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ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR10-1251

	Opinion Delivered April 20, 2011
EVERT DILLAHUNTY APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, FOURTH DIVISION [No. CR2010-589]
V.	
STATE OF ARKANSAS APPELLEE	HONORABLE HERBERT THOMAS WRIGHT, JR., JUDGE
	AFFIRMED

LARRY D. VAUGHT, Chief Judge

Evert Dillahunty was convicted by the Pulaski County Circuit Court of second-degree terroristic threatening and third-degree assault. He was sentenced to pay a fine for each conviction, with the payment of the fines being suspended. On appeal, Dillahunty argues that there is insufficient evidence supporting the convictions. We affirm.

In reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *Pullan v. State*, 104 Ark. App. 78, 81, 289 S.W.3d 180, 182 (2008). We do not re-weigh the evidence but determine instead whether the evidence supporting the verdict is substantial. *Id.*, 289 S.W.3d at 182. Evidence, whether direct or circumstantial, is sufficient to support a

conviction if it is forceful enough to compel reasonable minds to reach a conclusion without having to resort to speculation or conjecture. *Id.*, 289 S.W.3d at 182. We do not, however, weigh the credibility of the witnesses. *Id.*, 289 S.W.3d at 182.

This case stems from a contentious custody battle over eight-year-old J.H. The young boy lives with his mother and her husband, Dillahunty, in Georgia, while J.H.'s father, Jason Harrison, has visitation rights. On April 12, 2009, Easter Sunday, J.H. was in Little Rock visiting Jason. J.H. attended church with his grandfather (Jason's father), Robert Harrison. After church, Jason contacted Robert, asking Robert to take J.H. to an Auto Zone where J.H.'s mother and Dillahunty (who were also in town) were to pick up J.H. and return to Georgia.

According to the testimony of Robert, he and J.H. arrived at the Auto Zone between 10:30 a.m. and 11:00 a.m. as instructed by Jason; however, J.H.'s mother and Dillahunty were not there. Robert and J.H. went inside, bought a drink, and waited approximately one hour. When J.H.'s mother and Dillahunty, along with some other family members of Dillahunty, arrived, Robert and J.H. walked outside to meet Dillahunty. Robert tried to pick up J.H. to hug him goodbye, but Dillahunty jerked J.H. away from Robert and shoved his forearm into Robert's chest, which caused him to lose his balance and stumble. Robert told Dillahunty, "You don't scare anyone. You certainly do not scare me." As Dillahunty returned to his vehicle with J.H., and as Robert headed back to the Auto Zone, Dillahunty yelled, "I will f--- up you and your entire family," before leaving.

Auto Zone store employee Darrell Parker testified that he was working on April 12, 2009, when Robert and J.H., neither of whom he knew, entered the premises. After a while, Parker witnessed Robert and J.H. exit the store to meet Dillahunty in the parking lot. From inside the store, Parker witnessed a conversation between Dillahunty and Robert that turned into a heated exchange. Parker said that as Robert reached for J.H., Dillahunty stuck his forearm into Robert's chest, pushing Robert back and positioning Dillahunty between Robert and the boy. Parker said that there was a "pushing and shoving altercation," but neither man took a swing at the other. When Parker saw another man (Dillahunty's brother) exit his truck and walk toward the altercation, Parker thought "they was going to try to jump [Robert]." So Parker and another employee stepped outside. At that time Robert and Dillahunty separated, but Dillahunty, still "standing right in front of Mr. Harrison," said to Robert, "I'll f--- you up."

On appeal, Dillahunty first argues that there is insufficient evidence to support the second-degree terroristic-threatening conviction because he "showed no conscious object to cause fright." He argues that Robert stated that he was not scared, that the alleged threat occurred while the parties were separated, and that he did not brandish a weapon, "rev" the engine of his vehicle, or engage in any other acts to frighten Robert. Rather, Dillahunty argues that the alleged threat was merely "words of frustration" due to the ongoing custody feud. We disagree.

A person commits the offense of terroristic threatening in the second degree if, with the purpose of terrorizing another person, the person threatens to cause physical injury or

property damage to another person. Ark. Code Ann. § 5-13-301(b)(1) (Repl. 2006). The conduct prohibited by this section is the communication of a threat with the purpose of terrorizing another. *Lewis v. State*, 73 Ark. App. 417, 421, 44 S.W.3d 759, 763 (2001). It is not necessary that the recipient of the threat actually be terrorized. *Lewis*, 73 Ark. App. at 421, 44 S.W.3d at 763. The witness's state of mind is simply not an element of the offense of terroristic threatening, because it is not necessary that the recipient of the threat actually be terrorized. *Id.*, 44 S.W.3d at 763. Also, the defendant need not have the immediate ability to carry out the threat. *Brown v. State*, 2010 Ark. App. 336, at 2.

Two witnesses—Robert and Parker—offered testimony that Dillahunty communicated a threat. Parker testified that Dillahunty said this while standing in front of Robert. It is of no significance whether Robert was scared or whether Dillahunty had a weapon. And while Dillahunty argues that he did not intend to terrorize Robert, we note that intent can rarely be proved by direct evidence but must usually be inferred from the circumstances. *Dierks v. State*, 2009 Ark. App. 407, at 3. Here, Dillahunty's intent to cause terror can be inferred from evidence that he was involved in a custody dispute with Robert's family, that he shoved Robert in the chest when Robert attempted to embrace J.H., and that he said to Robert that he would "f--- [him] up." Given these circumstances, we hold that substantial evidence supports Dillahunty's conviction for second-degree terroristic threatening.

Dillahunty also challenges the third-degree assault conviction. A person commits assault in the third degree if he purposely creates apprehension of imminent physical injury in another person. Ann. Code Ann. § 5-13-207(a) (Repl. 2006). Dillahunty contends that there

is a lack of substantial evidence supporting this conviction because there is no evidence that he created an apprehension of imminent physical injury. He refers again to Robert's statement that he was not afraid of Dillahunty and that the store employee merely saw "some contact" between Robert and Dillahunty.

We hold that there is substantial evidence that Dillahunty created apprehension of imminent physical injury in Robert. There was a custody dispute over a child who Dillahunty jerked out of Robert's arms. With his forearm, Dillahunty shoved Robert in the chest, causing him to lose his balance and stumble. While standing in front of Robert, Dillahunty said that he would "f--- [Robert] up." This evidence, along with Parker's testimony that he and another employee stepped outside when they thought that Dillahunty and his brother were "going to try to jump [Robert]," is substantial evidence supporting the third-degree assault conviction.

Affirmed.

GLADWIN and HOOFMAN, JJ., agree.