

ARKANSAS COURT OF APPEALS

DIVISION III

No. CACR07-1166

ELLIOTT E. BAILEY,

APPELLANT

V.

STATE OF ARKANSAS,

APPELLEE

Opinion Delivered 14 JANUARY 2009

APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT,
[NO. CR-07-11-A]

THE HONORABLE JAMES O. COX,
JUDGE

AFFIRMED; MOTION TO
WITHDRAW GRANTED

D.P. MARSHALL JR., Judge

A Sebastian County jury convicted Elliott Bailey of second-degree battery and possessing cocaine. In a June 2008 opinion, we ordered re-briefing because counsel did not address all adverse rulings in the original no-merit brief. *Bailey v. State*, CACR 07-1166 (Ark. App. 25 June 2008). Bailey's lawyer has now filed an updated no-merit brief and motion to be relieved as counsel pursuant to *Anders v. California*, 386 U.S. 738 (1967) and our Rule 4-3(j)(1). Bailey filed no *pro se* points on appeal.

Bailey's lawyer has discussed each adverse ruling that might support an appeal and explained why each ruling does not provide a meritorious ground for reversal. *Eads v. State*, 74 Ark. App. 363, 365, 47 S.W.3d 918, 919 (2001). After a full examination of the proceedings, we agree that an appeal would be wholly frivolous.

Campbell v. State, 74 Ark. App. 277, 279–80, 47 S.W.3d 915, 917 (2001). We therefore affirm Bailey’s convictions and grant his lawyer’s motion to withdraw.

While working undercover in a high crime area, Officer Scott Campbell saw a man’s legs hanging out of the front window of a house. Other officers arrived and saw two men, Bailey and Clinton Spencer, sitting in a vehicle in front of the house. Officer George Harley attempted to secure the scene. He walked around the house and found shattered glass and the back door open. Harley approached the man sitting in the driver’s seat of the vehicle, Spencer, who said that the house had belonged to his girlfriend. Spencer claimed that he had gone in through the window to remove some personal items. He then consented to a search of the car. Officer Harley asked Bailey, the passenger, to step out of the vehicle. He then patted down Bailey and began to search the car. Harley immediately saw cocaine in a plastic wrapper on the passenger seat. About that time, Bailey attempted to run from the police.

First, the evidence shows that Bailey constructively possessed the cocaine. *Mings v. State*, 318 Ark. 201, 207, 884 S.W.2d 596, 600 (1994). It was found in plain view on the passenger seat, where Bailey had been sitting. And he attempted to flee from police. *Gillard v. State*, 366 Ark. 217, 221, 234 S.W.3d 310, 313 (2006).

Second, as he struggled to get away, Bailey knowingly and without legal justification injured Officer Roe, whom Bailey knew to be a law enforcement officer acting in the line of duty. Ark. Code Ann. § 5-13-202(a)(4)(A)(i) (Supp. 2007).

Officer Roe grabbed Bailey's shirt when he broke away from the police. Roe testified that he "took a shot to [his] body armor . . . went to the ground and was drug for a few feet." He also testified that he was wearing his police uniform at the time. Pictures showed that Roe suffered injuries to his knee and elbow. Viewing the evidence in the light most favorable to the State, substantial evidence supports both of Bailey's convictions. *Williams v. State*, 329 Ark. 8, 16, 946 S.W.2d 678, 682 (1997).

The circuit court also did not err in refusing to suppress the evidence found in the car. Bailey's lawyer argued at trial that the pat-down search was done without reasonable suspicion; thus the drugs found in the car were fruit of the poisonous tree. We agree with the circuit court that the officers' actions—including the pat-down search—were reasonable under the circumstances. *See Ark. R. Crim. P. 3.4.*

Nor did the circuit court abuse its discretion by overruling Bailey's relevance objection at the suppression hearing. The objection came during Officer Roe's testimony about events that occurred after the pat-down search. A circuit court has wide discretion over evidentiary matters, and we see no prejudice to Bailey here. *Smith v. State*, 354 Ark. 226, 241, 118 S.W.3d 542, 551 (2003).

Finally, the circuit court did not abuse its discretion by denying Bailey's mistrial motion based on juror confusion. When the jury returned from deliberating, it had signed the verdict forms for second-degree battery and its lesser-included offense. The judge then instructed the jury that it could sign only one verdict form. The jury was

sent back out and returned three minutes later with a guilty verdict on second-degree battery, but not the lesser-included offense. A mistrial is an extreme remedy, and is proper only where an error is beyond repair. *Taylor v. State*, 334 Ark. 339, 351, 974 S.W.2d 454, 461 (1998). The supplemental instructions here cured any juror confusion. The circuit court therefore did not abuse its discretion by denying Bailey's mistrial motion. *King v. State*, 317 Ark. 293, 297, 877 S.W.2d 583, 586 (1994).

Affirmed; motion to withdraw granted.

VAUGHT, C.J., and PITTMAN, J., agree.