Cite as 2023 Ark. App. 340

ARKANSAS COURT OF APPEALS

DIVISION III
No. CR-22-263

JEREMY DURKIN	APPELLANT	Opinion Delivered May 31, 2023 APPEAL FROM THE CRAWFORD COUNTY CIRCUIT COURT [NO. 17CR-21-580] HONORABLE MARC MCCUNE, JUDGE REBRIEFING ORDERED; MOTION TO WITHDRAW DENIED
V.		
STATE OF ARKANSAS	APPELLEE	

KENNETH S. HIXSON, Judge

Appellant Jeremy Durkin was convicted in a jury trial of two counts of second-degree sexual assault and was sentenced to two concurrent ten-year prison terms.[1] Durkin's counsel has filed a no-merit brief and a motion to withdraw as counsel pursuant to Arkansas Supreme Court Rule 4-3(b)(1) and *Anders v. California*, 386 U.S. 738 (1967), asserting that this appeal is wholly without merit. Durkin was provided with a copy of his counsel's brief and motion and notified of his right to file pro se points for reversal, which Durkin has done.

[1]Durkin was convicted under Ark. Code Ann. § 5-14-125(a)(2)(A) (Supp. 2021), which provides that a person commits second-degree sexual assault if the person engages in sexual contact with another person who is incapable of consent because he or she is physically helpless. Pursuant to Ark. Code Ann. § 5-14-101(8)(A) (Supp. 2021), "Physically helpless" means that a person is unconscious.

Consequently, the attorney general has filed a brief in response. Because Durkin's counsel's brief is deficient in numerous respects, we deny the motion to withdraw and order rebriefing.

At Durkin's jury trial, the State presented seven witnesses. The testimony established that the alleged victims, Minor Child 1 (MC1) and Minor Child 2 (MC2), were among several people to spend the night at Durkin's trailer on May 22, 2021. That night, MC1 and MC2 slept on a pallet on the living-room floor while Durkin slept in a recliner. MC2, age seventeen, testified that she was awakened to find Durkin's hand on her buttocks. MC1, age fourteen, testified that she was awakened by MC2 kicking her in the ribs, at which point she felt Durkin groping her breasts. Based on the evidence presented by the State, the jury found Durkin guilty of two counts of second-degree sexual assault and sentenced him to ten years in prison.

This first deficiency in Durkin's counsel's brief concerns the statement of the case. The supreme court made electronic filing of appeals mandatory for cases in which the notice of appeal was filed on or after June 1, 2021. *See In re Acceptance of Records on Appeal in Elec. Format*, 2020 Ark. 421 (per curiam). Because the notice of appeal in this case was filed after June 1, 2021, Durkin's counsel correctly filed an electronic brief on behalf of appellant. However, the brief provided does not contain a sufficient statement of the case. This is because the statement of the case does not contain the information necessary to understand the case and decide the issues in this no-merit appeal. The statement of the case merely recites that Durkin was convicted by a jury of two counts of second-degree sexual assault and

sentenced to ten years in prison, and it contains none of the relevant testimony. Rule 4-2(a)(6) of the Arkansas Rules of the Supreme Court provides:

> The appellant's brief *shall* contain a concise statement of the case and the facts without argument. The statement shall identify and discuss all material factual and procedural information contained in the record on appeal. Information in the appellate record is material if the information is essential to understand the case and to decide the issues on appeal. All material information must be supported by citations to the pages of the appellate record where the information can be found.

(Emphasis added.) Because of the mandatory language used by the supreme court in Rule 4-2, we cannot overlook Durkin's counsel's failure to comply with the rule. *See Bardin v. Bardin*, 2023 Ark. App. 195; *Burns v. State*, 2022 Ark. App. 472. Consequently, we order Durkin's counsel to file a substituted brief with a statement of the case that conforms to our rules.

Furthermore, the argument section of Durkin's counsel's no-merit brief is deficient as well. Rule 4-3(b)(1) requires the argument section of a no-merit brief to contain "a list of all rulings adverse to the defendant made by the circuit court on all objections, motions and requests . . . with an explanation as to why each . . . is not a meritorious ground for reversal." The test is not whether counsel thinks the circuit court committed no reversible error but whether the points to be raised on appeal would be wholly frivolous. *Holliman v. State*, 2023 Ark. App. 1. Pursuant to *Anders*, we are required to determine whether the case is wholly frivolous after a full examination of all the proceedings. *Id.* A no-merit brief in a criminal case that fails to address an adverse ruling does not satisfy the requirements of Rule 4-3(b)(1), and rebriefing will be required. *Jester v. State*, 2018 Ark. App. 360, 553 S.W.3d 198.

In his argument, Durkin's counsel briefly discusses the sufficiency of the evidence to support Durkin's convictions, and he also briefly discusses two adverse hearsay objections. These adverse hearsay objections occurred when Detective Jeremy Caldwell was permitted to testify as to what he had heard MC1 and MC2 say in a forensic interview and when MC2's mother was permitted to testify as to what MC2 had told her about being touched by Durkin on the morning after the assaults. However, in addressing these adverse rulings, Durkin's counsel cites no authority whatsoever and merely states that no error occurred in conclusory fashion without adequate explanations as to why an appeal from each of the adverse rulings would be wholly frivolous. Therefore, we direct Durkin's counsel to cure this deficiency on rebriefing.

Finally, a review of the record reveals at least six adverse rulings that Durkin's counsel has failed to address at all. These adverse rulings include (1) Durkin's unsuccessful attempt to present evidence that MC1's brother had acted out sexually and that Durkin's son had been "hitting on" MC1 (Record-Transcript 131–34); (2) the circuit court's overruling of Durkin's objection to MC2's mother's wife's testimony on the grounds that it was merely repetitive of previous testimony (Record-Transcript 175–76); (3) the circuit court's allowing MC2 to review her statement to the police during her testimony over Durkin's objection (Record-Transcript 195–98); (4) the circuit court's overruling of Durkin's objection that the prosecutor was testifying during rebuttal closing argument in the guilt phase of the trial (Record-Transcript 302); (5) the circuit court's overruling of Durkin's objection to the prosecutor's comments during rebuttal closing argument in the guilt phase of the trial

concerning Durkin's custodial statement (Record-Transcript 305–06); and (6) the circuit court's overruling of Durkin's objection to the prosecutor giving a rebuttal closing argument in the sentencing phase of the trial (Record-Transcript 320). Because Durkin's counsel has failed to address these adverse rulings and explain why each would not be a meritorious ground for reversal on appeal, rebriefing is required for this reason as well.

Because the no-merit brief filed by Durkin's counsel is deficient for the reasons explained herein, we order counsel to file a substituted brief within fifteen days of this opinion. In ordering rebriefing, we express no opinion as to whether the substituted brief should be filed pursuant to Rule 4-3(b)(1) and *Anders* or should be filed asserting meritorious grounds for reversal. If a no-merit brief is filed, counsel's motion and brief will be forwarded by this court's clerk to Durkin so that he can raise any points he chooses. The attorney general will also be given the opportunity to file a responsive brief for the State if it so chooses. Durkin and the State may elect to stand on the original pro se points and responsive brief filed in this case. Finally, we strongly encourage counsel, before filing the substituted brief, to review our rules and the substituted brief to ensure that no additional deficiencies are present.

Rebriefing ordered; motion to withdraw denied.

MURPHY and BROWN, JJ., agree.

Jones Law Firm, by: *F. Parker Jones III* and *Christopher Tolleson*, for appellant.

Leslie Rutledge, Att'y Gen., by: *Karen Virginia Wallace*, Ass't Att'y Gen., for appellee.