

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA** \* **NO. 2000-KA-1895**  
**VERSUS** \* **COURT OF APPEAL**  
**DAVID V. WILSON** \* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**  
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APPEAL FROM  
CRIMINAL DISTRICT COURT ORLEANS PARISH  
NO. 409-311, SECTION "L"  
Honorable Terry Alarcon, Judge  
\* \* \* \* \*  
**Judge David S. Gorbaty**  
\* \* \* \* \*

(Court composed of Judge James F. McKay III, Judge Dennis R. Bagneris,  
Sr., Judge David S. Gorbaty)

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**AFFIRMED**

David V. Wilson appeals his conviction for aggravated criminal damage to property, claiming that there was insufficient evidence to support the conviction. For the following reasons, we affirm the conviction and sentence.

**FACTS:**

David V. Wilson was charged by bill of information on August 25, 1999, with aggravated criminal damage to property in violation of La. Rev. Stat. 14:55. After a bench trial on February 15, 2000, he was found to be guilty as charged. His motion for an appeal was granted. He was sentenced on June 14, 2000 to serve two years at hard labor; his sentence was suspended and he was placed on active probation with special conditions. At trial Officer Claude Flot testified that on March 17, 1999, he investigated a complaint concerning aggravated criminal damage to property by answering two calls. One call was from the 2200 block of Choctaw Street where a police officer reported that someone was trying to steal his car and shots were fired. The second was from a caller in the 5400 block of Marais Street who said that shots were fired at him while delivering newspapers. Officer

Flot went to the Marais Street home of Mrs. Mickin and her son. He saw there a black Dodge truck with several bullet holes and learned from Mrs. Mickin that when her son threw a newspaper at a house on Choctaw Street, a man came out and began firing shots at them. Officer Flot examined the truck and described the damage as (1) the rear window shattered by a bullet, (2) the truck's side dented and the side mirror smashed by another bullet, (3) the front windshield pierced by two bullets, one of which hit the rear view mirror inside the truck, and (4) a hole in the left rear tailgate of the truck caused by a bullet. Additionally, two bullets were found in the bed of the truck. When Officer Flot asked Mrs. Mickin if she owned any weapons, she showed him two loaded revolvers that were on top of a china cabinet. The guns and the bullets in the chamber were dusty. The officer concluded that they had not been used recently.

Officer Joseph Hebert of the Public Integrity Division of NOPD testified that he investigated the charge that a police officer had discharged his weapon. When he arrived on the scene the officer met with Sergeant Williams and Lieutenant Orazio. Officer Hebert first observed ten bullet casings and a mirror in the street in front of Wilson's house. (It was later determined that the mirror came from the Mickins' truck.) Tire tracks indicating a vehicle left the area at a high speed were found about forty

yards from the house on Choctaw Street. The mirror was very near the tire tracks. The Glock model 27, .40 caliber handgun that fired the bullets was found in Wilson's house. Officer Hebert testified that an examination of the area showed no evidence of bullets being fired other than from Wilson's weapon. The officer also went to the Mickins' home and inspected their damaged truck. Later that day, Officer Hebert spoke to Wilson who refused to waive his constitutional rights and discuss the incident. Wilson was charged with aggravated criminal damage to property.

Prior to the testimony of Officer Kenneth Leary, an expert in the field of ballistics and firearms, the parties stipulated that the nine cartridge casings found in the 2200 block of Choctaw Street were found to have been fired from the defendant's Glock model 27, .40 caliber pistol; additionally, a brass bullet jacket and a lead bullet core recovered from the bed of the Dodge truck were fired from the same gun. Under cross-examination, the officer admitted he has nothing to do with gathering evidence and that sometimes evidence is found after he makes his initial evaluation. The officer testified that the size of a weapon is a determining factor in the sound made when the weapon is fired. For instance, gunfire from a .40 caliber gun would be louder than gunfire from a .22 caliber weapon. However, the officer qualified that the distance from which the guns are heard is also a

factor. He also stated that no other bullets, casings or jackets had ever been presented to him in this case.

Lieutenant Norvel W. Orazio testified that he investigated the subject incident on March 17, 1999, because a police officer was involved. He described driving up to a two-story red brick house with a parking bay in front. One car was parked there and a covered motorcycle was directly in front of the house. Lt. Orazio spoke with the defendant, David Wilson, and was told that early in the morning Wilson was awakened when his motorcycle alarm sounded. He rushed outside with his gun and saw a truck pulling away from his driveway. He also heard two shots and he returned the fire. Lt. Orazio said that an officer does not normally fire at a fleeing vehicle, unless he fears for his life.

Mrs. Delores Mickin testified that she and her son deliver newspapers in the Choctaw Street area. She did not know David Wilson, but she had previously seen him on one occasion when he was washing his car. On March 17, 1999, about 5:20 a.m., she was driving a black Dodge truck and her son was in the back of the truck throwing the papers. The paper "slid" by the motorcycle at Wilson's door and caused the alarm to sound twice. (About two months before the March date, the same thing happened: the paper had caused the alarm to go off by sliding up to and then under the

motorcycle). Mrs. Mickin drove beyond Wilson's house and turned the truck around; she was driving only five miles an hour because she was on a dirt road. As she passed the house, she saw Wilson standing outside, and asked her son if he had a gun because she thought she saw one. Her son said he did not see a gun. However, as they got closer to Wilson, Mrs. Mickin saw him raise his gun that was pointed at her, and she pressed the accelerator. Wilson began shooting and, as she sped away, Mrs. Mickin screamed to her son to get down in the bed of the truck. One shot hit the mirror, and glass "popped" over her. A bullet shattered the rear window. She said the shooting did not stop until she turned the corner. Mrs. Mickin knew the truck had taken several hits because the mirrors were gone and glass covered the floor of the cab of the truck. When she arrived at her home, she found the telephone number of the customers living in the house where the gunman had been standing, because she wanted to let them know that someone was in front of their house with a gun. She called and told the woman who answered; then she called 911. The police arrived at her house and inspected her truck. Mrs. Mickin said her son never got out of the bed of the truck while they were delivering papers, and while he was not injured, his jacket had a hole in the back that was not there before the incident. Mrs. Mickin said her husband kept a gun at home, but she did not have a gun with

her when she was delivering papers.

William Mickin testified that he was sitting in the back of the truck and throwing papers while his mother was driving on March 17; at the house on Choctaw, the newspaper slid under the motorcycle and set off the alarm. His mother proceeded to turn the truck around in the open lot next door to the house. That was when he saw the shadow of a person and his mother told him to duck. Mr. Mickin did not see a woman in front of the house or hear a woman scream.

Mr. Robert Lazard, who installs auto and motorcycle alarms, testified that he installed a Viper 300 alarm system on David Wilson's motorcycle. Mr. Lazard said the alarm would go off if someone tilted the cycle. For instance, if the bike were on a kickstand, and someone put it upright without disarming the alarm, it would sound for about thirty seconds. A newspaper sliding under the cycle would not set off the alarm. Under cross-examination, Mr. Lazard admitted he was not called to inspect the motorcycle on March 17 after it sounded, and he did not know at which level of sensitivity the alarm was set. However, rarely are alarms set to heightened sensitivity because they go off too easily.

Mr. Frederick Smith, who lives on Andry Street which is one street away from and parallel to Choctaw Street, testified that his backyard backs

up to a neighbor of David Wilson. About 5:15 a.m. on March 17, Mr. Smith was in his backyard feeding his dog when he heard two small shots and then a person screaming; he then heard about seven more shots. The shots fired first were “smaller” than those fired after the scream. Mr. Smith did not know anything about the incident at issue here, and he found out only by asking David Wilson what happened about two days after the shooting.

Ms. Nadge Wynder, who also lives on Andry Street, testified that she was in the bathroom of her home at 5:15 a.m. on March 17, when she heard two shots, then a scream, and then more shots. She said the first two shots were not as loud as the last set of shots. Ms. Wynder’s bathroom is in the middle of her house on the left side, and there is a house between her home and Choctaw Street. Her sister, Ms. Rose Wynder, also testified that she was awake at 5:15 and heard the same sequence of sounds. Ms. Tracy Wynder of the same address also stated that she heard the two gunshots, a woman scream and then three or four more shots. She said she was sure she heard two different guns. However, on cross-examination she said she did not know what a Glock 27, .40 caliber handgun was. She said she had heard a .38 Smith-Wesson fired. She admitted her knowledge of guns and the sound of gunfire is limited. She did not remember ever hearing car alarms going off in the neighborhood.

Ms. Deborah Wilson Banks, the defendant's mother, testified that on March 17 she was in the bathroom when she heard the alarm on her son's motorcycle sounding. As she came out of the bathroom, her son ran past her going downstairs. She followed, and when he was downstairs and she was still on the steps, she heard two gunshots. She testified that she fell and screamed because she had hit her arm. She lost sight of her son, and when she saw him again, he was at the end of their driveway. She also said David "fell back" "like he was ducking" when the two shots rang out. She thought the shots came from her driveway. She never saw her son fire his gun. Ms. Banks said she received a telephone call from someone, who was saying "something about shooting," but she hung up because she did not know who it was. She did not find out who was in the truck until the police came out.

David Wilson testified as to his version of the incident. He said he was awakened by the motorcycle alarm, grabbed his gun, and went downstairs. He saw a truck with the tailgate up pulling off, and he walked to the end of his driveway. He was trying to see the license plate of the truck but it had no lights on. Then "two shots came over my head. I heard my mom scream and . . . I ducked and returned fire. I was moving in a backwards motion." Wilson said he had had his motorcycle about six weeks and the alarm had never gone off before. Wilson said he believed his life

was in danger when he heard the two shots fired. Under cross-examination, Wilson said he did not see anyone with a gun in the truck nor did he see any flashes of gunfire. He did not order the driver of the truck to stop. Wilson said his continued shooting was just a “reaction.” He said he did not aim at the people in the truck. After the incident, Wilson called 911 and also his lieutenant.

### **DISCUSSION:**

### **ERROR PATENT:**

We note an error patent in that the defendant’s motion for an appeal was granted before he was sentenced in violation of La. Code Crim. Proc. arts. 912(C)(1) and 914(B)(1), and thus was granted prematurely. Although a defendant can take an appeal only from a conviction and sentence, this Court has held that an appeal taken prior to sentencing will not be dismissed “because ‘[d]ismissing the appeal would simply result in a delay of the appellate process and hinder defendant’s right to appeal.’” *State v. Thompson*, 98-0988 (La.App. 4 Cir. 1/26/00) 752 So.2d 293, 295, (quoting *State v. Martin*, 483 So.2d 1223, 1225 (La.App. 4 Cir. 1986)). Thus, the error is harmless.

### **ASSIGNMENT OF ERROR NO. 1:**

In a single assignment of error, Wilson maintains that the evidence

does not support his conviction of aggravated criminal damage to property. He argues that the State did not disprove he acted in self-defense.

The proper standard for appellate review for a sufficiency of evidence claim is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979); *State v. Bellamy*, 599 So.2d 326, 329 (La.App. 2 Cir.1992). The *Jackson* standard is applicable in cases involving both direct and circumstantial evidence. The facts established by the direct evidence and inferred from the circumstances established by that evidence must be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. *State v. Owens*, 30,903 (La.App. 2 Cir. 9/25/98), 719 So.2d 610, 614.

Wilson's offense is governed by La. Rev. Stat. 14:55 which provides:

Aggravated criminal damage to property is the intentional damaging of any structure, watercraft, or moveable, wherein it is foreseeable that human life might be endangered, by any means other than fire or explosion.

In *State v. Fluker*, 618 So.2d 459, 462 (La.App. 4 Cir. 1993), this Court determined that the State must disprove a claim of justification. In a

non-homicide situation, the defense of justification requires a dual inquiry: (1) an objective inquiry into whether the force used was reasonable under the circumstances; and (2) a subjective inquiry into whether the force was apparently necessary. *Id.*

In this case Mrs. Mickin and her son, William, testified that Wilson shot at and hit their truck after William inadvertently set off the alarm on Wilson's motorcycle. There was testimony that the ten bullet casings found in the street all came from Wilson's Glock handgun. No evidence of bullets from another gun was found on the scene. Several of Wilson's neighbors testified that they heard two gunshots and then gunshots fired from a different gun. However, in his reasons for judgment, the judge said that he found the state's witnesses "infinitely more credible" than those for the defense. One of the defense witnesses admitted that he learned of the incident from Wilson, and obviously heard his version of the events. The three Wynder witnesses did not live very close to Wilson's house and they were all inside their house at the time of the shooting.

The force used in this case is neither reasonable under the circumstances nor apparently necessary. The trial judge was correct in his decision that Wilson's actions of rushing outside and firing at the truck as long as it was in his view was not justified.

Accordingly, the conviction and sentence are affirmed.

**AFFIRMED**