NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR 08-553

	Opinion Delivered MAY 20, 2009
WAYNE ALAN DIERKS APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, FOURTH DIVISION
V.	[NO. CR 07-2003]
	HONORABLE JOHN W. LANGSTON, JUDGE
STATE OF ARKANSAS APPELLEE	
	AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Wayne Alan Dierks was tried before the bench in Pulaski County Circuit Court and found guilty of committing a terroristic act and second-degree terroristic threatening. The charges arose out of events on the night of January 20, 2007, at the Pizza D'Action restaurant in Little Rock, Arkansas. The charge of terroristic threatening was based upon appellant verbally threatening the manager after appellant was asked to leave. The charge of committing a terroristic act was based upon the evidence that within minutes of appellant's leaving the restaurant, the front plate-glass window of Pizza D'Action was shattered by shotgun blast. Appellant contends that neither conviction is supported by sufficient evidence. We disagree and affirm.[1]

[1]Appellant was convicted of committing a separate terroristic act, affirmed in CACR08-297, for shooting out the passenger window of an occupied vehicle by means

When an appellant challenges the sufficiency of the evidence to support a conviction on appeal, this court's test is whether there is substantial evidence to support the verdict. *Britt v. State*, 83 Ark. App. 117, 118 S.W.3d 140 (2003). 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.* In determining whether the evidence is substantial, evidence is viewed in the light most favorable to the State, considering only the evidence that supports the verdict. *Id.* Any question of credibility is left to the fact finder. The means to challenge the sufficiency of the evidence is via a motion to dismiss in a bench trial. Ark. R. Crim. P. 33.1(b) (2008).

Arkansas Code Annotated section 5-13-310 (Supp. 2007) defines the commission of a terroristic act, stating in relevant part that:

> (a) A person commits a terroristic act if, while not in the commission of a lawful act, the person: (2) Shoots at an occupiable structure with the purpose to cause injury to a person or damage to property.

Circumstantial evidence can be sufficient to support a conviction. *See Gaye v. State*, 368 Ark. 39, 243 S.W.3d 275 (2006); *Gillard v. State*, 366 Ark. 217, 234 S.W.3d 310 (2006). The question of whether the circumstantial evidence excludes every other reasonable hypothesis consistent with innocence is for the fact-finder to decide. *Gaye*, *supra*. Upon review, this court must determine whether the fact-finder resorted to speculation and conjecture in reaching its verdict. *Gaye*, *supra*.

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of a crossbow on the night of October 15, 2006. It was, in common vernacular, a "road rage" incident along the I-630 corridor of western Little Rock, committed by appellant while driving under the influence of alcohol.

In this bench trial, the evidence presented by the State, viewed most favorably to the State, showed that on the night in question, appellant drove himself and a co-worker (Anthony Talley) from Gypsy's restaurant to Pizza D'Action to have a drink together. Both appellant and Talley lived in that neighborhood, commonly known as Stifft Station. Pizza D'Action's manager (Chris McMillan) testified that he recognized appellant because appellant had been a problem customer in the past. Appellant and Talley ordered beers. McMillan approached appellant, took his beverage, and told appellant to leave. Appellant became visibly angry and said to McMillan, "I kill little bitches like you." Another employee of the restaurant (Brian Coop) confirmed that appellant was verbally threatening to McMillan.

Talley recalled appellant getting angry, remarking that he beat up "pu★★★★★" like McMillan, slapping the bar with his hand, and leaving Talley at the bar. Talley remained at the bar to finish his beer. Talley then left the bar, finding appellant outside the front door waiting in his red Ford Explorer Sport Trac.

Talley entered the vehicle. Talley testified that appellant said he was glad Talley was leaving because he was "going to fill that place up with some buck shot." Appellant drove Talley home, blocks from the restaurant.

Within minutes, the front window of the restaurant was shot and shattered. Police found shotgun wadding outside the window area on the sidewalk. Coop testified that he observed appellant take Talley away in a red truck traveling east on Markham Street minutes before the shooting, that the window was shot about ten to fifteen minutes after they left, and

that after the shot, he saw the same red truck leave the scene traveling west on Markham Street.

Appellant testified in his own defense, stating that he was angry about being asked to leave the bar but that he only commented to McMillan, "I'll beat your a★★." Appellant said he was merely "blowing off steam" and did not mean anything by it.

Appellant said that after he left, he drove Talley home, and then went home himself, just three blocks from Pizza D'Action. Appellant testified that he did not own a shotgun, nor did he have one at his apartment. He agreed he liked to hunt ducks and that there were stuffed and mounted ducks as decoration in his apartment, but that he only used the shotguns at the hunting club that belonged to his father. Appellant's landlord testified that when she was informed of the shooting by telephone call that night, her husband was with appellant in the garage apartment behind their home and that appellant had showered and was dressed for bed.

Appellant challenges his conviction for committing a terroristic act by arguing that the evidence was circumstantial and did not exclude every reasonable hypothesis other than guilt. In short, appellant contends that the State failed to prove beyond a reasonable doubt that he was the person who shot the window. We disagree with his contention.

The State presented compelling evidence that appellant was angry upon being asked to leave the restaurant, that appellant took his friend home and told the friend he was about to fill the restaurant with buckshot, and that within minutes, the front window shattered after being struck by a shotgun blast. A person inside the restaurant observed that right after the

shooting, a red vehicle that appeared to be like appellant's was traveling away from the scene in the opposite direction it was seen minutes beforehand. This was circumstantial evidence, but it was compelling. We affirm appellant's conviction for committing a terroristic act.

We now consider the conviction for second-degree terroristic threatening. A person commits this crime if he has the purpose of terrorizing another person and he threatens to cause physical injury or property damage to another person. Ark. Code Ann. § 5-13-301(b)(1). McMillan testified that appellant angrily responded to being asked to leave by stating, "I kill little bitches like you." Appellant admitted that he made a nasty remark to McMillan by telling him he would "beat his a★★." Talley confirmed that appellant was angry, that appellant slapped his hand on the bar, and that appellant said he was used to beating up "pu★★★★★ like him."

On appeal, appellant contends that whatever he actually said to McMillan that night, there was no intent to terrorize. One's intent can rarely be proved by direct evidence but must usually be inferred from the circumstances. Given the circumstances here viewed in the light most favorable to the State, we have no hesitation in holding that substantial evidence supports appellant's conviction for second-degree terroristic threatening.

Affirmed.

HART and BAKER, JJ., agree.