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ARKANSAS COURT OF APPEALS

DIVISION III
No. CR-22-179

	Opinion Delivered August 30, 2023
ANTONIO HOLLIMAN APPELLANT	APPEAL FROM THE ARKANSAS COUNTY CIRCUIT COURT, NORTHERN DISTRICT
V.	[NO. 01SCR-18-181]
STATE OF ARKANSAS APPELLEE	HONORABLE DONNA GALLOWAY, JUDGE
	AFFIRMED AS MODIFIED; MOTION TO WITHDRAW GRANTED

BRANDON J. HARRISON, Chief Judge

A jury found Antonio Holliman guilty of rape, and he was sentenced to thirty years' imprisonment. Holliman's attorney has filed a no-merit brief and a motion to withdraw as counsel pursuant to Arkansas Supreme Court Rule 4-3(b)(1) (2023) and *Anders v. California*, 386 U.S. 738 (1967), asserting that this appeal is wholly without merit. The clerk of this court mailed a copy of counsel's motion and brief to Holliman's last-known address informing him of his right to file pro se points for reversal, which he has done. Consequently, the attorney general has filed a brief in response. We grant counsel's motion to withdraw and affirm the conviction as modified.

In November 2018, the State charged Holliman with committing the offense of rape by engaging in sexual intercourse or deviate sexual activity with a person who was less than

fourteen years of age. In August 2021, the circuit court convened a jury trial. The State presented the following testimony.

Crystal Cox is the mother of nine-year-old Minor Child 1 (MC1) and six-year-old Minor Child 2 (MC2). In October 2018, Cox and the children lived in Stuttgart, as did her parents and siblings, including her sister Leoshia. The children spent a lot of time with Leoshia and often stayed at her home, sometimes on weekends. Holliman lived with Leoshia, so the children spent a lot of time with him as well. Cox recalled a particular weekend in October 2018 when the children stayed with Leoshia while Cox was in Little Rock. Cox picked up the children on Sunday evening and drove them home, which was approximately five minutes away. Around five to ten minutes after they had returned home, MC2, who was then three years old, approached Cox and stated that her private area hurt (her "front booty" as opposed to her "back booty"). MC2 said, "Antonio scratched me." Cox examined MC2 and observed scratches, which she described as little whelps, on the outside of MC2's vagina (labia). Cox also observed scratches and some blood on the inside of MC2's labia. Cox called her parents and asked them to meet her and the children at the hospital. MC1 stayed with her parents while she took MC2 into the emergency room. An ER nurse reported the incident to the child-abuse hotline, and police told Cox to bring MC2 to the child advocacy center (CAC) the next morning, which she did. Cox said that she and MC2 have talked some about what happened, and MC2 has never changed her story.

MC1 explained that on that weekend in October 2018, he saw MC2 go into the bathroom and close the door, then Holliman opened the door and went into the bathroom,

too. When MC2 came out of the bathroom she was crying and told MC1 that she was "gonna tell Mommy." On cross-examination, MC1 denied seeing Holliman spank MC2. The defense introduced a video of MC1's interview at the CAC in which he said he had opened the door to the bathroom, saw that MC2 had peed on the floor, and saw Holliman "slap her booty."

Lisa Fraizer, the ER nurse who examined MC2, said that MC2 reported that her aunt's boyfriend had scratched her vagina and had spanked her for trying to pull up her pants. Fraizer observed redness to MC2's labia. On cross-examination, Fraizer confirmed that she had not observed scratches or blood, but she had been two feet away and had not touched MC2.

MC2 stated that Holliman had done a bad thing to her by coming into the bathroom and touching her "back booty." The State introduced MC2's interview at the CAC in which she told the investigator that her "inside" was hurt because "'Tonio sticked his fingers in me." She said MC1 had been at school when this happened.

After the State rested, the defense moved for a directed verdict. First, the defense argued that the children's inconsistent testimony was untrustworthy and insufficient to establish the elements of the charge. Next, the defense asserted that the medical reports were circumstantial evidence, that "the law says that circumstantial evidence cannot convict someone unless there's no other reasonable explanation for that," and that "[n]o testimony had been given as to whether or not there were any other explanations for that." The defense argued that there had been no evidence that sexual assault is the only way that this kind of injury could occur and no link made between Holliman and the injury other than

MC2's testimony.

The motion was denied, and the defense offered the following testimony. Leoshia Moore said that MC2 had liked Holliman and that she (Leoshia) had been jealous of their bond. She had not noticed anything abnormal about MC2's or Holliman's behavior during the weekend in question. She also explained that she normally watched MC2 but that she had a migraine that particular evening and had taken a nap. She said that she believed MC2's allegations.

Holliman testified that he treated the children like his own nieces and nephews and that he would never hurt a child. He learned of the allegations against him when Cox confronted him, and he was threatened by both Cox and her father. He denied ever touching either of the children. On cross-examination, Holliman said the scratches had been self-inflicted and that someone had coached MC2 to accuse him. Holliman had escaped from the county jail after his arrest, and he explained his escape was necessary because he was being given the wrong blood pressure medication and he was looking for a lawyer and "trying to get some help."

The jury found Holliman guilty of rape and recommended a sentence of thirty years' imprisonment. The court accepted the recommendation and sentenced Holliman accordingly. Holliman timely appealed the circuit court's order.

Holliman's counsel filed a no-merit brief and a motion to withdraw, which were submitted to this court on 14 December 2022. We denied the motion to withdraw and ordered rebriefing, however, because counsel failed to address all adverse rulings as required by Rule 4-3(b)(1). *Holliman v. State*, 2023 Ark. App. 1. Counsel has now filed a second

no-merit brief and motion to withdraw.

Rule 4-3(b)(1) requires that 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. *T.S. v. State*, 2017 Ark. App. 578, 534 S.W.3d 160. 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. *Vail v. State*, 2019 Ark. App. 8.

Counsel identifies nine rulings potentially adverse to Holliman. The first occurred at a pretrial hearing in October 2019 when defense counsel explained that it had certain discovery (DNA testing) that needed be completed and asked for new pretrial and jury-trial dates. Defense counsel also asked that the extra time needed not be tolled for speedy-trial purposes, and that request was denied. On appeal, counsel explains that a period of delay resulting from a continuance granted at the request of the defendant or his counsel is excluded for the purposes of computing speedy trial pursuant to Ark. R. Crim. P. 28.3(c), therefore the time was correctly excluded for speedy-trial purposes, and the issue presents no meritorious grounds for reversal.

Next, at a bond-reduction hearing convened on 4 November 2020, defense counsel acknowledged that Holliman had an escape charge from the jail in which he currently

resided but argued that Holliman had not left the county and was trying to "clear up some stuff and to get some money together to hire an attorney." The State countered that Holliman had absconded for ten days, that he was apprehended in a different county, and that he did not hire an attorney during that time. Based on the arguments, and particularly in light of the escape charge, the court declined to allow Holliman out on bond. On appeal, counsel explains that criminal defendants have an absolute right to a reasonable bail, except in capital cases, so the circuit court erred in denying Holliman a bond. However, counsel asserts, the issue of bond is moot because a determination on the bond issue would have no practical legal effect after Holliman's conviction and sentence in this case. Thus, there are no meritorious grounds for reversal on this issue.

The third adverse ruling occurred during Cox's testimony when defense counsel objected on hearsay grounds to Cox repeating what MC2 had said to her the night of the incident. The State responded that MC2's statements were not offered for the truth of the matter asserted but instead to explain Cox's actions that night. Defense counsel conceded that the statements could be admitted for purpose. On appeal, counsel explains that Cox's testimony of MC2's statements was allowable because it was given to explain Cox's conduct and not to prove the truth of the matter asserted; thus, to the extent this is an adverse ruling, it does not provide a basis for reversal.

During Cox's cross-examination, the State objected on relevance and opinion grounds when defense counsel asked Cox whether the ER nurse had "performed a poor job" when examining MC2, and the court sustained the objection. Counsel explains on appeal that under Ark. R. Evid. 701(1), opinion testimony by lay witnesses is limited to

opinions that are rationally based on the perception of the witness; that Cox was testifying as a lay witness; and that her opinion of the nurse's performance would go beyond what she could perceive as it requires specialized knowledge of the standards and practices for nurses. Thus, this adverse ruling does not provide a basis for reversal.

Also during Cox's cross-examination, the State interjected, "Your Honor, I believe we're getting beyond the scope of my re-direct examination here." The court advised defense counsel, "Make sure you keep your questions within what has already been testified to," to which counsel responded, "Yes. That's all I have." On appeal, counsel asserts that under the rules of evidence, cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness and that the scope and extent of cross-examination is within the circuit court's discretion. *Mikel v. Dev. Co.*, 269 Ark. 365, 602 S.W.2d 630 (1980). Counsel contends that this ruling falls within the court's discretion and therefore does not provide a basis for reversal.

The sixth adverse ruling occurred when defense counsel asked Lisa Fraizer, "If [Cox] says that you're lying if you did say that you don't see any scratches what—what do you say about that?" The State objected, stating that no such testimony had been presented. The court ruled that defense counsel had phrased the question a bit differently to Cox and told him to ask the question again. Defense counsel then asked, "If Crystal Cox said that you would be lying if you said that you could not see any scratches, what do you say to that?" No objection was made to the rephrased question. Defense counsel asserts that there is only a slight difference between the rephrased question and the original question and that no material change in the question resulted from this ruling. Counsel concludes that this ruling

does not provide a basis for reversal.

Counsel also explains that any challenge to the sufficiency of the evidence on the basis of the defense's motion for a directed verdict would be wholly without merit because the motion was not renewed at the close of the defense's case. Rule 33.1(a) of the Arkansas Rules of Criminal Procedure requires that directed-verdict motions in a jury trial be made at the close of the State's evidence and at the close of all the evidence, and such motions shall state the specific grounds therefor. The failure to challenge the sufficiency of the evidence in this manner and at the proscribed times waives any question pertaining to the sufficiency of the evidence to support the verdict. Ark. R. Crim. P. 33.1(c).

The next adverse ruling occurred after defense counsel asked Leoshia Moore, "So, would it make sense to you if someone testified that Antonio always kicked her?"[1] The State objected on relevance grounds, and the court sustained the objection and told defense counsel to rephrase. Defense counsel rephrased the question: "Did you witness MC2 having any behavior that would lead you to believe that Antonio might be kicking her regularly?" On appeal, counsel asserts that relevant evidence has the tendency to make the existence of any consequential fact more or less probable. Ark. R. Evid. 401. Counsel explains, "Whether or not the testimony would make sense to Leoshia is not relevant. The trial court correctly had the Defense counsel rephrase to a relevant question." Thus, counsel argues that this adverse ruling does not provide a basis for reversal.

The final adverse ruling occurred when the State indicated its intent to question

[1]During MC2's CAC interview, when asked how else Holliman had touched her, she said, "He always kick me."

Holliman about his escape from county jail because it was an indication of guilt. Defense counsel countered that Holliman had not been convicted of escape, but the court found that it was a question of fact for the jury and allowed the State to question Holliman about the escape. On appeal, counsel notes that under Arkansas case law, whether an escape shows consciousness of guilt is a question of fact for the jury, and when evidence of a prior crime reflects a consciousness of guilt, it is independently relevant and admissible under Ark. R. Evid. 404(b). *Skiver v. State*, 336 Ark. 86, 983 S.W.2d 931 (1999); *Centeno v. State*, 260 Ark. 17, 537 S.W.2d 368 (1976). Based on this case law, counsel contends, the circuit court did not err in allowing evidence of Holliman's escape to be presented, so this adverse ruling provides no basis for reversal.

Holliman was given the opportunity to file pro se points when this case was originally appealed, and on rebriefing, he has chosen to stand on those original pro se points and to also file additional points. In his original pro se points, Holliman asserts the following arguments. First, a number of witnesses were subpoenaed by the State but did not appear for trial; there was no motion to exclude these witnesses made to the court; and his constitutional right to confront witnesses against him had been violated. Second, he was denied his right to a fair trial, citing *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the State from striking a venireperson as a result of racially discriminatory intent). Third, the circuit court admitted certain medical reports without proper authentication, and some reports were incomplete. Fourth, a nurse at the CAC who examined MC2 was not available to testify because she had passed away. Fifth, certain

evidence was not sent to the state crime lab. Sixth, Cox's testimony and MC2's testimony contained inconsistencies. Seventh, the State referred to Holliman as a pedophile in its closing argument. Eighth, the jury deliberated for only five to ten minutes, which was not long enough. Ninth, the transcript shows that MC2 is a liar. In his additional points, the only new argument he presents is that the prosecutor blocked his view of the victim and one of the witnesses during their testimony by standing in front of them, which was a violation of his Sixth Amendment right to confront his accusers.

In response to Holliman's pro se points, the State argues that except for an assertion of inconsistent testimony made in the directed-verdict motion (which was not renewed), the points asserted by Holliman were not raised, developed, or ruled on below. Thus, Holliman's points are not preserved for review. *See Strong v. State*, 372 Ark. 404, 277 S.W.3d 159 (2008) (explaining that an appellant must raise and develop an argument and obtain a ruling on the argument to preserve the matter for this court's review). Further, Holliman's points lack supporting argument and/or citation to authority, and this court will not consider an argument, even a constitutional one, when the appellant presents no citation to authority or convincing argument in its support and it is not apparent without further research that the argument is well taken. *Id.* For these reasons, the State concludes, Holliman's conviction should be affirmed.

We hold that Holliman's pro se arguments lack merit, are not preserved, and lack any factual basis to support a ground for reversal. From our review of the record and the briefs presented, we hold that counsel has complied with the requirements of Rule 4-3(b) and that there is no merit to this appeal. Accordingly, we grant counsel's motion to

withdraw and affirm Holliman's conviction.

Even though we affirm Holliman's conviction, we note our duty in a no-merit appeal to fully examine the proceedings in order to decide if an appeal would be wholly frivolous. *Tijerina-Palacios v. State*, 2012 Ark. App. 444. In reviewing the record, we have determined that the circuit court's order is illegal on its face regarding courts costs assessed to Holliman. In Arkansas, sentencing is entirely a matter of statute. *See* Ark. Code Ann. § 5-4-104(a) (Supp. 2021); *Richie v. State*, 2009 Ark. 602, 357 S.W.3d 909. We view an issue of a void or an illegal sentence as one of subject-matter jurisdiction in that it cannot be waived by the parties and may be addressed for the first time on appeal. *Holmes-Childers v. State*, 2016 Ark. App. 464, 504 S.W.3d 645. A sentence is void or illegal when the circuit court lacks the authority to impose it. *Id.*

The sentencing order reflects that the court costs billed to Holliman are $165. Arkansas Code Annotated sections 16-10-301 and -302 (Repl. 2021) mandate assessment of uniform court costs throughout the State. Arkansas Code Annotated section 16-10-305(a)(1) (Supp. 2021) provides that "there shall be levied and collected the following court costs from each defendant upon each conviction . . . one hundred fifty dollars ($150) for a misdemeanor or felony violation of state law[.]" Further, section 16-10-305(d) directs that "[n]o . . . circuit court shall assess or collect any other court costs other than those authorized by this act, unless specifically provided by state law."

Although this issue was not raised below, counsel was not precluded from bringing this to our attention on appeal because, as noted above, we treat illegal sentences as a matter of subject-matter jurisdiction regardless of whether any objection is raised below. *Holmes-*

Childers, *supra*. Because an attack on an illegal sentence has merit, this appeal is not technically a no-merit appeal, and Holliman's counsel should not have characterized it as such. However, in the interest of judicial economy, and because the illegal sentence has nothing to do with culpability and relates only to punishment, we will correct the error in lieu of remanding for rebriefing or remanding to the circuit court. *Norton v. State*, 2018 Ark. App. 507, 563 S.W.3d 584. Thus, we modify Holliman's court costs from $165 to $150.

Affirmed as modified; motion to withdraw granted.

THYER and MURPHY, JJ., agree.

Wesley Rhodes, for appellant.

Tim Griffin, Att'y Gen., by: *David L. Eanes, Jr.*, Ass't Att'y Gen., for appellee.