**ARKANSAS COURT OF APPEALS**

DIVISION IV
**No.** CACR 08-1415

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| | **Opinion Delivered** SEPTEMBER 9, 2009 |
| DEREK MULLINS<br>APPELLANT | APPEAL FROM THE GRANT COUNTY CIRCUIT COURT, [NO. CR-2007-137-1] |
| V. | HONORABLE CHRIS E WILLIAMS, JUDGE |
| STATE OF ARKANSAS<br>APPELLEE | AFFIRMED |

**JOHN B. ROBBINS, Judge**

Appellant Derek Mullins appeals his convictions for first-degree terroristic threatening and first-degree assault, entered after a jury trial in Grant County Circuit Court. Appellant was charged for his behavior during a "family brawl" at approximately 4:00 a.m. on October 16, 2007, at a residence in Sheridan, Arkansas, that he shared with his girlfriend Whitney Clark and Whitney's family.

Appellant contends on appeal that his actions were not accompanied by the requisite criminal intent. Thus, he challenges the sufficiency of the State's proof and urges our court to reverse and dismiss his convictions as not supported by sufficient evidence. We disagree with his argument and affirm.

The test for determining sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial; substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Smith*

*v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003); *Saulsberry v. State*, 81 Ark. App. 419, 102 S.W.3d 907 (2003). Evidence is viewed in the light most favorable to the State; only evidence that supports a verdict is considered. *Clements v. State*, 80 Ark. App. 137, 91 S.W.3d 532 (2002). When we review a challenge to the sufficiency of the evidence, we will affirm the conviction if there is substantial evidence to support it. *Saulsberry v. State*, *supra*.

We do not weigh evidence presented at trial or weigh the credibility of witnesses, as these are matters to be resolved by the finder of fact. *Garner v. State*, 82 Ark. App. 496, 122 S.W.3d 24 (2003). Furthermore, a criminal defendant's intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances of the crime. *Barrett v. State*, 354 Ark. 187, 119 S.W.3d 485 (2003). Since intent cannot be proven by direct evidence, members of the jury are allowed to draw upon their common knowledge and experience to infer it from the circumstances. *Cummings v. State*, 353 Ark. 618, 110 S.W.3d 272 (2003) (citing *Proctor v. State*, 349 Ark. 648, 79 S.W.3d 370 (2002)). Moreover, because of the obvious difficulty in ascertaining a defendant's intent or state of mind, a presumption exists that a person intends the natural and probable consequences of his acts. *Proctor v. State*, 349 Ark. 648, 79 S.W.3d 370 (2002); *Harmon v. State*, 340 Ark. 18, 8 S.W.3d 472 (2000); *Tarentino v. State*, 302 Ark. 55, 786 S.W.2d 584 (1990).

A person commits the offense of terroristic threatening in the first degree if, with the purpose of terrorizing another person, the person threatens to cause death or serious physical injury or substantial property damage to another person. Ark. Code Ann. § 5-13-301(a)(1)(A) (Repl. 2006). The conduct prohibited by section 5-13-301 is the communication of a threat

with the purpose of terrorizing another. *Smith v. State*, 296 Ark. 451, 757 S.W.2d 554 (1988). *See also Mason v. State*, 361 Ark. 357, 206 S.W.3d 869 (2005). Appellant's argument on appeal is that he only acted in self-defense from the Clark brothers and that there was insufficient evidence to prove that he acted with "purpose to terrorize" them.

Appellant was also charged with aggravated assault at trial, with consideration of the lesser-included offense of first-degree assault. He was convicted of the lesser offense. A person commits assault in the first degree if he recklessly engages in conduct that creates a substantial risk of death or serious physical injury to another person. Ark. Code Ann. § 5-13-205(a). On appeal, appellant argues that there was no proof of "reckless intent" to create a risk of death or serious injury. However, this differs from his argument at trial, which was solely to the greater charge of aggravated assault, specifically contending that because the muzzle-loader was found to be unloaded, then there was no evidence of a risk of death or serious physical injury.

In order to preserve challenges to the sufficiency of the evidence supporting convictions for lesser-included offenses, defendants must address the lesser-included offense either by name or by apprising the trial court of the elements of the lesser-included offenses questioned by their motions for directed verdict. *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003); *Mainard v. State*, 102 Ark. App. 210, 242 S.W.3d 627 (2008). Appellant's directed-verdict motion did not include the lesser-included offense of first-degree assault, either in name or in elements. Because appellant failed to contest the sufficiency of the evidence on the lesser charge (and ultimate conviction), and because he has changed the

nature of his argument on appeal, we hold that the sufficiency argument is not preserved for appellate review on his first-degree assault conviction. *See id.* Therefore, we will not address that point on appeal.

The sole point we consider today is whether the State presented sufficient evidence to go to the jury on purposeful intent to terrorize. The following is a recitation of the testimony and evidence, presented in the light most favorable to the State.

Appellant had lived with the Clark family for about two months when this event took place. Whitney's father Steve Clark owned the home. At home that night were Whitney, Whitney and appellant's one-year-old son, Whitney's father Steve, Steve's wife Teresa, and Teresa's twelve-year-old daughter. When appellant arrived at that late hour, it was apparent that he was drunk. Steve ordered appellant to leave. A verbal altercation ensued, and then appellant pointed a muzzle-loader rifle at Steve's chest and threatened to kill Steve. A physical altercation commenced.

Although Steve managed to inflict some injuries upon appellant during their fight, Steve testified that he was afraid of appellant. During the melee, appellant broke the kitchen window with the rifle and also repeatedly struck the sliding-glass door. Steve's brother, Cary "Bud" Clark, who lived within walking distance, arrived to intervene, whereupon appellant pointed the gun toward Bud and said, "I'll kill you, too. M___f____." Bud asked appellant to take down the gun barrel, but he would not. The gun barrel caused a bruise to Bud's chest from a barrel imprint. By this time, Steve had already called the sheriff's department, whose personnel intervened to arrest appellant. Steve and Bud were attempting to handcuff

appellant as law enforcement personnel arrived.

While appellant argues that he was merely protecting himself from Steve and Bud Clark, his intention was a matter for the jury to decide. We easily conclude that, when the evidence is taken in the light most favorable to the State, there was sufficient evidence from which the jury could conclude that appellant's purpose in wielding the gun was to terrorize both Steve and Bud Clark. *See Davis v. State*, 368 Ark. 351, 246 S.W.3d 433 (2007).

Affirmed.

GRUBER and BROWN, JJ., agree.