DIVISION II

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, Judge

CACR05-645

JUNE 28, 2006

APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT
[NO. CR-2004-2402]

HON. MICHAEL MAGGIO, JUDGE

AFFIRMED;
MOTION GRANTED

STEVIE TURNER
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

The Faulkner County Circuit Court found appellant Stevie Turner guilty of aggravated robbery, breaking or entering, and terroristic threatening, and the trial court sentenced him to serve an aggregate term of ten years' imprisonment. Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Ark. Sup. Ct. R. 4-3(j), appellant's counsel has filed a motion to withdraw on the ground that there is no merit to an appeal. Counsel's motion was accompanied by a brief discussing all matters in the record that might arguably support an appeal and a statement of the reason why each adverse ruling in this case is not a meritorious ground for reversal. Appellant elected to file pro se points for reversal, to which the State has responded. We grant counsel's motion to withdraw and affirm appellant's convictions.

At a bench trial, Kevin Hare testified that around 10:00 p.m. on September 3, 2004, he and his two small children went to his wife's workplace. They had gone inside and come back outside with Hare's wife when their three-year-old son ran to get into Hare's truck. Hare went to retrieve his son and saw something move on the driver's side of the vehicle. He went around to that side, and appellant jumped out of the truck and began to walk away. Hare asked appellant what he had taken out of the truck, and appellant replied that he had not been in the truck. According to Hare, appellant then told him to "back off before I got shot." The only thing missing from Hare's truck was a piece of a child's toy mini-mag flashlight.

Officer James Stephen Bemies, Jr., with the Conway Police Department, testified that he apprehended appellant approximately three blocks from Hare's truck. He retraced appellant's path but did not find a gun.

Appellant took the stand in his own defense. He testified that in 1997 he was convicted of felony theft by receiving for which he received three years' probation; that his probation was revoked in 1999 and he was sentenced to ten years' imprisonment with four years' suspended imposition of sentence; that in 2002 he was convicted of breaking or entering and sentenced to two years' imprisonment; and that he had been convicted of misdemeanor theft and fleeing. Appellant further testified that he was not inside Hare's truck and was not even close to the truck. He had simply cut across a parking lot to get to "Fred's," where he planned to get a ride home. Appellant stated that he did not make any

threats toward Hare but that he only asked Hare to stop following him. Appellant further stated that he did not have a gun and that he had not been drinking that night.

On cross-examination, appellant testified that he had been drinking all day but did not think he was drunk. He stated that, if he did come into contact with Hare's truck, he must have thought it was his brother's truck. Appellant insisted that, although he walked by Hare's truck, he did not think he got into the truck. He said he did not know whether he "blacked out or what."

Appellant's counsel moved for a directed verdict at the close of the State's case-in-chief and renewed the motion at the close of all the evidence. Counsel essentially argued that appellant lacked the culpable mental state to have committed the crimes and pointed out that it was a credibility issue. In denying appellant's motions, the trial court found appellant guilty of the charges based upon his own testimony, which contained inconsistencies.

During sentencing, appellant's counsel stated that she was going to ask for a suspended sentence but ultimately agreed with the prosecutor that the trial court could not suspend a sentence on the aggravated-robbery conviction because it was a Class Y felony. The trial court agreed with the prosecutor's recommendation that appellant serve the minimum sentence of ten years.

Counsel's Motion to Withdraw

Appellant's counsel argues that the trial court did not err in denying appellant's motions for directed verdict. A motion for a directed-verdict or dismissal is a challenge to

the sufficiency of the evidence. *Green v. State*, 79 Ark. App. 297, 87 S.W.3d 814 (2002). We affirm the trial court's denial of a directed-verdict motion if there is substantial evidence to support the conviction. *Ross v. State*, 346 Ark. 225, 57 S.W.3d 152 (2001). Substantial evidence is evidence of sufficient force that it will compel a conclusion one way or another and pass beyond suspicion and conjecture. *Mulkey v. State*, 330 Ark. 113, 952 S.W.2d 149 (1997). We review the evidence in the light most favorable to the State, considering only the testimony that tends to support the guilty verdict. *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003). In bench trials, the trial judge is in a superior position to evaluate the witnesses and to weigh their credibility. *Johnson v. State*, 337 Ark. 196, 987 S.W.2d 694 (1999). Moreover, the factfinder may resolve questions of conflicting testimony and inconsistent evidence. *Sera v. State*, 341 Ark. 415, 17 S.W.3d 61 (2000).

A person's intent or state of mind at the time of an offense is seldom apparent. *Tarentino v. State*, 302 Ark. 55, 786 S.W.2d 584 (1990). Because intent cannot ordinarily be proven by direct evidence, the factfinder is allowed to draw upon his or her common knowledge and experience to infer intent from the circumstances. *See Jones v. State*, 72 Ark. App. 271, 35 S.W.3d 345 (2000). Because of the difficulty in ascertaining a person's intent, a presumption exists that a person intends the natural and probable consequences of his acts. *Id*.

A person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately thereafter, he employs or threatens

to immediately employ physical force upon another. Ark. Code Ann. § 5-12-102(a). A person commits aggravated robbery when he commits robbery, and he is armed with a deadly weapon or represents by word or conduct that he is so armed. Ark. Code Ann. § 5-12-103(a)(1). Here, appellant entered Hare's truck under circumstances that make it reasonable to conclude that his purpose in doing so was to commit a theft. Appellant was found inside the truck by Hare, and appellant attempted to leave the area. When confronted by Hare, appellant denied having been inside the truck even though Hare saw him, and appellant threatened to shoot Hare if he continued to pursue him.

A person commits the offense of breaking or entering if, for the purpose of committing a theft, he enters or breaks into a vehicle. Ark. Code Ann. § 5-39-202. Hare testified that he saw appellant inside the truck, and one could infer from the circumstances that appellant's purpose was to commit a theft inside the truck.

A person commits the offense of terroristic threatening in the first degree if, with the purpose of terrorizing another person, he threatens to cause death or serious physical injury to another person. Ark. Code Ann. § 5-13-301(a)(1)(A). Hare testified that appellant told him to "back off" or he would shoot him. It is reasonable to conclude that appellant's purpose was to terrorize Hare in order to get Hare to stop following him.

Although counsel included the fact that the trial court did not suspend imposition of appellant's sentence, there was no adverse ruling. Counsel was going to request a suspended imposition of sentence but realized that appellant's conviction for aggravated robbery

foreclosed that possibility. Thereafter, counsel agreed with the prosecutor that, pursuant to Ark. Code Ann. § 5-4-301(a)(1)(C), a court shall not suspend imposition of sentence as to a term of imprisonment for Class Y felonies. Furthermore, for a Class Y felony, the sentence shall be not less than ten years nor more than forty years, or life. Ark. Code Ann. § 5-4-401(a)(1). Appellant received the minimum sentence authorized by statute.

Appellant's Pro Se Points for Reversal

Appellant states that the prosecutor failed to allege the essential elements of the aggravated- robbery charge that was included in the information only weeks before the trial and that his counsel allowed him to be tried for the "uncharged" offense. Appellant contends that the prosecutor obviously did not believe he had the intent to commit theft because it was only after he had rejected a plea negotiation on the terroristic-threatening charge that the prosecutor charged him with aggravated robbery. Appellant states, "Sadly, this is a case where the prosecutor deliberately over charged the appellant with the aggravated robbery." Appellant's claims are merely conclusory statements raised for the first time on appeal, and thus we will not address them. *See Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1998).

Appellant argues that the trial court erred in finding that the evidence was sufficient to prove each and every element of the crime of aggravated robbery beyond a reasonable doubt as is required by the Due Process Clause of the Fourteenth Amendment of the United

States Constitution, Article 2, §§ 8 and 29 of the Arkansas Constitution, and Ark. Code Ann. §§ 5-1-111(a)(1) and 5-2-204(b). Even constitutional arguments cannot be raised for the first time on appeal. *See Wetherington v. State*, 319 Ark. 37, 889 S.W.2d 34 (1994).

Regarding the elements of the offenses, appellant argues that, at most, the State may have proved that he was inside Hare's truck but failed to prove that he took the toy that was useless without the other parts. It is well settled that no transfer of property needs to take place to complete the offense of aggravated robbery. *Williams v. State*, 351 Ark. 215, 91 S.W.3d 54 (2002). Rather, the focus of aggravated robbery is the threat of harm to the victim; consequently, the offense is complete when physical force is threatened. *Id*. Appellant further argues that the State failed to prove that his intent was to commit a theft when he entered the truck. However, appellant's intent could be inferred from the circumstances. *Jones*, *supra*. Appellant then argues that, "Clearly, since there was no proof that the appellant committed aggravated robbery or breaking and entering, at most, the appellant's act of playing like he had a gun and threatening Mr. Hare, was not for the purpose to terrorize him, it was because, Mr. Hare was following him, and he wanted him to stop." Appellant further argues that he perceived Hare's statements as a threat to him and that he "made the threat for his own safety, and not for the purpose to terrorize another person. The threat to shoot is not always for the purpose to terrorize another person." We find these contentions to be without merit.

Appellant states that at the end of the sentencing phase, the trial court failed to provide allocution and erroneously informed him that his counsel, Ms. Knight, was not representing him on appeal. Again, appellant makes no cogent argument supported by citation to authority. *See Satterlee v. State*, 289 Ark. 450, 711 S.W.2d 827 (1986). Appellant concludes that this court should deny counsel's motion to withdraw and order her to "argue more fully and professionally" the issues and arguments raised "involuntarily pro se" by him. Appellant states that it cannot be said that he was afforded effective assistance of counsel. We do not consider ineffective assistance of counsel as a point on direct appeal unless that issue has been considered by the trial court. *Missildine v. State*, 314 Ark. 500, 863 S.W.2d 813 (1993). If appellant should wish to raise an ineffective-assistance-of-counsel claim, he may do so in a petition pursuant to Ark. R. Crim. P. 37. *Id.*

Based on our review of the record and the briefs presented, we conclude that there has been full compliance with Rule 4-3(j) and that the appeal is wholly without merit. Defense counsel's motion to be relieved is granted, and appellant's convictions are affirmed.

Affirmed; motion granted.

ROBBINS and BIRD, JJ., agree.