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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR09-897

	Opinion Delivered March 3, 2010
MATTHEW TURNER APPELLANT	APPEAL FROM THE LONOKE COUNTY CIRCUIT COURT [CR-2008-469]
V.	HONORABLE BARBARA ELMORE, JUDGE
STATE OF ARKANSAS APPELLEE	REVERSED & DISMISSED

DAVID M. GLOVER, Judge

Appellant, Matthew Turner, was convicted in a bench trial of first-degree terroristic threatening and sentenced to five years in prison. On appeal, Turner argues that the trial court erred in denying his motion for directed verdict. We hold that this case must be reversed.

At trial, the State presented the testimony of Tammy Chambers, who had dated and lived with Turner. Chambers testified that Turner had children with his ex-wife, Ledya Anderson. Chambers said that during the year she and Turner lived together, she spoke to Anderson only in reference to the children. She testified that on the afternoon of May 3, 2008, she was getting out of the shower when she overheard Turner on the bedroom

telephone saying that "she was not going to keep his children from him." Chambers said that the only person with whom Turner had children was Ledya; that when Turner hung up the phone, he was very mad and made the statement to Chambers that "the b★★★h was going to be dead in the ditch next week; he was going to hire a crack head; and that he would be nowhere around for anybody to blame him" and that "he should've had a bigger gun and did it right the first time." Chambers testified that Turner had previously shot Ledya in the head; that she was concerned and worried for Ledya to the point that she called Ledya that night and told her to watch her back; and that she called her back the next morning and told Ledya the exact words Turner had used the night before. Chambers said that she waited for "a couple" of days to file a police report.

Ledya Anderson testified that Chambers called her in May 2008, and what Chambers told her scared her so much that she bought a gun and obtained an order of protection. Anderson explained that while she and Turner were going through their divorce in 1993, Turner had shot her car with a gun; had hidden in her car, pulled a gun on her, and raped her; and had run out of the woods, jumped into her car, stuck a gun to her head, and shot her. She said that after Turner shot her, he also shot her stepfather, who was in the car behind her.

At the close of the State's case, Turner moved for a directed verdict, arguing that the State presented insufficient evidence to prove that he uttered the threat with the express purpose of terrorizing his victim because at the time he made the threat, he had no reason to believe that it would be communicated to the victim. The trial court denied this motion.

Turner rested without presenting any evidence. The trial court then found Turner guilty of first-degree terroristic threatening.

On appeal, Turner again argues that there was insufficient evidence to prove that he had the purpose to terrorize the victim at the time he uttered the threats. Although Turner moved for a directed verdict, the motion was actually a motion for dismissal because it was a bench trial, not a jury trial. Ark. R. Crim. P. 33.1(b) (2009). A motion to dismiss, identical to a motion for a directed verdict in a jury trial, is a challenge to the sufficiency of the evidence. *Reed v. State*, 91 Ark. App. 267, 209 S.W.3d 449 (2005). On appeal, evidence is reviewed in the light most favorable to the State, and the conviction is affirmed if there is substantial evidence to support the verdict. *Id.* Substantial evidence is evidence that will, with reasonable certainty, compel a conclusion one way or another without resorting to speculation or conjecture. *Id.* It is within the province of the finder of fact to determine the weight of the evidence and the credibility of the witnesses. *Id.*

A person commits first-degree terroristic threatening if, "with the purpose of terrorizing another person, the person threatens to cause death or serious physical injury ... to another person." Ark. Code Ann. § 5-13-301(a)(1)(A) (Repl. 2006). A person acts "purposely" with respect to his conduct or a result of his conduct "when it is the person's conscious object to engage in conduct of that nature or to cause the result." Ark. Code Ann. § 5-2-202(1) (Repl. 2006).

In support of his argument, Turner contends that *Knight v. State*, 25 Ark. App. 353, 758 S.W.2d 12 (1988), requires that his conviction be reversed. We agree that this case

mandates reversal of Turner's conviction. In *Knight*, the appellant was an inmate in the Pulaski County Jail; he was overheard by a deputy sheriff monitoring an intercom system stating to the other inmates in his cell that they would read about some of the deputies in the obituaries and they would not have died of natural causes because he would be "out of this pen someday." The deputy who overheard those remarks testified that he considered this a death threat and felt terrorized. Knight was convicted of first-degree terroristic threatening. On appeal, this court reversed, holding:

> We agree with the State that the gravamen of the offense of terroristic threatening is communication, not utterance. The statute does not require that the threat be communicated by the accused directly to the person threatened. *Richards v. State*, 266 Ark. 733, 585 S.W.2d 375 (1979). There is no requirement that the terrorizing continue over a prolonged period of time. *Warren v. State*, 272 Ark. 231, 613 S.W.2d 97 (1981). Nor does the statute require that it be shown that the accused had the immediate ability to carry out the threats. *See Commonwealth v. Ashford*, 268 Pa. Super. 225, 407 A.2d 1328 (1979). We do agree, however, with the statement of the court in *State v. Morgan*, 128 Ariz. 362, 625 P.2d 951 (1981), that to be found guilty of threatening the defendant must intend to fill the victim with intense fright. Under our statute it is an element of the offense that the defendant act with the purpose of terrorizing another person, *i.e.*, it must be his "conscious object" to cause fright.
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> When we view the evidence in the light most favorable to the State, we find that the State established that appellant made the threatening statement, that the statement was perhaps sufficiently specific to constitute a threat to [the deputy], that appellant was aware that it was possible that his statement might be overheard, and that [the deputy] was, in fact, put in fear. While we are aware that one's purpose, like any other state of mind, is not ordinarily subject to proof by direct evidence, and must frequently be inferred from other facts, we do not think that the evidence in this case is sufficient to establish that appellant made the statement with the conscious object of terrorizing [the deputy], even if he was aware that he might be overheard. Statutes in other states impose criminal liability for threats made in reckless disregard of the risk of causing terror. *See, e.g.*, *State v. Schweppe*, 184 Minn. 25, 237 N.W.2d 609 (1975). Our statute does not.

25 Ark. App. at 356–57, 758 S.W.2d at 14.

Here, as in *Knight*, when the evidence is viewed in the light most favorable to the State, it shows that the State established that Turner made the threatening statement, and that the statement was perhaps sufficiently specific to constitute a threat to Anderson; however, as in *Knight*, we hold that the evidence was not sufficient to establish that Turner made the statement with the conscious object of terrorizing Anderson. The threatening statements, which were made by Turner while he was, by his girlfriend's description, "very mad," were made in Turner's home to his girlfriend, who had no relationship with Anderson other than talking to her regarding issues involving Anderson and Turner's children. There is no evidence, either direct or circumstantial, that it was Turner's conscious object that his threat be communicated to Anderson. For this reason, we reverse and dismiss Turner's conviction.

Reversed and dismissed.

ROBBINS and MARSHALL, JJ., agree.