ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION IV

CACR06-170

January 17, 2007

JOHNNY CRAIG, JR. APPELLANT	AN APPEAL FROM JEFFERSON COUNTY CIRCUIT COURT [NO. CR-2005-487-5]
V.	HON. ROBERT H. WYATT, JR., JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED; MOTION TO WITHDRAW GRANTED

On September 19, 2005, a Jefferson County jury found Johnny Craig, Jr. guilty of two counts of aggravated assault, criminal mischief, and committing a terroristic act and sentenced him to a sixty-six-year term in the Arkansas Department of Correction. Appellant's attorney has filed a motion to withdraw as appellant's counsel, and the motion was accompanied by a no-merit brief, pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Ark. Sup. Ct. R. 4-3(j), wherein counsel contends that all rulings adverse to his client are abstracted and discussed. Appellant was provided a copy of this brief and was notified of his right to file pro se points for reversal, and appellant has filed nine pro se points. We agree that an appeal here would be wholly without merit. Accordingly, we affirm appellant's conviction and grant counsel's motion to withdraw.

According to the testimony of Bennie Higgins, appellant shot at Higgins's car with a twelve-gauge shotgun on the evening of May 24, 2005. He stated that on that date, he was married to Roberta Higgins but had been separated for about a year and a half. The two had three minor children, and Roberta had a teenage daughter, Shambreka, prior to the marriage. At that time, Bennie owned a 1994 Fleetwood Cadillac, which he had purchased the previous February for $4500 and was in good running condition.

On May 24, Bennie left work and went by Roberta's home at 4:00 p.m. He stayed for an hour, then left and went to a friend's house. After about three hours, he returned to Roberta's home after receiving a call from his son. Bennie had Roberta's cell phone, and he used that phone to call the number that called him. A man whose voice he did not recognize answered. When he returned to Roberta's house the second time, he stayed for about two hours. Antonio Alexander was with him at the time. All of the children were at home under Shambreka's supervision. Bennie and Antonio left Roberta's house after the second visit. Thirty minutes later, Bennie received a phone call from the same person that he spoke to earlier. He returned to Roberta's home, fearing for his children's safety. He was still on the phone talking to the person as he was driving down an alleyway. As he was driving, the person said, "Well, here I am." The person, whom Bennie identified as appellant, then "popped out of the dark with a rifle and shot at the car." Antonio was still in the car at that time. After hearing the gun re-cock, Bennie tried to get away, but he crashed his car in a ditch across the street. The resulting crash totaled his car. Neither Bennie nor Antonio was hit by the bullet.

Shambreka testified about the moments prior to the shooting. According to her testimony, she was babysitting her younger siblings that evening. Roberta had left her cell phone with Shambreka. Roberta called Shambreka at least once that evening, and Shambreka opined that Roberta was using appellant's phone because appellant's phone number appeared on the caller ID. That evening, Bennie came by Roberta's house and took Roberta's phone outside with him. Bennie then brought the phone back into the house and left. Shambreka then called Roberta and told her that Bennie had stopped by the home. Roberta returned to her home, and appellant was with her. Shambreka testified that appellant was upset and that she overheard appellant say, "Tell your kids I'm going to kill their daddy." Appellant then left. Appellant later returned and told Shambreka to call Bennie. She did so using appellant's phone. Bennie then returned to Roberta's home. Shambreka testified that she heard a gunshot soon after, but that she did not see the shooting because she shut the door after Bennie arrived.

Pine Bluff Police Officer Leslie Lindsay investigated the shooting. She talked to appellant the evening after the shooting, and appellant signed a statement saying that he was in Monticello the previous night between 9:00 p.m. and 10:00 p.m. and that he was in bed at 10:30 p.m. In the statement, he stated that last time he saw Roberta was the evening before May 24. Lindsay testified that she told appellant that there had been a shooting, but that she did not tell him why she wanted to talk to him or mention a time frame. She stated that appellant insisted several times that he was in Monticello between 9:00 and 10:00 p.m.

Gloria Jones, who lives in Monticello, testified that she left work and went home

between 8:30 and 9:00 p.m. Around 8:45, she tried to call appellant but received no answer. She tried calling again after she arrived home, and someone answered the phone. She heard two voices on the other end: a male that sounded like appellant and a female whom she could not identify. Jones stated that appellant arrived at her home after 10:30 p.m. and did not have his cell phone with him. While at her house, appellant called his cell phone and checked his voice-mail messages. The phone records indicate that this occurred at 11:16 p.m. Appellant stayed at her house and left the next morning.

The jury found appellant guilty of two counts of aggravated assault, for which he received two twelve-year sentences; criminal mischief, for which he received a twelve-year sentence; and terroristic act, for which he received a thirty-year sentence. The court ordered the sentences to run consecutively for an aggregate sixty-six-year term in the Arkansas Department of Correction. Appellant filed a motion to modify the sentence on September 23, 2005, and the court denied the motion after a hearing on October 5, 2005.

An attorney's request to withdraw from appellate representation based upon a meritless appeal must be accompanied by a brief that contains a list of all rulings adverse to his client that were made on any objection, motion, or request made by either party. *Eads v. State*, 74 Ark. App. 363, 47 S.W.3d 918 (2001). The argument section of the brief must contain an explanation of why each adverse ruling is not a meritorious ground for reversal. *Id.* We are bound to perform a full examination of the proceedings as a whole to decide if an appeal would be wholly frivolous. *Campbell v. State*, 74 Ark. App. 277, 47 S.W.3d 915 (2001). If counsel fails to address all possible grounds for reversal, we can deny the motion

to withdraw and order rebriefing. *Sweeney v. State*, 69 Ark. App. 7, 9 S.W.3d 529 (2000).

Other than minor evidentiary objections, which were all conceded by appellant at trial, counsel discusses seven adverse rulings: a pre-trial motion to sever counts, four directed-verdict motions, and two arguments on appellant's post-trial motion to modify sentence.

1. Motion to Sever

Before trial, appellant filed a motion to sever one of the charges. However, as counsel notes, appellant never pursued the motion and never obtained a ruling on the motion, which precludes this court from addressing the issue. *See Wicks v. State*, 270 Ark. 731, 606 S.W.2d 366 (1980) (requiring that an appellant obtain a ruling on an objection if he wishes to preserve it for appellate review).

2. Directed-Verdict Motions

Next, counsel discussed the directed-verdict motions. For the two aggravated-assault charges, appellant argued at trial that the State presented insufficient evidence to show that he engaged in conduct that created a substantial danger of death or serious physical injury to Bennie Higgins or Antonio Alexander. A person commits aggravated assault if, under circumstances manifesting extreme indifference to the value of human life, he purposefully engages in conduct that creates a substantial danger of death or serious physical injury to another person. Ark. Code Ann. § 5-13-204(a)(1) (Repl. 2006). Counsel properly cites *Carter v. State*, 324 Ark. 249, 921 S.W.2d 583 (1996), where the supreme court affirmed a conviction for aggravated assault. The evidence there showed that the appellant drove himself and his co-defendants to the scene of the shooting, fired a gun at the scene, assisted a co-defendant in retrieving his rifle, and that the victim was in the line of fire and narrowly escaped injury. Here, the evidence shows that appellant fired a shotgun in the direction of two people. The State presented sufficient evidence to support appellant's aggravated-assault convictions.

Next, counsel discussed the directed-verdict motion for the charge of criminal mischief. At trial, appellant argued that the State failed to establish that appellant caused the damage to the vehicle or that the damage was in excess of $500. A person commits criminal mischief in the second degree if he recklessly destroys or damages any property of another person. Ark. Code Ann. § 5-38-204(a)(1) (Repl. 2006). The crime is a Class D felony if the amount of the actual damage exceeds $2500. Here, Bennie Higgins's testimony established that appellant shot at his vehicle, causing him to accelerate into a ditch and total his car. His testimony further established that he purchased the vehicle for $4500 three months prior to the incident and that the vehicle was still in good running condition. This evidence is sufficient to support a conviction for Class D felony second-degree criminal mischief.

Finally, counsel discussed the directed-verdict motion for the charge of committing a terroristic act. At trial, appellant argued that the State failed to establish that he caused injury to Bennie Higgins's property. A person commits a terroristic act if he shoots at an object with the purpose to cause injury to another person or damage to property that is being operated or occupied by another person. Ark. Code Ann. § 5-13-310(a)(1) (Repl. 2006). Again, Higgins's testimony establishes the elements of this crime.

3. Post-trial Motion

Finally, counsel reviews appellant's post-trial motion to modify his sentence. After trial, appellant moved to have his sentences to be served concurrently rather than consecutively and argued that neither the jury nor the State recommended consecutive sentences. Arkansas Code Annotated section 5-4-403(a) (Repl. 2006) provides in pertinent

part:

> When multiple sentences of imprisonment are imposed on a defendant convicted of more than one (1) offense . . . , the sentences shall run concurrently unless, upon recommendation of the jury or the court's own motion, the court orders the sentences to run consecutively.

The trial court has the discretion to order sentences to be served consecutively, and the appellant assumes a heavy burden of showing that the trial judge failed to give due consideration to the exercise of his discretion in the matter of consecutive sentences. *Love v. State*, 324 Ark. 526, 922 S.W.2d 701 (1996). In denying the motion, the trial court stated that it ordered the sentences to run consecutively because the jury gave appellant the maximum sentence on each charge. Appellant did not provide much of an argument before the trial court below, other than noting that his sentence is well above the presumptive sentence provided in the sentencing guidelines. We hold that there would be no meritorious appeal based upon this argument.

Appellant also argued in his motion, but not at the subsequent hearing, that his sentence violated the state and federal constitutional protections and state statutory protection against double jeopardy. When the same conduct establishes the commission of multiple offenses, the defendant may be prosecuted for each such offense; however, he may not be convicted of more than one offense if one offense is a lesser-included of the other offense. Ark. Code Ann. § 5-1-110(a)(1) (Repl. 2006). While all of appellant's offenses are similar and came out of the same impulse, aggravated assault, criminal mischief, and terroristic act are all distinct offenses, none of which is a lesser-included of any other

offense. The court did not err in allowing convictions for all three offenses.

4. Pro Se Points

Appellant presents nine pro se points for reversal, but none of them present a meritorious argument on appeal. First, appellant argues that he was denied the right to face his accuser. However, no objection based upon the Confrontation Clause was presented to the trial court, which precludes this court from addressing the issue here. *See Roston v. State*, 362 Ark. 408, — S.W.3d — (2005).

In six of his nine points, appellant challenges the testimony of State's witnesses. In each case, appellant raises an issue of credibility, and such issues are for the jury to resolve. *See Bush v. State*, 90 Ark. App. 373, — S.W.3d — (2005).

In his third point, appellant argues that there was no weapon to charge him with aggravated assault. Bennie Higgins's testimony established that appellant shot at him and Alexander with a shotgun. The fact that the State did not find the gun used is irrelevant.

Finally, appellant argues that he could not have been charged with criminal mischief because no one was in the vehicle when the police arrived at the scene. Not only was this argument not made at trial, nothing in the definition of criminal mischief requires anyone to be near the destroyed property.

The record has been reviewed in accordance with Ark. Sup. Ct. R. 4-3(j) and *Anders*, *supra*. We conclude that there were no errors with respect to rulings adverse to appellant and that this appeal is without merit. Accordingly, counsel's motion to be relieved is granted, and appellant's convictions are affirmed.

HART and BIRD, JJ., agree.