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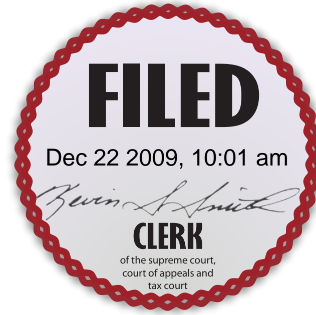

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IN THE COURT OF APPEALS OF INDIANA

RICHARD BROWN,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

No. 49A02-0906-CR-577

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable James B. Osborn, Judge
Cause No. 49F15-0804-FD-76788

December 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

In this belated direct appeal, Appellant-Defendant Richard Brown appeals his conviction and 180-day sentence for Pointing a Firearm, a Class D felony.[1] Brown claims that he received ineffective assistance of trial counsel. We affirm.

FACTS AND PROCEDURAL HISTORY

On April 8, 2008, fifteen-year-old J.S. and his friend E.V. walked to a park located within a mobile home park in Indianapolis where Brown lived at the time. In walking to the park, J.S. and E.V. cut through some empty lots and certain residents' yards. Although E.V. admitted to having crossed Brown's property in the past, both J.S. and E.V. testified that on the date in question they did not touch Brown's property. As they walked on the road past Brown's property, Brown yelled at them to get off of his property. J.S. and E.V. spent about an hour or two at the park and then walked past Brown's property again on their way home from the park. Brown yelled at them through his window, then walked outside to his porch and pointed a shotgun at them. J.S. and E.V. left the scene.

J.S.'s stepfather saw Brown holding and pointing a firearm at J.S. and E.V. on the date in question. J.S.'s stepfather's co-worker similarly saw Brown holding a firearm in the presence of J.S. and E.V., although he did not see Brown pointing the gun.

Upon responding to the scene, Indianapolis Metropolitan Police Officer Dustin Loeb arrested Brown, who admitted to having a shotgun. When Officer Loeb recovered Brown's gun inside his door, he discovered that it was loaded.

[1] Ind. Code § 35-47-4-3 (2007).

On April 9, 2008, the State charged Brown with Class D felony pointing a firearm. On March 5, 2009, the trial court held a bench trial. At trial, Brown testified that on the day in question he had been scared by a loud bang and vibrations, suggesting to him that someone had kicked the hitch cover on his trailer. According to Brown, this had never happened before, so he responded by "whipp[ing] out" the shotgun he kept in his living room. Tr. p. 77. Defense counsel asked Brown whether he kept the shotgun loaded and whether it was loaded at the time of the offense. Brown responded in the affirmative, indicating that a shotgun is "not much good if it's not loaded" and that he kept it to protect himself. Tr. p. 77. Brown denied having pointed the gun at J.S. and E.V. In closing argument, defense counsel argued that Brown was acting in defense of his property.[2] The trial court found Brown guilty as charged and sentenced him on April 16, 2009 to 180 days, 160 of them suspended to probation.

On May 28, 2009, Brown filed a verified motion to file a belated notice of appeal, which the trial court granted on June 2, 2009. This appeal follows.

DISCUSSION AND DECISION

Upon appeal Brown claims that his trial counsel rendered ineffective assistance by asking him whether his gun was loaded, which he argues prejudiced him by establishing an element of his Class D felony offense. In making this argument, Brown points to the trial court's comment, in finding him guilty, that Brown's own testimony established that

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[2] Under Indiana Code section 35-41-3-2(c) (2007), as relied upon by defense counsel, "[A] person is justified in using reasonable force against another person if the person reasonably believes that the force is necessary to immediately prevent or terminate the other person's trespass on or criminal interference with property lawfully in the person's possession . . . ."

the firearm was loaded. Pointing a firearm, which is generally a Class D felony offense, is a reduced Class A misdemeanor offense if the firearm is not loaded. *See* Ind. Code § 35-47-4-3(b).

Ineffective assistance of counsel claims are analyzed under the two-part test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000). To succeed, the petitioner must demonstrate both deficient performance and resulting prejudice. *Id.* Regarding the first part of the *Strickland* test—counsel's performance—we presume that counsel provided adequate representation. *Allen v. State*, 749 N.E.2d 1158, 1166 (Ind. 2001). Accordingly, "'[c]ounsel is afforded considerable discretion in choosing strategy and tactics, and we will accord that decision deference.'" *Id.* (quoting *Williams v. State*, 733 N.E.2d 919, 926 (Ind. 2000)). The second part of the *Strickland* test—the prejudicial effect of counsel's conduct—requires the defendant to show "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* (quoting *Strickland*, 466 U.S. at 694). Failure to satisfy either part of the *Strickland* test will cause the claim to fail. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002). Indeed, most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. *Id.*

Brown's ineffective-assistance-of-counsel claim is before us upon direct appeal. Such claims rarely succeed. For example, in *Woods v. State*, 701 N.E.2d 1208, 1220 (Ind. 1998), the Indiana Supreme Court held that claims of ineffective assistance of trial counsel raised upon direct appeal were not available for collateral review. In reaching

this holding, the *Woods* court observed that this holding would "likely deter all but the most confident appellants from asserting any claim of ineffectiveness on direct appeal." *Id.* at 1220. Indeed,

> [w]hen the only record on which a claim of ineffective assistance is based is the trial record, every indulgence will be given to the possibility that a seeming lapse or error by defense counsel was in fact a tactical move, flawed only in hindsight. It is no surprise that such claims almost always fail.

Id. at 1216 (quoting *United States v. Taglia*, 922 F.2d 413, 417-18 (7th Cir. 1991)).

To the extent defense counsel's question established that Brown's gun was loaded, Brown suffered no demonstrable prejudice. While the fact that the firearm at issue is *not* loaded serves to reduce the offense of pointing a firearm to a Class A misdemeanor, the fact that the firearm *is* loaded is not an element of the Class D felony offense. *See Adkins v. State*, 887 N.E.2d 934, 937 (Ind. 2008) ("The elements of Class D Felony Pointing a Firearm simply do not include a requirement that the gun be loaded.")

Further, defense counsel's asking Brown whether his gun was loaded can easily be construed as a matter of reasonable trial strategy. It would have been reasonable for defense counsel to conclude that the fact of Brown's loaded gun emphasized the reality of the threat Brown believed he was facing and buttressed his defense of property claim. Given that the loaded nature of the firearm was not an element of the offense, defense counsel cannot be faulted for pursuing a strategy based upon the negligible risk to Brown of admitting a fact which had the potential to reinforce his complete defense to the charge.

The judgment of the trial court is affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.