

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
WENDELL L. GRIFFEN, JUDGE

DIVISION III

CACR06-1465

September 19, 2007

KENNETH THOMAS  
APPELLANT

AN APPEAL FROM PULASKI  
COUNTY CIRCUIT COURT  
[CR2006-519]

V.

HON. WILLARD PROCTOR, JR.,  
JUDGE

STATE OF ARKANSAS  
APPELLEE

AFFIRMED

At a bench trial held on August 28, 2005, Kenneth Thomas was convicted of aggravated assault on a family or household member and criminal mischief in the first degree. He challenges the sufficiency of the evidence to support the aggravated-assault conviction, contending that the State failed to prove that he created a substantial danger of death or serious physical injury to the victim. We affirm, holding that the State presented sufficient evidence to support the conviction when it showed that appellant struck the victim with a weed eater, even though the blow only caused minor injuries.

Most of the evidence presented at trial came from the testimony of Melissa Mills, the mother of appellant's son. On the evening of July 27, 2005, appellant was at Mills's home when she saw him leaning over the kitchen stove with a glass pipe. Mills told appellant, "I don't want you doing that around here." The two moved to the living room and started arguing. Mills then asked appellant to leave. Appellant left, retrieved a weed eater from the back of the house, and began beating the front door with the weed eater. Mills later retrieved

a knife from the kitchen and opened the door. After arguing, Mills again told appellant to leave. Appellant then struck Mills with the weed eater; Mills responded by cutting appellant with the knife.<sup>1</sup> Appellant left the house and broke the windows in the living room. During the altercation, appellant brought a manhole cover into Mills's living room. Little Rock police officer Stan Wilhite described Mills's injuries as "some bruises and a couple of scrapes" on her right arm.

At the close of the evidence, appellant made motions for directed verdict. With respect to the aggravated-assault charge, appellant argued that the State failed to prove that he purposely engaged in conduct that created a substantial danger of death or serious physical injury to Mills and that, at best, the State proved battery in the third degree. The court denied his motion. After hearing evidence on other charges, the court found appellant guilty of criminal mischief in the first degree and aggravated assault on a family member and sentenced him to two concurrent eight-year terms of imprisonment.

Appellant challenges the sufficiency of the evidence to support the conviction for aggravated assault on a family or household member. He contends that the State failed to introduce substantial evidence that he engaged in conduct that created a substantial danger of death or serious physical injury to the victim.

A motion to dismiss at a bench trial is a challenge to the sufficiency of the evidence. *Stewart v. State*, 362 Ark. 400, 208 S.W.3d 768 (2005). We review the evidence in the light most favorable to the State. *Baughman v. State*, 353 Ark. 1, 110 S.W.3d 740 (2003). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Id.*

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<sup>1</sup>Appellant testified that he was admitted to UAMS for three or four days with a punctured lung.

Only evidence supporting the verdict will be considered. *Id.*

A person commits aggravated assault on a family or household member if, under circumstances manifesting extreme indifference to the value of human life, the person purposely engages in conduct that creates a substantial danger of death or serious physical injury to a family or household member. Ark. Code Ann. § 5-26-306(a) (Repl. 2006).<sup>2</sup> Appellant argues, “A defendant *creates* a risk of serious physical injury to the victim when he *causes* ‘physical injury that creates a substantial risk of death or causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ’” (emphasis added). However, this is merely the definition of “serious physical injury.” See Ark. Code Ann. § 5-1-102(21) (Repl. 2006). It is not the proper standard for determining whether someone has “create[d] a substantial danger of death or serious physical injury.”

One does not have to actually cause death or serious physical injury to be convicted of aggravated assault on a family or household member. In *Nelson v. State*, 84 Ark. App. 373, 141 S.W.3d 900 (2004), we affirmed a conviction for aggravated assault on a family or household member when the appellant grabbed a shotgun and pointed it at his father and his children. The appellant’s father wrestled the gun away before the appellant could do anything with it. In *Williams v. State*, 96 Ark. App. 277, \_\_\_ S.W.3d \_\_\_ (2006), we affirmed a conviction for aggravated assault on a family or household member when the appellant attempted to hit the victims with her automobile. We rejected the argument that the testimony showing that she attempted to hit the victims with the car did not constitute substantial evidence that she engaged in conduct that created a substantial danger of death or serious injury to the victims.

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<sup>2</sup>Mills is a “family or household member” under the statute. See Ark. Code Ann. § 5-26-302(2)(G) (Repl. 2006) (“Persons who have or have had a child in common”).

Appellant also argues that the trial court had to speculate about the potential lethality of the weed eater because the weed eater was not introduced into evidence. However, our supreme court had held that a five-foot length of iron pipe was capable of causing death or serious injury. *See Jones v. State*, 292 Ark. 183, 729 S.W.2d 10 (1987). In reaching that conclusion, the court listed several items less lethal than an iron pipe that other jurisdictions have held to be a deadly weapon: a flashlight, a walking cane, a stone measuring two-by-three-by-nine inches, an unloaded pistol used as a striking object, a broomstick, boots, and even fists (depending on the manner of usage). *See id.* (citations omitted).

The trier of fact is not required to set aside common sense in determining whether the accused created a substantial danger of death or serious injury to the victim. *Williams, supra.* In addition, the court is not required to judge the severity of swinging the weed eater in isolation; it may consider other actions of violence in conjunction with the event constituting aggravated assault. *See id.* Here, appellant, after arguing with the victim, attempted to hit her with a weed eater, brought a manhole cover into the dwelling, and later broke several windows in the victim's home. Although Mills suffered relatively superficial injuries, a trier of fact could reasonably conclude that an angry person swinging a weed eater is creating a substantial danger of death or serious physical injury as prescribed by the statute in question.

We hold that the State presented substantial evidence to support the conviction for aggravated assault on a family or household member. We affirm.

Affirmed.

GLADWIN and VAUGHT, JJ., agree.