NOT DESIGNATED FOR PUBLICATION

# ARKANSAS COURT OF APPEALS

DIVISION II
**No.** CACR 07-941

| | |
|---|---|
| | **Opinion Delivered** JANUARY 14, 2009 |
| JAYSON WAYNE CARROLL<br>APPELLANT | APPEAL FROM THE COLUMBIA COUNTY CIRCUIT COURT, [NO. CR-06-55-5] |
| V. | HONORABLE HAMILTON H. SINGLETON, JUDGE |
| STATE OF ARKANSAS<br>APPELLEE | AFFIRMED; MOTION TO BE RELIEVED GRANTED |

**JOHN B. ROBBINS, Judge**

Appellant Jayson Wayne Carroll was convicted by a jury in Columbia County Circuit Court of the offense of second-degree escape. Pursuant to *Anders v. California*, 386 U.S. 738 (1967) and Rule 4-3(j)(1) of the Rules of the Arkansas Supreme Court and Court of Appeals, appellant's counsel has filed a motion to withdraw from representation on the grounds that this appeal is without merit. Counsel's motion was accompanied by a brief that purports to discuss all matters that might arguably support an appeal, including each adverse ruling, and a statement as to why each point raised would not be a meritorious ground for reversal. Appellant was provided a copy of his attorney's brief and notified of his right to file a statement of pro se points for reversal within thirty days but did not file any such points. The State, via the Attorney General, has declined to file a brief in this matter.

This is the second time appellant's counsel has attempted to be relieved from representation in a no-merit appeal of this conviction. In the first attempt, we discerned that a complete record had not been brought up to our court for review, so we remanded the appeal for supplementation of the record. *See Carroll v. State*, CACR07-941 (June 25, 2008), unpublished opinion. Also in that opinion, we directed counsel to ensure that all adverse rulings were abstracted and discussed in a substituted brief. *See id.* The record has been supplemented, and appellant's counsel has filed a substituted brief.

First, we must consider the sufficiency of the evidence to sustain the conviction. Second-degree escape is defined in Ark. Code Ann. § 5-54-111(a)(2) (Repl. 2006), and it is committed when a person who has been found guilty of a felony escapes from custody. Appellant had been convicted of two felony offenses (possession of methamphetamine and false imprisonment of his wife). As alleged, appellant was in the county detention facility awaiting transport to the Department of Correction when he and another detainee escaped from confinement by climbing over the razor-wired fencing of the facility. Appellant was injured by the razor wire but nonetheless fled on foot and hid; he was recaptured the next day. Appellant was subject to a sentencing range of zero to twelve years for this crime. The State offered appellant a five-year sentence prior to trial, but this offer was refused by appellant.

Appellant did not contest his guilt for the escape, but rather submitted his case to a jury of his peers for sentencing purposes. Therefore, any argument about the sufficiency of the evidence would be wholly without merit. There was an abbreviated trial on the merits, and

defense counsel told the jury that appellant was not contesting the actual escape, which was filmed on videotape and played for the jury. No motion for directed verdict was made. Thus, any adverse rulings concerning the procedures and evidence received in the guilt phase would likewise be of no effect in presenting an argument for reversal.

The focus of the proceedings was the sentencing phase, during which there were several adverse rulings. Arkansas Code Annotated section 16-97-103 (Repl. 2006) delineates examples of evidence that may be relevant for the sentencing body to consider. Our rules of admissibility and exclusion must govern the introduction of evidence in the sentencing phase of trials, *Hill v. State*, 318 Ark. 408, 887 S.W.2d 275 (1994), but statutory guidelines provide that certain evidence is admissible at sentencing which would not have been admissible at the guilt phase of the trial. *See Crawford v. State*, 362 Ark. 301, 208 S.W.3d 146 (2005). Thus, the range of permissible evidence is generally broader than that available during the guilt phase. *MacKool v. State*, 365 Ark. 416, 231 S.W.3d 676 (2006). Evidentiary rulings are reviewed for an abuse of discretion. *Rollins v. State*, 362 Ark. 279, 208 S.W.3d 215 (2005).

The first adverse ruling came during the testimony of the Columbia County Sheriff who recounted his responsibility to capture any escapee and who stated that the media was notified so that the public could be on the lookout for the two escaped criminals. The sheriff then related that jail escapes create panic and unrest in the community. Defense counsel objected that this called for speculation and moved to strike the answer. The trial court urged the prosecutor to lay a foundation. The sheriff testified that the news media had broadcast the identity of the escapees and that elderly citizens had repeatedly called his department with

concern over the escapees. Appellant did not further object, nor did he obtain a final ruling on the motion to strike, thereby waiving any argument on appeal. *See Jackson v. State*, 334 Ark. 406, 976 S.W.2d 370 (1998).

The sheriff continued to testify about the manpower required by law enforcement to stop their other work and focus on capturing the escapees. Defense counsel objected when the sheriff stated that he had concerns about appellant doing something erratic while on the loose. In response, the prosecutor withdrew his question. The prosecutor asked another question of the sheriff's opinion about how dangerous appellant was to society on a scale of one to ten, but defense counsel objected. The prosecutor abandoned the question. No further relief was requested, such as a curative instruction or the like, so that no meritorious argument could be presented for reversal on these objections.

The Magnolia Police Chief was next to testify about the manpower and costs associated with recapturing the two escapees. The chief stated that appellant had "a long history with our department," which drew an objection as improper evidence of any prior criminal behavior. The prosecutor turned his questioning away from "gossip" to whether appellant's prior history was relevant to the urgency that his office had in helping recapture him. The chief said, "yes." No further objection was lodged nor was any ruling obtained; thus appellant received all the relief he requested.

When appellant took the stand, he explained that he had reconciled with his wife, who was purportedly the victim of false imprisonment. Appellant said he was twenty-six years old, the father of a four-year-old son, and presently living in the Tucker prison facility. Appellant

stated that his wife had sent him a letter and Christmas card, but the State objected to the contents of those documents as hearsay because the wife was not at trial. The judge sustained that objection, and appellant did not pursue having the contents read to the jury. There is no discernable prejudice in excluding what was clearly hearsay. *See* Ark. R. Evid. 801 and 802. Furthermore, appellant was able to present to the jury evidence that his wife reconciled with him, which was his attorney's stated desire in bringing up the existence of the documents.

Also during appellant's testimony, he attempted to explain what the other escapee, Tommy Cockrun, had advised him about prison life. The State objected to the hearsay and later to leading questions, which objections were sustained. Those evidentiary rulings were correct. *See* Ark. R. Evid. 802 and 611(c). Appellant was nonetheless able to convey that what he learned made him very fearful of going to prison, such as fear of being harmed or sexually abused, and fear of having his food taken away. Appellant was allowed to testify that Cockrun had made alcohol in the jail, and that they were both drunk when they decided to escape. There is no prejudice resulting here because the hearsay was not admissible, and appellant presented the evidence by other means.

After recapping what appellant explained were his motives in deciding to escape, the State objected that this was not relevant. The trial judge urged defense counsel to move on in questioning, which defense counsel did. We can discern no prejudice where appellant was given a fair opportunity to explain the reasons for escape. The trial court is permitted reasonable control over questioning of witnesses to ascertain truth without needless consumption of time. Ark. R. Evid. 611(a).

During the prosecutor's cross-examination of appellant, he noted that appellant had earlier testified that he was very intoxicated during the escape. Then the prosecutor said that appellant "did not look drugged to me" on the videotape. Defense counsel objected to the comment, and the prosecutor rephrased it as a question. He then asked appellant if he himself would agree that on film, he did not look drunk. Appellant replied, "I was highly intoxicated." Appellant's counsel did not ask for any curative instruction, and he received the relief by having the prosecutor to refrain from commenting on the evidence.

Defense counsel again objected when the prosecutor asked, "whenever you escape you are always a good escapee . . . you do not hurt people, right?" Defense counsel stated that this insinuated that appellant had escaped more than once, and upon rephrasing of the question, that line of questioning was left unanswered. Again, appellant's counsel was diligent in keeping the prosecutor from asking the question. Furthermore, appellant's counsel obtained no ruling from the trial court nor asked for any curative instruction.

At the conclusion, the jury deliberated and returned to court, recommending that appellant be sentenced to twelve years in prison and assessed an $8000 fine. Defense counsel asked the judge to consider suspending part of the sentence in light of the maximum sentence rendered by the jury. The judge stated that "while I won't tell you I won't consider it, I doubt that I will do anything to in any way take away the significance of what this jury has done. They are the ones that made this call and I have got to respect their decision." No reversible error could be predicated on this finding because a trial court may in its discretion suspend a sentence, but it is not a matter of right. *Dale v. State*, 55 Ark. App. 184, 935

S.W.2d 274 (1996); *Bing v. State*, 23 Ark. App. 19, 740 S.W.2d 156 (1987). Here, the judge agreed to consider the request but denied it. No reversible error could be asserted on appeal.

After reviewing this appeal under the proper standards, we affirm appellant's conviction and sentence. Counsel's motion to be relieved is granted.

HART and BAKER, JJ., agree.