Cite as 2018 Ark. 261

SUPREME COURT OF ARKANSAS

No. CR-17-891

	Opinion Delivered: September 20, 2018
CHRISTOPHER FLETCHER APPELLANT	APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT
V.	[NO. 35CR-15-191]
STATE OF ARKANSAS APPELLEE	HONORABLE ALEX GUYNN, JUDGE
	AFFIRMED; MOTION TO WITHDRAW GRANTED.

COURTNEY HUDSON GOODSON, Associate Justice

A jury in the Jefferson County Circuit Court found appellant Christopher Fletcher guilty of capital murder, for which he was sentenced to life imprisonment without parole plus an additional fifteen years for using a firearm in the commission of the crime. Fletcher's attorney filed a no-merit brief pursuant to Arkansas Supreme Court Rule 4-3(k) (2017) and *Anders v. California*, 386 U.S. 738 (1967), asserting that there are no nonfrivolous issues for appeal. Specifically, counsel argues that (1) the trial court did not commit reversible error in denying Fletcher's motions for a directed verdict, (2) the sentence imposed was allowed pursuant to the capital-murder statute, and (3) the trial court did not commit reversible error in allowing the introduction of testimony from two

witnesses and a drawing from a third witness. For reversal, Fletcher has filed pro se points disputing the points counsel argued and also alleging that his appellate counsel was ineffective. The State has responded. In compliance with Rule 4-3(i), because this is a life-imprisonment case, the State has certified that all adverse rulings have been abstracted and evaluated and that no other issues warrant briefing. Our jurisdiction is pursuant to Arkansas Supreme Court Rule 1-2(a)(2). After having reviewed the record, briefs, and pro se points, we affirm and grant counsel's motion to withdraw.

I. *Factual Background*

By an amended felony information, the Jefferson County Prosecuting Attorney charged Fletcher with capital murder in the shooting death of Laronda McElroy.[1] The record reflects that Officer Sylvester Davis of the Pine Bluff Police Department was dispatched to 708 West 27th Street in Pine Bluff on April 13, 2015, to respond to a reported shooting. At trial, Davis testified that when he arrived, he found McElroy in a nearby yard, unresponsive, with gunshot wounds to her leg, neck, and head. Davis could not find a pulse. However, EMTs arrived, found a pulse, and transported McElroy to a hospital. McElroy later died as a result of her wounds. Detective Scott Norton testified that Fletcher was arrested in Amarillo, Texas, the day after the shooting.

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[1]The information also charged Fletcher with possession of a firearm by certain persons, but the State nolle prossed the charge.

Four children testified at the trial, and all four testified that they knew the difference between the truth and a lie. Two of the children, G.F. and C.F., were children McElroy had with Fletcher. G.F., who was five years old at the time of trial, identified Fletcher as his father and testified that "[w]hen my momma was running, my daddy shot her in the leg. And he walked up on my momma and shot her in the head." C.F. was six years old at the time of the trial. C.F. identified Fletcher as his father and testified that Fletcher shot McElroy and then fled. Ten-year-old D.M., one of McElroy's children by another father, testified that he and his siblings were preparing to go to school when Fletcher approached McElroy and pointed a gun at her while she was in the car. D.M. testified that when McElroy exited the vehicle and ran, Fletcher shot her in the leg and then "came up and shot her in the face." T.H., a twelve-year-old neighbor, testified that he witnessed Fletcher point a gun at McElroy and shoot her when she ran away. C.F. and D.M. both testified that Fletcher did not live with them and McElroy.

Dr. Charles Kokes, the state medical examiner, testified that he performed an autopsy on McElroy on April 14, 2015. Kokes's autopsy revealed that McElroy sustained gunshot wounds to the neck, leg, and head. Kokes testified that an individual with only the neck or leg wounds he observed would likely recover, but in his opinion, the head wound would almost always be fatal. Kokes's final report indicates that the cause of McElroy's death was gunshot wounds to the head and leg.

The murder weapon was not found, but investigators did find .357 magnum

ammunition at Fletcher's residence. Rebecca Mullen, the chief firearm-and-tool-marks examiner for the Arkansas State Crime Lab testified that the bullets found in Fletcher's home were of the same caliber class as the one used in McElroy's murder.[2]

Based on this and other testimony, the jury found Fletcher guilty and he was sentenced as previously stated in this opinion. Counsel has outlined each adverse ruling and explained why none presents a meritorious ground for reversal. *See* Ark. Sup. Ct. R. 4-3(k) (stating that counsel's brief must contain an argument section that explains why each adverse ruling "is not a meritorious ground for reversal.") We also conclude that Fletcher's pro se points provide no grounds for reversal.

II. *Sufficiency of the Evidence*

Fletcher first argues that the trial court erred by denying his motions for a directed verdict. At trial, Fletcher moved for a directed verdict and argued that the State failed to prove the premeditation and deliberation necessary to support a capital-murder charge. Fletcher argues in his second pro se point that the trial court was without authority to impose a life-without-parole sentence because the State failed to prove the premeditation and deliberation elements required to support his capital-murder conviction.

An appeal from the denial of a motion for a directed verdict is treated as a challenge to the sufficiency of the evidence. *Taffner v. State*, 2018 Ark. 99, 541 S.W.3d 430. Thus,

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[2]Mullen testified that the .38-caliber class of bullets includes .380 auto, .357 magnum, .38 special and 9mm Luger.

Fletcher's first two pro se points are challenges to the sufficiency of the evidence. In reviewing a challenge to the sufficiency of the evidence, we determine whether the verdict is supported by substantial evidence. *Howard v. State*, 2016 Ark. 434, 506 S.W.3d 843. Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.* In reviewing a sufficiency challenge, we view the evidence in the light most favorable to the State, considering only evidence that supports the verdict. *Id.*

Pursuant to Arkansas Code Annotated § 5-10-101(a)(4) (Repl. 2013), a person commits capital murder if "with the premeditated and deliberated purpose of causing the death of another person, the person causes the death of any person." Premeditated and deliberate murder occurs when the killer's conscious object is to cause death, and he forms that intention before he acts and as a result of weighing the consequences of his course of conduct. *Brooks v. State*, 2016 Ark. 305, 498 S.W.3d 292. Premeditation need not exist for any particular length of time and may be formed in an instant. *Id.* Premeditation is rarely capable of proof by direct evidence but usually must be inferred from the circumstances of the crime. *Id.* A jury can infer premeditation and deliberation from circumstantial evidence, such as the type and character of the weapon used; the nature, extent, and location of wounds inflicted; and the conduct of the accused. *Id.*

Fletcher does not dispute that he caused McElroy's death, but only argues that the State failed to prove that he acted with premeditation and deliberate purpose. However, substantial evidence supports the verdict. Testimony at the trial indicated that Fletcher did not live with McElroy and that he waited outside her home with a firearm to confront her when she left the home to transport her children to school. Four witnesses, two of whom were Fletcher's own children, testified that Fletcher shot McElroy. One of Fletcher's children testified that after McElroy was on the ground, Fletcher approached her and shot her in the head. The eyewitness testimony was consistent with the testimony of the medical examiner, who testified that McElroy sustained gunshot wounds to her neck, leg, and head, and that the shot to McElroy's head came from behind and at a downward angle. The evidence was sufficient to allow the jury to reach its conclusion without resorting to speculation or conjecture, and the trial court did not err in denying Fletcher's motions for a directed verdict.

Our conclusion that substantial evidence supports the jury's verdict necessarily means that Fletcher cannot prevail on his second point in which he argues that the trial court was without jurisdiction to impose a sentence of life imprisonment without parole because the State failed to prove premeditation and deliberation. For offenders over the age of eighteen, capital murder is punishable by death or life imprisonment without parole. Ark. Code. Ann. § 5-10-101(c)(1). Because the evidence was sufficient to establish the premeditation and deliberation required to convict Fletcher of capital murder, and because

the sentence he received is provided for by statute, the trial court did not exceed its authority in sentencing Fletcher to life imprisonment without parole.

III. *Evidentiary Objections*

Fletcher argues that the trial court erred (1) by allowing hearsay testimony from Detective Norton as to his arrest in Amarillo, Texas, (2) by allowing C.F. to testify because C.F. could be manipulated by the prosecution, and (3) by admitting into evidence a drawing that T.H. created about a week after the murder.

Fletcher concedes that he did not obtain a ruling on his objections to testimony from Norton and C.F. It is the obligation of an appellant to obtain a ruling from the trial court in order to preserve an issue for appellate review. *Vance v. State*, 2011 Ark. 392, 384 S.W.3d 515. Fletcher's failure to obtain a ruling on his objections to testimony from Norton and C.F. precludes our review of those arguments. *Id.*

Fletcher's final claim of evidentiary error is that the trial court erred in permitting the admission of a drawing T.H. made several days after the murder. Fletcher argued at trial that the drawing was made outside the courtroom, that counsel was not present when it was prepared, and that the drawing was repetitive and not to scale. The trial court overruled Fletcher's objection and allowed the drawing. T.H. testified that the drawing was a representation of what he saw. Although Fletcher did preserve this issue for review, we find no error. Trial courts have broad discretion in deciding evidentiary issues, and their rulings are not reversed on appeal in the absence of an abuse of discretion. *Lard v.*

State, 2014 Ark. 1, 431 S.W.3d 249. Abuse of discretion is a high threshold that does not simply require error in the circuit court's decision but requires that the circuit court act improvidently, thoughtlessly, or without due consideration. *Id.* In general, all relevant evidence is admissible. Ark. R. Evid. 402 (2017). However, Rule 403 provides that relevant evidence may be excluded if the danger of unfair prejudice substantially outweighs the probative value of the evidence. *See Lard*, *supra*. We have observed that all evidence offered by the State in a criminal trial is likely to be prejudicial to the defendant to some degree. *Vance v. State*, 2011 Ark. 243, 383 S.W.3d 325. As counsel notes, the key question is whether the danger of unfair prejudice substantially outweighs the probative value of the evidence. We have allowed the introduction of a drawing that was not drawn to scale when it helped the witnesses in offering their testimonies. *See Bly v. State*, 267 Ark. 613, 593 S.W.2d 450 (1980) (holding that there was no indication that an investigator's drawing made days after the murder was prejudicial). Additionally, Fletcher's counsel was allowed to question T.H. about the drawing. Under the circumstances, we cannot say that Fletcher was unfairly prejudiced or that the trial court abused its discretion in allowing the drawing.

IV. *Assistance of Counsel*

Fletcher's final pro se point is that he was denied effective assistance of appellate counsel. We do not consider issues raised for the first time on appeal. *Tornavacca v. State*, 2012 Ark. 224, 408 S.W.3d 727. Because this claim by its nature does not arise until the

appeal, Fletcher must bring it in a Rule 37 proceeding in the trial court. *See* Ark. R. Crim. P. 37.1; *Taylor v. State*, 2015 Ark. 339, 470 S.W.3d 271. To the extent that Fletcher is arguing that his trial counsel was ineffective, we will not decide that issue because it has not been considered by the trial court. *Gordon v. State*, 2015 Ark. 344, 470 S.W.3d 673 (2015).

V. *Rule 4.3(i) Review*

Because Fletcher received a sentence of life imprisonment without parole, the record has been reviewed for all errors prejudicial to him as required by Arkansas Supreme Court Rule 4-3(i). No reversible error was found.

Affirmed; motion to withdraw granted.

BAKER and HART, JJ., dissent.

KAREN R. BAKER, Justice, dissenting. I must dissent from the majority's decision to affirm Fletcher's sentence of life imprisonment and grant counsel's motion to withdraw. I would order rebriefing and deny the motion to withdraw.

As explained by the majority, Fletcher's counsel has filed a no-merit brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and a motion requesting to be relieved a counsel. Pursuant to *Anders*, we are required "after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.* at 744. If we find "any of the legal points arguable on their merits (and therefore not frivolous) [we] must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." *Id.* The purpose of this procedure is to "assure penniless defendants the same rights and

opportunities on appeal—as nearly as is practicable—as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel." *Id.* at 745. Thus, the test is not whether counsel believes that the circuit court committed no reversible error; rather, it is whether the arguments to be raised on appeal would be "wholly frivolous."

Accordingly, based on the record before us, I disagree with the majority's decision to affirm without the benefit of adversary briefing. Fletcher's claim of evidentiary error regarding the admission of T.H.'s drawing does not rise to the level of a "wholly frivolous" argument and requires rebriefing. Stated differently, I am not convinced after examining the record that this evidentiary issue is one that may be decided without adversary presentation.

Because this issue deserves adversary presentation, I would deny counsel's motion to withdraw and order rebriefing in adversary form. Therefore, I must respectfully dissent.

JOSEPHINE LINKER HART, Justice, dissenting. This case should be remanded for a merit brief on the admission of the drawing issue. Neither the brief nor the majority's disposition comports with the dictates of *Anders v. California*, 386 U.S. 738 (1967), and its progeny. Filing an *Anders* brief is permissible only when an attorney has provided the client with a diligent and thorough search of the record for any arguable claim that might support the client's appeal, and after having identified all of the potential adverse rulings,

the attorney determines that an appeal from those rulings would be "frivolous." *Her v. State*, 2015 Ark. 91 at 8-9, 457 S.W.3d 659, 664 (citing *Penson v. Ohio*, 488 U.S. 75 (1988)). In an *Anders* case, the standard is not whether the appellant has an argument that will result in a reversal of his or her conviction; it is whether it would be wholly frivolous—essentially unethical—to argue a particular point. An argument on the merits of whether the admission of a graphic depiction of a horrendous murder that was created by a twelve-year-old witness, at least a week after the incident, at the behest of a "counselor," would not be frivolous.

The following colloquy took place at trial.

> THE STATE: I am going to offer this as Exhibit Number 38. It's a hand-drawn picture by this witness, who I expect to testify that he drew the picture describing what he saw.
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> THE DEFENSE: My objection is that he has already described what he saw. This was something prepared out of the courtroom. I was not around when it was done. This is not to SCALE. This is simply a child's rendering of what he has already said and I object to it being introduced.
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> THE COURT: WHEN was this prepared?
>
> THE STATE: April 21, 2015. It was about a week after the INCIDENT.
>
> THE DEFENSE: It was not immediately afterwards. Again, it was prepared out of the courtroom for the purpose of being used as evidence. I wasn't there when it was done, so I don't know who coached him, who talked to them about it or any of that.

THE COURT: Did you get a copy of it?

THE DEFENSE: Yes. WE did get a copy, but again it was drawn out of the courtroom. It was not done to the jury. He has described the entire incident, I thought he did a good job describing it. This, I think, is prejudicial.

THE COURT: I OVERRULE your objection, and will allow it.

[TESTIMONY continues.]

T.H.: I RECOGNIZE the picture marked as Exhibit Number 38. I recall drawing the picture when the police questioned me. I did not DRAW it when I gave my statement to the police. I [drew it] when I was at the counselor. I did the scene after the incident happened. It is what I remembered of the incident.

[Whereupon State's Exhibit Number 38 was admitted over DEFENDANT'S renewed objection, and published to the Jury]

First, the majority seems to misunderstand what is meant by judicial discretion. Judicial discretion means

> discretion bounded by rules and principles of law, and not arbitrary, capricious, or unrestrained. It is not the indulgence of judicial whim, but the exercise of judicial judgment, based on facts and guided by law or the equitable decision or what is just and proper under the circumstances. It is legal discretion to be exercised in discerning the course prescribed by law and is not to give effect to the will of the judge, but to that of the law.

Black's Law Dictionary 323 (6th ed. 1990). In the case before us, the circuit court asked when the drawing was prepared and whether the defense was provided a copy. When it was informed that the drawing was prepared "about a week after the incident," the circuit court did not have the factual predicate to decide that it fit within a hearsay exception found in Rule 803 of the Arkansas Rules of Evidence. Stated another way, the so-called "discretion" that the law affords the circuit court extends only to determining whether there exists a factual basis for finding an exception to the prohibition in our rules of evidence against admitting hearsay. Accordingly, it would not be "wholly frivolous" to argue that the circuit court erred in admitting the drawing over a hearsay objection. The same rationale exists for an argument that the drawing was cumulative and impermissible bolstering of T.H.'s testimony with a prior consistent graphic statement.

Second, it is not proper to conclude that it would be "wholly frivolous" to make a merit-based argument because there is a wide range of theories about the admissibility of the drawing. As shown above, Fletcher's trial counsel argued that the drawing was inadmissible hearsay, cumulative, and impermissible bolstering with a prior consistent graphic statement. Fletcher's appellate attorney opined that admission of the drawing was error, but the error was harmless. The attorney general's office opined that it was not error

to admit the drawing because it was "helpful" to the witness when he testified. The majority asserts that it was not error to admit the drawing because this case is controlled by *Bly v. State*, 267 Ark. 613, 593 S.W.2d 450 (1980). Suffice it to say that submitting a merit brief would not be wholly frivolous.

Third, under the *Anders* formulation, Fletcher's appellate counsel did not satisfy the requirement to explain why an argument concerning an adverse ruling would be wholly without merit by anticipating that this court would find the error harmless. Harmless-error analysis is undertaken by the appellate court, not the appellate attorney in an *Anders* brief. *See Kou Her*, 2015 Ark. 91, 457 S.W.3d 659 (discussing *Penson*, 488 U.S. 75). For this reason alone, this court should have denied appellate counsel's motion to withdraw.