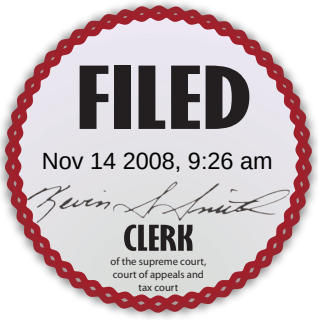

ATTORNEY FOR APPELLANT:

JOHN C. BOHDAN
Deputy Public Defender
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JANINE STECK HUFFMAN
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

QUINTIN D. HOLMES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0808-CR-399
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Kenneth R. Scheibenberger, Judge
Cause No. 02D04-0705-FD-388

November 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Following a jury trial, Quintin Holmes was convicted of Criminal Recklessness,[1] as a class D felony, and was subsequently sentenced to three years imprisonment. Upon appeal, Holmes presents two issues for our review:

1. Is the evidence sufficient to sustain his conviction?

2. Is the sentence imposed inappropriate in light of the nature of the offense and the character of the offender?

We affirm.

The facts most favorable to the conviction follow. Sergeant Thomas Strausborger is a police officer with the Fort Wayne Police Department. On October 9, 2005, Sergeant Strausborger was off duty working as a security officer for the Chapel Oaks Apartments in Fort Wayne. On that day, he drove his unmarked black Chevy Impala to the apartment complex to check on things, as he often did. Sergeant Strausborger was not wearing his full police uniform, but was wearing the police department's bullet proof vest which bore the emblem of the Fort Wayne Police Department. While driving through the complex, Sergeant Strausborger learned of a "party armed" call coming through dispatch. *Transcript* at 83. The call comments on his computer read that there was a black male wearing a black jacket and armed with a gun banging on the front door of an apartment within the complex.

Upon arriving at the location specified, Sergeant Strausborger noticed a group of individuals standing outside the apartment, one of whom matched the description given over dispatch. Sergeant Straus parked his car about 100 feet away from the group. As he got out of his car, Sergeant Strausborger grabbed his shotgun because it had a flashlight on the front of it. Sergeant Strausborger "racked" his shotgun and shined its flashlight on the group of

[1] Ind. Code Ann. § 35-42-2-2 (West, Premise through 2007 1st Regular Sess.).

people as he shouted "Fort Wayne Police. Let me see everybody's hands". *Id*. at 85. Holmes, who Sergeant Strausborger believed to be the suspect because he matched the description given in the call, started walking away from the group and looked back at Sergeant Strausborger as he did so. Sergeant Strausborger yelled at Holmes, "You, in the black coat, stop right there", but Holmes began walking faster and then started running away from Sergeant Strausborger. *Id*. Sergeant Strausborger engaged in a foot pursuit of Holmes, who during the chase kept looking back at Sergeant Strausborger.

Although it was dark at the time, the apartment complex had good street lighting and Sergeant Strausborger kept shining his flashlight in Holmes's face. As Sergeant Strausborger chased after Holmes, he yelled "Police. Stop". *Id*. at 89. During the pursuit, Sergeant Strausborger came within eight to ten feet of Holmes. At some point, Sergeant Strausborger noticed that Holmes had his hand in front of his body as if he were holding a gun in place. Holmes looked back, raised the gun up toward Sergeant Strausborger, fired one shot, then tripped and fell to the ground and immediately jumped up and ran around a building. Sergeant Strausborger took cover. He then gave chase again, eventually ending his pursuit of Holmes upon losing sight of him. Sergeant Strausborger then checked on a resident who was in close proximity to where the bullet hit and who had heard the gunshot. Sergeant Strausborger did not return fire because of safety issues.

Sergeant Strausborger advised dispatch that a shot had been fired and that no one was hurt and also requested that a perimeter be set up in the area. A search of the area revealed a loaded firearm and an empty shell casing that came out of the same gun located near the location where Holmes had fallen to the ground.

Over a year later, on November 1, 2006, Sergeant Strausborger observed Holmes, along with two other individuals, coming out of an apartment near the shooting location. Holmes had a very long goatee, which was a distinctive feature of the suspect involved in the October 9, 2005 shooting incident. Sergeant Strausborger initiated a traffic stop and identified the person as Holmes. Sergeant Strausborger was "very sure" of his identification. *Id*. at 102.

On May 8, 2007, the State charged Holmes with class D felony criminal recklessness. A jury trial was held on March 12, 2008, at the conclusion of which Holmes was found guilty as charged. At an April 7, 2008 sentencing hearing,[2] the trial court imposed the maximum sentence of three years executed.[3] In support of the sentence, the trial court identified three aggravating circumstances: (1) Holmes's criminal history, (2) prior attempts at probation had failed, and (3) that Holmes shot at a police officer. Holmes now appeals his conviction and sentence.

1.

Holmes argues that the evidence is insufficient to sustain his conviction for criminal recklessness. Our standard of review for a challenge to sufficiency is well settled. When considering a challenge to the sufficiency of evidence to support a conviction, we respect the fact-finder's exclusive province to weigh the evidence and therefore neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the verdict, and

[2] A transcript of the sentencing hearing was not included in the record on appeal.

"must affirm 'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" *Id*. at 126 (*quoting Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

To convict Holmes of criminal recklessness as a class D felony, the State was required to provide beyond a reasonable doubt that Holmes recklessly, knowingly, or intentionally performed an act that created a substantial risk of bodily injury to another person, and did so while armed with a deadly weapon. *See* I.C. § 35-42-2-2. On appeal, Holmes's specific challenges are that the State's evidence was insufficient to establish that he recklessly, knowingly, or intentionally discharged the firearm and/or that the firing of the weapon created a substantial risk of bodily injury to Sergeant Strausborger.

The State's evidence showed that Holmes pointed a loaded firearm at Sergeant Strausborger and fired in his direction. The bullet went into the ground between Sergeant Strausborger's position and that of a tenant standing on her porch twenty to thirty feet from Sergeant Strausborger. The shot was so close that Sergeant Strausborger testified he "could actually see the bullet go next to [him] and hit the ground." *Transcript* at 89. The still-loaded firearm and empty shell casing from the gun were found where Holmes had fallen. Holmes focuses on the distance testified to (i.e., the twenty to thirty feet between Sergeant Strausborger's position and that of the apartment resident) and the fact that the bullet impacted the ground as insufficient to support the finding that the projectile created a substantial risk of bodily injury to Sergeant Strausborger. Holmes's argument is simply a

[3] Ind. Code Ann. § 35-50-2-7 (West, Premise through 2007 1st Regular Sess.) ("[a] person who commits a Class D felony shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 1/2) years").

request that we reweigh the evidence, a task in which we will not engage on appeal. Clearly, a reasonable trier of fact could infer from the firing of a loaded weapon in the direction of a pursuing police officer such that the bullet impacted the ground within twenty to thirty feet (likely less) of the officer created a substantial risk of bodily injury to the pursuing police officer. We therefore conclude that the evidence presented by the State was sufficient to support Holmes's conviction for class D felony criminal recklessness.

2.

Holmes argues that his sentence is inappropriate.[4] We have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. *See Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218; Indiana Appellate Rule 7(B). Although we are not required under App. R. 7(B) to be "extremely" deferential to a trial court's sentencing decision, we recognize the unique perspective a trial court brings to such determinations. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). Thus,"we exercise with great restraint our responsibility to review and revise sentences." *Scott v. State*, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006), *trans. denied*.

[4] We note that Holmes included in his appendix a copy of the presentence investigation report on white paper. We remind Holmes that Ind. Appellate Rule 9(J) requires that documents and information excluded from public access pursuant to Ind. Administrative Rule 9(G)(1), which includes presentence investigation reports, must be filed in accordance with Ind. Trial Rule 5(G). That rule provides that such documents must be tendered on light green paper or have a light green coversheet and be marked "Not for Public Access" or "Confidential". T.R. 5(G)(1).

In arguing that his sentence is inappropriate, Holmes suggests that his criminal history does not support the sentence imposed and that there is no support in the record for the trial court's reliance on failure of prior attempts at rehabilitation as an aggravating factor. Holmes, acknowledging his criminal history, asserts that he is not among the worst offenders.

Although Holmes makes no argument with regard to the nature of the offense, we consider the nature of the offense for purposes of our review. The nature of this offense is that Holmes fired a gun in an apartment complex and at an officer of the law while running from the officer and disobeying the officer's commands to stop. His actions demonstrate a complete disregard for the life of the officer and the safety of the residents in the complex. Moreover, Holmes fired at a police officer – someone who risks his life to protect others and maintain peace in our society. We find the nature of the offense to be egregious and not deserving of a lesser sentence.

As to Holmes's character, we note that his criminal history includes a conviction for misdemeanor attempted residential entry. Subsequent to the shooting in this case, but prior to sentencing, Holmes was convicted of class D felony possession of cocaine, narcotic drug, or methamphetamine for which he was sentenced to two years of probation. Holmes was also convicted of misdemeanor possession of marijuana for which he received a sixty-day sentence in the county jail. Holmes's criminal history is indicative of poor character. His poor character is further demonstrated by the fact that more lenient measures (i.e., probation) have proved to be unsuccessful in deterring his behavior. In light of the nature of the offense and character of the offender, we cannot say that the three-year sentence imposed is inappropriate.

Judgment affirmed.

DARDEN, J., and BARNES, J., concur