bodily injury.

[17] Marvin relies on *Harmon v. State*, in which we held that the trial court erred in excluding evidence regarding Harmon's self-defense claim when there was "a legitimate question" regarding the plausibility of that claim. 849 N.E.2d 726, 734 (Ind. Ct. App. 2006). In that case, Harmon retrieved a firearm while in the middle of a heated altercation in which he was outnumbered, and one of his adversaries had a shotgun. *Id*. We also noted that "Harmon's possession of the firearm was temporary and lasted only for the period of time necessary to abate the danger." *Id*. at 735. Marvin claims his case is analogous to *Harmon* in that Marvin was outnumbered, Marvin only produced the firearm when Byron exited the car, and Marvin eventually left the parking lot.

[18] Marvin's reliance on *Harmon* is misplaced. First, we did not hold in *Harmon* that Harmon's use of force was reasonable but only that the evidence regarding Harmon's claim of self-defense should have been presented to the jury. 849 N.E.2d at 735. Further, the facts in *Harmon* are quite different than those present here. Unlike in *Harmon*, where one of the defendant's adversaries was armed with a shotgun, here, neither of the Jacksons were armed. In addition, Marvin pointed his firearm at Byron for far longer than necessary to abate any threat Byron presented. We find, accordingly, that Marvin's use of force was unreasonable, and that the State, therefore, presented sufficient evidence to rebut Marvin's claim of self-defense.

Conclusion

[19] The State presented sufficient evidence to rebut Marvin's claim of self-defense. Accordingly, we affirm.

[20] Affirmed.

Brown, J., and Altice, J., concur.