MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Mark S. Lenyo
South Bend, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

George P. Sherman
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Justin Gerard Stewart,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 28, 2022

Court of Appeals Case No. 22A-CR-729

Appeal from the St. Joseph Superior Court

The Honorable Jeffrey L. Sanford, Judge

Trial Court Cause No. 71D03-1910-F5-251

Tavitas, Judge.

Case Summary

[1] Justin Gerard Stewart appeals his convictions for two counts of intimidation, Level 5 felonies. Stewart argues the evidence is insufficient to sustain the convictions. Finding the evidence sufficient, we affirm.

Issue

[2] Stewart raises a single issue: whether the evidence is sufficient to sustain his convictions for intimidation.

Facts

[3] Ronald Boren and David Oblinger were at a McDonald's drive-through in South Bend shortly before midnight on October 18, 2019. The drive-through had two lanes—an inner lane closer to the restaurant and an outer lane. Boren, who was driving, initially pulled into the inner lane, which had three or four cars ahead of him. The outer lane only had one car in it. Seeing that the lone car in the outer lane was finished ordering and that no cars were pulling up behind it, Boren repositioned his car into the outer lane.

[4] Stewart's car was behind Boren's. After Boren pulled into the second lane, Stewart exited his vehicle and knocked on Boren's driver-side window. Stewart told Boren that Boren had "just cut everybody off." Tr. Vol. II p. 21. Stewart's tone was "irritated," and Stewart and Oblinger, who was sitting in the passenger seat, became embroiled in a "hostile" argument—"like they were getting aggressive and trying to be more confident than each other . . . ." *Id.* at 23.

[5] Stewart initially went back to his vehicle, but he soon returned to Boren's vehicle equipped with an "assault rifle," which police later determined to be in the style of an AK-47. State's Ex. 2 at 00:52-1:00. Stewart "pointed [the gun] in [Oblinger's] face and said '[i]f you pass me again I'll blow your head off.'" *Id*. at 01:04-01:07. As Stewart and Oblinger exchanged more words, Stewart's tone was "still aggressive . . . almost like a tone of I'm proving a point . . . don't mess with me. This is what I have." Tr. Vol. II p. 25. Boren was "very . . . afraid at that time." *Id.*

[6] Stewart again returned to his vehicle, and this time he pulled his vehicle beside the passenger side of Boren's vehicle. Before driving away, Stewart rolled down his window to say, "[a]nd I have a license to carry so don't even think about calling the police." *Id.* at 31.

[7] Oblinger called 911 to report the incident along with Stewart's license plate number to the operator. The police then located Stewart's vehicle and arrested him. Police found an AK-47 style rifle on the floor of the passenger side of the vehicle with live rounds in the magazine. Stewart was escorted back to the McDonald's restaurant, where Boren positively identified Stewart as the man involved in the drive-through incident.[1]

[8] The State charged Stewart with two counts of intimidation, Level 5 felonies, one for each victim, Boren and Oblinger. A jury trial was held on January 13,

[1] Oblinger did not testify at trial, and it is unclear whether he also positively identified Stewart.

2022. Oblinger did not testify, but his statement to the 911 operator that Stewart "pointed [a gun] in [his] face and said '[i]f you pass me again I'll blow your head off'" was admitted at trial. State's Ex. 2 at 01:04-1:07. Boren testified, "I can't tell you if the rifle was pointing directly at me. But it was pointing—when I looked over, the top of the gun was in my peripherals. But I did not want to look at him, to his face." *Id.* at 25. Boren also did not recall hearing Stewart say he was "going to blow somebody's head off." *Id.* at 43.

[9] The jury found Stewart guilty on both counts. On March 8, 2022, the trial court sentenced Stewart to three years on each count to be served concurrently, with three years suspended and two years of probation. Stewart now appeals.

Discussion and Decision

[10] Stewart contends the evidence is insufficient to sustain his intimidation convictions. Sufficiency of evidence claims "warrant a deferential standard, in which we neither reweigh the evidence nor judge witness credibility." *Powell v. State*, 151 N.E.3d 256, 262 (Ind. 2020) (citing *Perry v. State*, 638 N.E.2d 1236, 1242 (Ind. 1994)). We consider only the evidence supporting the judgment and any reasonable inferences drawn from that evidence. *Id.* (citing *Brantley v. State*, 91 N.E.3d 566, 570 (Ind. 2018), *cert. denied*). "We will affirm a conviction if there is substantial evidence of probative value that would lead a reasonable trier of fact to conclude that the defendant was guilty beyond a reasonable doubt." *Id.* "A conviction can be sustained on only the uncorroborated testimony of a single witness, even when that witness is the victim." *Bailey v.*

State, 979 N.E.2d 133, 135 (Ind. 2012). We affirm the conviction "unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." *Sutton v. State*, 167 N.E.3d 800, 801 (Ind. Ct. App. 2021) (quoting *Drane v. State*, 867 N.E.2d 144, 146-47 (Ind. 2007)).

[11] The offense of intimidation is governed by Indiana Code Section 35-45-2-1, which reads, in pertinent part: "A person who communicates a threat with the intent . . . that another person be placed in fear of retaliation for a prior lawful act . . . commits intimidation." Ind. Code § 35-45-2-1(a)(2). The offense is a Level 5 felony if "while committing it, the person draws or uses a deadly weapon." I.C. § 35-45-2-1(d). The statute defines "threat" as: "an expression, by words or action, of an intention to . . . unlawfully injure the person threatened or another person, or damage property." I.C. § 35-45-2-1(c).

I. Sufficiency—Threat

[12] Stewart first argues that the evidence does not support a finding that he communicated a threat to either Oblinger or Boren. We disagree. "Whether a statement is a threat is an objective question for the trier of fact." *Newell v. State,* 7 N.E.3d 367, 369 (Ind. Ct. App. 2014), *trans. denied.*

[13] Here, the State presented to the jury Oblinger's 911 call, in which Oblinger reported that Stewart pointed a gun and threatened to "blow [his] head off,"

which is clearly a threat. State's Ex. 2 at 01:04-01:07.[2] In addition, after Stewart displayed his firearm to the two men, Stewart pulled his vehicle up beside them and said, "I have a license to carry so don't even think about calling the police." Tr. Vol. II p. 31. *See Johnson v. State*, 743 N.E.2d 755, 757 (Ind. 2001) ("In this case, evidence that Johnson displayed a firearm combined with telling Kreczmer 'don't even think it,' which was preceded by two obscene remarks, was sufficient for a trier of fact to conclude that Johnson communicated a threat within the meaning of the intimidation statute[.]").

[14] Either of Stewart's statements were sufficient evidence to support a finding of a threat. We find instructive our Supreme Court's holding in *Johnson* that, while the mere display of a firearm does not constitute a threat, "the existence of words or conduct that are reasonably likely to incite confrontation, coupled with the display of a firearm" may. 743 N.E.2d at 756. In *Johnson*, the defendant parked his car at a red light in the middle of traffic to speak with a person on the street. He and a man in another vehicle exchanged profanities after the light turned green. When the man went to exit his vehicle, the defendant "lifted his jacket revealing the top of an automatic handgun and stated, 'Don't even think it.'" *Id.* at 755-56. Our Supreme Court found the evidence sufficient to support a finding of intimidation. *Id.* at 757.

[2] While Oblinger's statement was somewhat disputed by Boren's testimony, we will not reweigh the evidence at this stage. *Powell*, 151 N.E.3d at 262.

[15] Here, after engaging in a "hostile" verbal argument with Oblinger and Boren, Stewart pointed an AK-47 style rifle in their direction. Tr. Vol. II p. 41. Boren testified he could see the gun "was pointing—when I looked over, the tip of the gun was in my peripherals." *Id.* at 25. Stewart's tone was "aggressive," and Boren was "very . . . afraid at that time." *Id.* As in *Johnson*, the defendant displayed a firearm while exchanging hostile words. *See Johnson*, 743 N.E.2d at 756 ("[W]e observe that introducing a handgun into an emotionally charged environment can easily lead to a physical confrontation with tragic consequences."). Moreover, Stewart's firearm was an AK-47 rifle, the display of which after the heated argument would certainly be threatening. Tr. Vol. II p. 41. Thus, the evidence is sufficient to support a finding that Stewart communicated a threat.

II. Sufficiency—Requisite Intent

[16] Stewart next argues that the evidence does not support a finding that he acted with the requisite intent. We disagree. Stewart contends the State failed to prove that he either communicated a threat or pointed his weapon at Boren or Oblinger. As discussed above, the jury heard evidence to the contrary, and we will not reweigh the evidence here. Further, "[a] defendant's intent may be proven by circumstantial evidence alone, and knowledge and intent may be inferred from the facts and circumstances of each case." *Chastain v. State*, 58 N.E.3d 235, 240 (Ind. Ct. App. 2016) (citations omitted), *trans. denied*. Here, Stewart escalated the situation from an angry exchange of words to pointing an

AK-47 style rifle. The evidence is sufficient to support a finding of the requisite intent to communicate a threat.

Conclusion

[17] The evidence is sufficient to support his convictions for intimidations. Accordingly, we affirm.

[18] Affirmed.

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