

ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR11-851

FRANCISCO ORTEGO MONTALVO
APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered FEBRUARY 8, 2012

APPEAL FROM THE FAULKNER
COUNTY CIRCUIT COURT,
[NO. CR2010-539]

HONORABLE CHARLES E.
CLAWSON, JR., JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Francisco Ortego Montalvo appeals his aggravated-assault conviction, which followed a bench trial in Faulkner County Circuit Court. He contends that the State failed to prove, beyond a reasonable doubt, that he purposely engaged in conduct described in Arkansas Code Annotated section 5-13-204 (Supp. 2011). We affirm.

Appellant was charged with criminal attempt to commit capital murder by felony information, which was later amended to include a charge of aggravated assault. During the May 5, 2011 bench trial on these charges, several witnesses testified to the events leading to appellant's arrest. Anthony Jarrell testified that he was stopped at a stop light in Conway, Arkansas, when he was hit from behind on May 10, 2010. The vehicle that struck him was a white truck. When the truck did not stop, Jarrell followed it while calling 9-1-1 on his cell phone. The truck, driven by appellant, eventually pulled into a driveway on Hazelwood Street, and appellant went inside. Jarrell waited in his car until police arrived.



Police Officer Derek Flowers testified that he responded to the call and inspected Jarrell's vehicle but found no damage. Officer Flowers instructed Jarrell to wait at his vehicle while he obtained identification and insurance information from the truck's owner. Officer Flowers went to the front door of appellant's house and knocked but did not identify himself. Officer Flowers heard movement inside the house, then heard the carport door opening from the side of the house. As he turned to walk toward the carport, appellant came out with a gun and a shot was fired, hitting the first step of those leading to the front porch upon which Officer Flowers was standing. Officer Flowers testified that appellant pointed the gun in his direction but not directly at him. Officer Flowers felt something on his knee and initially thought he had been shot.

Jarrell also testified that he witnessed a quick burst of light, which he thought was gunfire, coming from the garage area and looked in that direction. He then saw someone that was shirtless and pointing a gun in the general direction of where Officer Flowers was standing. At that point, Jarrell ran to call for more assistance.

Appellant testified that he was in bed when someone knocked loudly on his door. He did not know who it was, so he grabbed his father's gun and walked to the carport door. He testified that he walked through the door and his gun went off, but he denied pointing the gun at the officer. Appellant testified that he was standing in the doorway to his carport when the gun went off. He said that he did not know it was a policeman at his front door until Officer Flowers began calling for backup and then identified himself after the shot had been fired. He said that when he realized it was a police officer and he saw the police car, he went back and put the gun in the barbeque grill because he was scared. After backup officers



arrived, appellant was taken into custody. He denied being involved in an automobile accident that night and said he was in shock and did not know why the police were at his house. Appellant stated that he was drunk, having had four margaritas before he left work at a restaurant. Officers noticed that appellant was wounded in the leg and called MEMS for assistance. Later, appellant was interviewed by Detective Melissa Smith.

Detective Smith testified that she was called to the scene to investigate. She noticed a pock mark in one of the concrete stairs leading to the front porch and fragmented pieces of silver-colored metal near it. She interviewed appellant at the police station and noted several inconsistencies in his statement. He initially told her that he knew it was a police officer at his door before the gun went off, and then said that he did not know it was a policeman until after the gun was shot. She also testified that his claim of having shot the gun while in the house was not consistent with the evidence.

Appellant's counsel moved for directed verdict both at the close of the State's case and at the close of all evidence. The trial court took those motions under advisement until the evidence could be further reviewed. In a letter dated May 9, 2011, the trial court ruled that appellant was not guilty of attempted capital murder but was guilty of aggravated assault. The trial judge wrote:

In this instance it is clear to the Court from the testimony that Mr. Ortego-Montalvo upon being awakened by the knocking on his door before ever investigating the source of that took a pistol in hand and moved purposely to create a circumstance that would have the potential for creating harm. In this instance the Court is convinced beyond a reasonable doubt that he did in fact exit the home from the back door [and] as he approached the steps to his front porch was confronted with the officer and fired the weapon injuring himself and the officer.



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A judgment and commitment order was filed on May 31, 2011, reflecting the trial court's ruling. Appellant was later sentenced to fifty-four months' imprisonment and fined \$1500, plus court costs and fees. A timely notice of appeal was filed, and this appeal followed.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Wilson v. State*, 88 Ark. App. 158, 196 S.W.3d 511 (2004). In reviewing a challenge to the sufficiency of the evidence, we will not second-guess credibility determinations made by the fact-finder. *Stone v. State*, 348 Ark. 661, 74 S.W.3d 591 (2002). Instead, we view the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Id.* We affirm the conviction if there is substantial evidence to support it. *Hughes v. State*, 74 Ark. App. 126, 46 S.W.3d 538 (2001). Substantial evidence is evidence of sufficient force and character to compel a conclusion one way or the other with reasonable certainty, without resorting to speculation or conjecture. *Crutchfield v. State*, 306 Ark. 97, 812 S.W.2d 459 (1991).

Arkansas Code Annotated section 5-13-204(a)(1)–(2) provides that 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 or purposely displays a firearm in such a manner that creates a substantial danger of death or serious physical injury to another person.

Appellant argues that there was insufficient evidence to support his conviction for aggravated assault in that he did not act with purpose. He claims to have acted either



negligently or recklessly, but never purposely, which is required under the statute.¹ He contends that, pursuant to Arkansas Code Annotated section 5-2-620 (Repl. 2006), he had a fundamental right to defend himself in his home.² He argues that Officer Flowers did not

¹Arkansas Code Annotated section 5-2-202(1), (3)–(4) (Repl. 2006) provides the definitions for various culpable mental states, including:

(1) “Purposely.” A person acts purposely with respect to his or her conduct or a result of his or her conduct when it is the person’s conscious object to engage in conduct of that nature or to cause the result;

• • • •

(3) “Recklessly.” (A) A person acts recklessly with respect to attendant circumstances or a result of his or her conduct when the person consciously disregards a substantial and unjustifiable risk that the attendant circumstances exist or the result will occur.

(B) The risk must be of a nature and degree that disregard of the risk constitutes a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation; and

(4) “Negligently.” (A) A person acts negligently with respect to attendant circumstances or a result of his or her conduct when the person should be aware of a substantial and unjustifiable risk that the attendant circumstances exist or the result will occur.

(B) The risk must be of such a nature and degree that the actor’s failure to perceive the risk involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation considering the nature and purpose of the actor’s conduct and the circumstances known to the actor.

²Arkansas Code Annotated section 5-2-620(a)–(b) states:

(a) The right of an individual to defend himself or herself and the life of a person or property in the individual’s home against harm, injury, or loss by a person unlawfully entering or attempting to enter or intrude into the home is reaffirmed as a fundamental right to be preserved and promoted as a public policy in this state.

(b) There is a legal presumption that any force or means used to accomplish a purpose described in subsection (a) of this section was exercised in a lawful and necessary manner, unless the presumption is overcome by clear and convincing evidence to the contrary.



identify himself when he knocked, thus making him an intruder. In support of this notion, appellant cites *Carter v. State*, 9 Ark. App. 206, 657 S.W.2d 213 (1983) and *Lucas v. State*, 5 Ark. App. 168, 634 S.W.2d 145 (1982), which stand for the principle that use of force may be allowed to defend against a law-enforcement officer exceeding his rights.

Appellant urges that the circuit court should have granted the motion for directed verdict because the State failed to prove the elements of aggravated assault. He cites both *Swaim v. State*, 78 Ark. App. 176, 79 S.W.3d 853 (2002), and *Wooten v. State*, 32 Ark. App. 198, 799 S.W.2d 560 (1990), where this court reversed the defendants' aggravated-assault convictions due to insufficient evidence. In both cases, the defendants were confronted with law-enforcement officers and displayed guns, but neither pointed those guns at the officers. However, *Wooten* was convicted of the lesser-included offense of assault in the third degree. *Wooten, supra*. Appellant maintains that the evidence presented by the State was that he did not point his gun at the police officer. Further, he contends that the State only proved that he discharged the gun in the direction of a step, which was three steps down from where Officer Flowers was standing. Keeping in mind appellant's right to defend himself under the law and that Officer Flowers did not identify himself, appellant claims that he may have acted recklessly or negligently but not purposefully.

The State maintains, and we agree, that substantial evidence supported appellant's conviction for aggravated assault. First, appellant's argument—that he should have the benefit of the presumption found in Arkansas Code Annotated section 5-2-620, that one may use deadly force in self-defense in one's home unless there is clear and convincing evidence to the contrary—is unavailing. To prove the elements of the charge beyond a reasonable doubt is



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a higher burden than the presumption of legality in the defense of your home, which is overcome by clear and convincing evidence. Thus, the State was obligated to prove the elements of aggravated assault beyond a reasonable doubt, which subsumes the lesser burden of proof. *See Hopes v. State*, 294 Ark. 319, 742 S.W.2d 561 (1988).

The elements of aggravated assault were proved by the evidence presented, including Officer Flowers's testimony that appellant came out of the house through the carport and, when Officer Flowers turned toward him, appellant fired the gun, hitting the step several steps below the one on which Officer Flowers stood. Both Officer Flowers and appellant were injured during the incident. Jarrell corroborated Officer Flowers's testimony in that he observed Officer Flowers knock on appellant's front door and, after hearing a gunshot and seeing a flash, observed appellant aiming a gun in the general direction of Officer Flowers. Appellant's explanation of the gun accidentally firing either while he was in the house or as he was walking out the carport door does not match the physical evidence of bullet fragments found near a pock mark on the first step to the front porch and both Officer Flowers and appellant being wounded. This evidence is substantial and supports the trial court's conclusion that appellant acted with purpose and is guilty of aggravated assault.

Affirmed.

HART and WYNNE, JJ., agree.

Alexander Law Firm, by *Hubert W. Alexander*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Kent G. Holt*, Ass't Att'y Gen., for appellee.