

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CR-16-562

GEORGE DEWAYNE GUTHRIE
APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered: December 13, 2017

APPEAL FROM THE CRAIGHEAD
COUNTY CIRCUIT COURT, EASTERN
DISTRICT
[NO. 16LCR-15-18]

HONORABLE JOHN N. FOGLEMAN,
JUDGE

AFFIRMED; MOTION TO WITHDRAW
GRANTED

BART F. VIRDEN, Judge

A Craighead County jury convicted appellant George Dewayne Guthrie of residential burglary and theft of property, and he was sentenced as a habitual offender to thirty years' imprisonment. Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Arkansas Supreme Court Rule 4-3(k), Guthrie's counsel filed a motion to withdraw on the basis that there is no merit to an appeal. In *Guthrie v. State*, 2017 Ark. App. 383 (*Guthrie I*), this court denied counsel's motion to withdraw and ordered rebriefing due to deficiencies in the abstract. Guthrie's counsel has filed another motion to withdraw and a substituted brief listing all adverse rulings and explaining why there are no nonfrivolous issues for appeal. Guthrie filed pro se points for reversal the first time this case was before us; he was

notified and again given the opportunity to file pro se points. He did not file any additional points, which indicates to us that he has elected to stand on his original pro se points for reversal. *See, e.g., Reynolds v. State*, 2017 Ark. App. 397; *Lenderman v. State*, 2017 Ark. App. 1. We affirm Guthrie's convictions and grant defense counsel's motion to withdraw.

I. *Summary of Facts*

Guthrie was caught on camera breaking into a neighbor's cabin. An investigator with the Craighead County Sheriff's Office, with whom Guthrie was well acquainted, brought him in for questioning. The investigator told Guthrie that he was being questioned about a breaking or entering. Guthrie eventually admitted stealing beer, trash bags, and Q-tips. The State initially charged Guthrie with breaking or entering and theft of property but later amended the information to charge him with residential burglary and theft of property and to allege that Guthrie should be sentenced as a habitual offender.

II. *Discussion of Adverse Rulings*

Counsel discusses the trial court's denial of Guthrie's motion to suppress his custodial statement; the denial of Guthrie's motions for directed verdict; the denial of Guthrie's motion for a mistrial; the implicit overruling of Guthrie's objection during closing argument; the sustaining of the State's objection to Guthrie's request for sentencing by the court; and the denial of Guthrie's request for an appeal bond. The latter two rulings were the ones this court identified as having been omitted from counsel's previous discussion of all adverse rulings.

Guthrie moved to suppress his custodial statement, arguing that it had been induced by the investigator's "promise" that he would be charged with breaking or entering and theft of property, and not residential burglary and theft of property. A statement induced by a false promise of reward or leniency is not a voluntary statement. *Fuson v. State*, 2011 Ark. 374, 383 S.W.3d 848. The trial court denied the motion to suppress, finding that the investigator did not make any promises about the charges Guthrie would face, that the investigator only gave his opinion about the possible charges considering the facts, and that it was up to the prosecutor to determine what charges would be brought.

The trial court denied Guthrie's motion for directed verdict on residential burglary. Ark. Code Ann. § 5-39-201(a)(1) (Supp. 2017). Guthrie had argued that the cabin was not an "occupiable structure" as defined by Ark. Code Ann. § 5-39-101(8)(A)(ii) because the cabin did not have running water at the time of Guthrie's entry. The owner, however, testified that he and his grandchildren use the cabin for sleeping and eating. Even though someone had stolen the copper pipes, and therefore the cabin had no running water for a time, the cabin was the type of structure that is capable of being occupied by people and was being used for overnight accommodation. *Julian v. State*, 298 Ark. 302, 767 S.W.2d 300 (1989). The trial court also denied Guthrie's motion for directed verdict as to theft of property. Ark. Code Ann. § 5-36-103(b)(4)(A). Guthrie argued that the evidence concerning the value of the stolen items was not "concrete enough" for a jury, but he acknowledged that there had been some evidence of value.

The trial court denied Guthrie's motion for a mistrial when the jury returned with a guilty verdict for both residential burglary and the lesser-included offense of breaking or entering. See *Smith v. State*, 2011 Ark. App. 162. A defendant may be prosecuted for more than one offense, but he or she may be convicted of only one. *Meadows v. State*, 360 Ark. 5, 199 S.W.3d 634 (2004); *Hill v. State*, 314 Ark. 275, 862 S.W.2d 836 (1993). When a jury finds a defendant guilty of both a lesser and greater offense, the court should enter a judgment of conviction for only the greater offense. *Id.* Here, Guthrie was convicted of the greater offense—residential burglary.

Defense counsel objected during the prosecutor's closing argument, stating that the prosecutor had mischaracterized Guthrie's argument; however, the objection was not ruled on by the trial court and was not pursued by defense counsel at trial. It was Guthrie's burden to obtain a ruling, and his failure to secure a ruling constitutes a waiver, precluding its consideration on appeal. *Walker v. State*, 301 Ark. 218, 783 S.W.2d 44 (1990).

The trial court sustained the State's objection to Guthrie's request to have the court fix sentencing, as opposed to the jury. Arkansas Code Annotated section 5-4-103(a) (Repl. 2013) provides that if a defendant is charged with a felony and is found guilty of an offense by a jury, the jury shall fix punishment. The court shall fix punishment if the prosecution and the defense agree to it. Ark. Code Ann. § 5-4-103(b)(4).

The trial court denied Guthrie's request for an appeal bond, noting that a notice of appeal had not yet been filed. Arkansas Rule of Appellate Procedure—Criminal 6(b)(1) states that, when a defendant has been found guilty and is sentenced to serve a term of

imprisonment, *and he or she has filed a notice of appeal*, the trial court shall not release the defendant on bail or otherwise pending an appeal unless it makes certain findings.

III. *Guthrie's Pro Se Points for Reversal*

Guthrie raises several pro se points for reversal. He argues that the jury foreman lied when he said that he did not know Guthrie; that it was illegal to occupy the cabin because it lies within the boundaries of the St. Francis Sunken Lands Wildlife Management Area, which forbids occupation of a permanent building or shelter; that no habitual-offender status hearing was conducted and that, if it had been, one conviction would have been removed from consideration because a charge from 1989 had been nolle prossed; and that the trial court improperly instructed the jury about the timing of his eligibility for transfer.

IV. *Conclusion*

The test for filing a no-merit brief is not whether there is any reversible error but whether an appeal would be wholly frivolous. *Wright v. State*, 2015 Ark. App. 300. From our review of the record and the brief presented by defense counsel, including consideration of Guthrie's pro se points for reversal, which are either not preserved for review or do not otherwise support reversal, we find compliance with Rule 4-3(k) and that there is no merit to an appeal.

Affirmed; motion to withdraw granted.

GRUBER, C.J., and HARRISON, J., agree.

Joseph C. Self, for appellant.

Leslie Rutledge, Att'y Gen., by: *Rebecca Bailey Kane*, Ass't Att'y Gen., for appellee.

