

Cite as 2009 Ark. App. 603

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CACR08-1503

ROBERT ANTONIO KING
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE**Opinion Delivered** SEPTEMBER 23, 2009APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
[NO. CR 2007-503]HONORABLE JOHN W.
LANGSTON, JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

Robert Antonio King was convicted by a Pulaski County jury of aggravated assault, aggravated robbery, two counts of theft of property, theft by receiving, and fleeing. The circuit court sentenced King to a total of sixty-five years' imprisonment. King appeals only the aggravated-assault conviction, arguing that the State failed to introduce substantial evidence that he displayed a firearm in such a manner that created a substantial danger of death or serious physical injury to another person. We affirm.

The State alleged by information that King committed seven criminal offenses in the course of robbing an employee of Pizza Hut on January 13, 2007. He was accused of committing the Class Y felony of aggravated robbery, the Class B felony of being a felon in possession of a firearm, the Class C felony of theft of property, the Class C felony of theft by receiving, the Class D felony of aggravated assault as defined in Arkansas Code Annotated

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section 5-13-204(a)(2) (Repl. 2006), the Class A misdemeanor of theft of property, and the Class C misdemeanor of fleeing. The State also asked that any sentence imposed be enhanced pursuant to the habitual offender statute¹ and the firearm enhancement statute.² The felon-in-possession charge was severed, and King stood trial in Pulaski County Circuit Court on May 20-21, 2008, on the remaining six charges.

During trial, King moved for a directed verdict at the end of the State's case-in-chief. He argued that the State failed to show that he, "while manifesting extreme indifference to the value of human life, displayed a firearm that created a substantial danger of death or serious physical injury." The State responded that King brought with him a gun to the robbery of the Pizza Hut and also fired that gun toward an employee. The trial court denied the motion for directed verdict. After King testified, the defense rested its case and renewed its motion for directed verdict, which was again denied.

King was convicted of aggravated assault and the five other criminal offenses described above. He was sentenced to fifteen-years' imprisonment for aggravated assault, with his aggregate sentence, including concurrent, consecutive and applicable enhancements, being sixty-five years. From the aggravated-assault conviction, this appeal followed.

We treat a motion for directed verdict as a challenge to the sufficiency of the evidence. *Strong v. State*, 372 Ark. 404, 277 S.W.3d 159 (2008). We have repeatedly held that in

¹Ark. Code Ann. § 5-4-501(b)(1) (Supp. 2007).

²Ark. Code Ann. § 16-90-120(a) (Supp. 2007).

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reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *Id.* We affirm a conviction if substantial evidence exists to support it. *Id.* Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.* Furthermore, circumstantial evidence may provide a basis to support a conviction, but it must be consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *Id.* Whether the evidence excludes every other hypothesis is left to the jury to decide. *Id.* The credibility of witnesses is an issue for the jury and not the court. *Id.* The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Id.*

King argues that the Pizza Hut employee, Stanley Conrad, testified as follows:

[King came] into the store, he showed the gun, a pistol, and was demanding the money . . . while I was bent over in front of the safe trying to get the safe door open, he just kept hollering, 'You're trying to call the cops; you're trying to call the cops,' and at one point, he shot the Pepsi machine behind me.

King contends that Stanley Conrad never testified that King pointed a pistol at him. King admits that he fired the pistol, but argues that he did not shoot *at* Stanley Conrad, thereby making him not guilty of aggravated assault.

King points out that Arkansas Code Annotated section 5-13-204(a)(2) provides that a person commits aggravated assault when, under circumstances manifesting extreme indifference to the value of human life, he or she displays a firearm in such a manner that

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creates a substantial danger of death or serious physical injury to another person. “Serious physical injury” is defined as “physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.” Ark. Code Ann. § 5-1-102(21) (Supp. 2007). King contends that pursuant to *Swaim*, a person does not commit aggravated assault with a firearm if he merely displays a firearm to another person. *Swaim v. State*, 78 Ark. App. 176, 79 S.W.3d 853 (2002) (where this court found insufficient evidence to sustain an aggravated-assault charge, where Swaim had displayed a revolver in the course of a robbery but never pointed it at the security officer attempting to apprehend him).

King claims that the State failed to prove that he shot the firearm at Stanley Conrad. He admits to discharging the firearm near Mr. Conrad, but asserts that Mr. Conrad was not in danger of suffering serious physical injury as a result of his discharge of the firearm. King contends that even though one witness, Sondra Ivey, did testify that King pointed the gun at Mr. Conrad, her testimony should be disregarded because Mr. Conrad was in a better position to see whether King pointed the gun at him. Because Mr. Conrad did not testify that King pointed the gun at him, King claims that the State failed in its burden to introduce substantial evidence that King displayed a firearm in such a manner that he created a substantial danger of death or serious physical injury to Stanley Conrad.

The State does not dispute the statutory requirements of aggravated assault set forth in King’s argument. The State does contend that by firing his gun at the Pepsi machine in the

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course of robbing the Pizza Hut, King created a substantial danger of death or serious physical injury to Stanley Conrad. *Swaim, supra*. We agree. Further, by shooting his gun in the direction of Mr. Conrad, threatening the occupants of the Pizza Hut, and making demands of them, all the while brandishing the pistol fired moments before, King created a substantial risk that Conrad would be seriously injured or killed, either at King's hand or by eliciting a violent response. *See Harris v. State*, 72 Ark. App. 227, 35 S.W.3d 819 (2000) (where this court made clear that even if a gun is unloaded, the fact that a gun was pointed at someone is enough to create a substantial danger of death or serious physical injury to another person); *Schwede v. State*, 49 Ark. App. 87, 896 S.W.2d 454 (1995) (where this court found sufficient evidence to sustain an aggravated-assault charge where Schwede made a threatening statement, pointed a pistol at two other men and then cocked the hammer).

Affirmed.

GLOVER and HENRY, JJ., agree.