Not designated for publication.

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR08-318

	Opinion Delivered OCTOBER 8, 2008
JAMES HAROLD BROOKS, JR. APPELLANT	APPEAL FROM THE MISSISSIPPI COUNTY CIRCUIT COURT, [NO. CR-2007-140]
V.	HONORABLE BARBARA HALSEY, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant James Harold Brooks, Jr., appeals his December 19, 2007 conviction in Mississippi County Circuit Court of aggravated assault. The issue presented is whether the evidence was sufficient to uphold appellant's conviction. We affirm.

The State filed a felony information on May 22, 2007, accusing appellant of aggravated assault and discharging a firearm in the city limits on April 13, 2007. At the bench trial held December 19, 2007, Tomika Petty testified that she was on the street at the corner of Laclede and Davis when appellant and his girlfriend, Croshayla Williams, drove by and stopped. She claimed that appellant was driving and his girlfriend was the passenger, and when appellant stopped, his girlfriend jumped out of the car with her hand in her pocket. She further stated that appellant got out of the car, which was six or seven feet away from her, with a gun in his hand. She claimed that she then began to walk away, and she heard three gun shots. When

she heard the shots, she ran and called the police. She described the gun held by appellant as small and black with a spinning barrel. However, she stated she did not see the gun being fired, and she did not know in which direction the gun was pointed when it was fired. Brittany Petty, Tomika Petty's sister, testified that she was with Tomika when the shooting occurred and corroborated Tomika's story. She also stated that when Croshayla Williams got out of the car, she had her hand in her pocket, "and that's when I saw her with the gun."

Officer Ray Anthony Perry testified that he was working for the Blytheville Police Department on April 13, 2007, and was called to the scene. He found a spent shell casing at the scene and spoke with Ms. Petty and others there. Blytheville Police Officer David Bailey testified that when he pulled in front of appellant's house on the evening of April 13, 2007, appellant ran inside and stayed for an hour. When he came out, Officer Bailey patted appellant down pursuant to his arrest and found no weapon. A search warrant was not obtained for appellant's house. Detective Scott Adams testified that he was also called to the scene that night, and he collected the shell casing from Officer Perry. He testified that the casing was from a nine-millimeter Luger. He also testified that it took appellant an hour to surrender himself to police outside his house. Detective Adams questioned appellant after his arrest, and appellant admitted he was at the scene with his girlfriend in a car, and they were about to fight. However, appellant denied shooting or having a gun. Appellant told Detective Adams that he ran into his house that night because he did not want to go to jail.

Appellant's attorney moved for a directed verdict as to the aggravated-assault charge, arguing under *Swain v. State*, 78 Ark. App. 176, 79 S.W.3d 853 (2002), that because appellant

did not point the gun in the direction of the Pettys, he could not be found guilty of aggravated assault. He further argued that the only individual who threatened Ms. Petty was appellant's girlfriend. He claimed that there was no testimony as to who fired the shots or in which direction the shots were fired. He argued that if appellant had tried to shoot Ms. Petty, he probably would have succeeded because she was in such close proximity to him when he got out of the car.

The State argued that it is not required under Arkansas Code Annotated section 5-13-204 (Repl. 2006), that appellant actually point the gun at the victim, but that he displays the firearm in such a manner that creates a substantial danger or other serious physical injury to another person. The State claimed that the situation was volatile when appellant stepped out of his car brandishing the gun. The State argued that appellant shot the gun, and Ms. Petty ran away.

Appellant's attorney then argued that *Dillehay v. State*, 74 Ark. App. 100, 46 S.W.3d 545 (2001), was another example where aggravated assault was proved, and the evidence was that the defendant had pointed a gun at her victim. Appellant pointed out that there was no evidence that he pointed a gun in the instant case. Also, appellant's attorney explained that no loaded gun with a round in the chamber and the safety off was discovered here, as it was in *Dillehay*.

The trial court denied the motion for directed verdict, stating that the evidence before the court was Ms. Petty's testimony that she saw appellant getting out of his vehicle coming toward her with a gun, and she started to walk away when she heard shots and ran. At the

close of all evidence, appellant again moved for a directed verdict based on the same reasons stated at the conclusion of the State's case, and the trial court denied the motion. The trial court then found appellant guilty of aggravated assault and sentenced him to twelve months' probation. Appellant filed a notice of appeal on December 28, 2007, following the December 19, 2007 filing of the judgment and disposition order. This appeal followed.

Appellant argues that the trial court erred in denying his motion for directed verdict because there was insufficient evidence to find him guilty of aggravated assault. When a challenge is made to the sufficiency of the evidence, we consider only the evidence that supports the verdict, viewing the evidence in the light most favorable to the State. *Slater v. State*, 76 Ark. App. 365, 65 S.W.3d 481 (2002). The test is whether there is substantial evidence to support the verdict; substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or another. *Id.* at 369, 65 S.W.3d at 484.

A person commits aggravated assault if, under circumstances manifesting extreme indifference to the value of human life, he purposely engages in conduct that creates a substantial danger of death or serious physical injury to another person. Ark. Code Ann. § 5-13-204(a)(1). A person also commits aggravated assault if he displays a firearm in such a manner that creates a substantial danger of death or serious physical injury to another person. Ark. Code Ann. § 5-13-204(a)(2). Appellant argues that because there is no evidence he pointed the gun at any person, he cannot be found guilty of aggravated assault. He cites

Swaim, *supra*; *Dillehay*, *supra*; *Harris v. State*, 72 Ark. App. 227, 35 S.W.3d 819 (2000); and *Wooten v. State*, 32 Ark. App. 198, 799 S.W.2d 560 (1990), for this proposition.

In *Swaim*, this court overturned the defendant's aggravated-assault conviction where defendant had displayed a gun, but did not point it at the officer involved. In *Dillehay*, this court upheld the defendant's aggravated-assault conviction where the defendant pointed a gun at another person and soon thereafter a police officer found a loaded gun in defendant's possession in which the safety feature was disengaged. In *Harris*, this court affirmed defendant's aggravated-assault conviction, which turned on the defendant having pointed her gun at two women. The defendant in *Harris* argued that the gun was not loaded, but we stated, "[T]he fact that a gun was pointed at someone is enough to create a substantial danger of death or serious physical injury to another person." *Harris*, 72 Ark. App. at 234, 35 S.W.3d at 824. In *Wooten*, this court held that the evidence did not support the defendant's conviction for aggravated assault, but it was sufficient to support a conviction for the lesser-included offense of assault in the third degree. The defendant in *Wooten* did not point the gun in the officer's direction or expressly threaten the officer, even though the officer could see that the defendant had a weapon. *Wooten*, 32 Ark. App. at 201, 799 S.W.2d at 562.

Appellant argues that Tomika Petty did not see the gun fired and did not know in which direction the gun was pointed. Neither Tomika nor Brittany Petty testified that appellant pointed a gun at either of them. Neither testified that appellant expressly threatened them. Because of appellant's proximity to Tomika at the time shots were fired, he argues it is not reasonable to conclude he fired a gun at Tomika. Appellant argues, therefore, that the

trial court resorted to speculation and conjecture to conclude that he was guilty of aggravated assault.

The State argues that it presented ample evidence to support the conviction. We agree. The State maintains that the aggravated-assault statute does not require that the weapon actually be used or for the victim to actually fear for his or her safety, but requires a "substantial danger of death or injury to another person." *Schwede v. State*, 49 Ark. App. 87, 89, 896 S.W.2d 454, 455 (1995). The State distinguishes the instant case from *Wooten* and *Swaim*, stating that Wooten backed away from officers while he was attempting to get the handgun out of his pocket, and Swaim was fleeing the crime scene when the officer saw the gun displayed. Here, appellant was walking toward Tomika Petty when the gun was displayed. And to add to the distinction pointed out by the State, in the present case, shots were actually fired, and in the cases cited by appellant, shots were not fired.

We hold that there was substantial evidence of aggravated assault before the trial court. Tomika Petty testified she was at the intersection when appellant and his girlfriend drove toward them in his car and parked. The girlfriend got out, and then appellant got out with a gun. Brittany Petty testified that both appellant and his girlfriend had guns, but Tomika Petty testified that only appellant had a gun. As both were walking away, three shots were fired, causing them to run. Neither Tomika nor Brittany Petty saw the gun being fired. Even though neither witness testified appellant pointed the gun at them, there was evidence before the trial court that appellant was the one with the gun and that three shots were fired. Viewing this evidence in the light most favorable to the State, we hold the evidence was

sufficient to support the trial court's conclusion that appellant, under circumstances manifesting extreme indifference to the value of human life, purposely engaged in conduct that created a substantial danger of death or serious physical injury to another person.

Further, pursuant to Arkansas Code Annotated section 5-2-403(a)(2) (Supp. 2007), a person is an accomplice in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, the person aids, agrees to aid, or attempts to aid the person in planning or committing the offense. Our supreme court has said that there is no distinction between principals on the one hand and accomplices on the other, insofar as criminal liability is concerned. *Navarro v. State*, 371 Ark. 179, ___ S.W.3d ___ (2007). When two people assist one another in the commission of a crime, each is an accomplice and criminally liable for the conduct of both. *Id.* One cannot disclaim accomplice liability simply because he did not personally take part in every act that went to make up the crime as a whole. *Id.* In considering the evidence viewed in the light most favorable to the State, even had appellant's girlfriend been proven to have had a gun and fired the shots, appellant would be liable for aggravated assault under the theory of accomplice liability.

Affirmed.

HART and HEFFLEY, JJ., agree.