

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT FRAGALE,	§
	§ No. 509, 2012
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 1109001492
	§
Plaintiff Below-	§
Appellee.	§

Submitted: February 13, 2013

Decided: February 19, 2013

Before **HOLLAND, BERGER** and **JACOBS**, Justices

ORDER

This 19th day of February 2013, upon consideration of the appellant’s brief filed pursuant to Supreme Court Rule 26(c), his attorney’s motion to withdraw, and the State’s response thereto, it appears to the Court that:

(1) The defendant-appellant, Robert Fragale, was found guilty by a Superior Court jury of Criminal Trespass in the First Degree, a lesser-included offense of Burglary in the Second Degree.¹ He was sentenced to 1

¹ Fragale was acquitted of the additional charges of Assault in the Second Degree, Possession of a Deadly Weapon During the Commission of a Felony, two counts of Endangering the Welfare of a Child, Malicious Interference With Emergency Communication, Criminal Mischief and two counts of Menacing.

year of Level V incarceration, to be suspended for 1 year of probation. This is Fragale's direct appeal.

(2) Fragale's counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: a) the Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for claims that could arguably support the appeal; and b) the Court must conduct its own review of the record to determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.²

(3) Fragale's counsel asserts that, based upon a careful and complete examination of the record and the law, there are no arguably appealable issues. By letter, Fragale's counsel informed Fragale of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw, the accompanying brief and the complete trial transcript. Fragale also was informed of his right to supplement his attorney's presentation. Fragale responded with a brief that raises one issue for this Court's consideration. The State has responded to the position taken by Fragale's

² *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

counsel as well as the issue raised by Fragale and has moved to affirm the Superior Court's judgment.

(4) Fragale raises one issue for this Court's consideration. He claims that the evidence at trial does not support his conviction of Criminal Trespass in the First Degree because two witnesses at trial perjured themselves when they testified that he did not have permission to enter the premises where the incident occurred.

(5) The evidence presented at trial established the following. On September 2, 2011, Fragale entered the Newark, Delaware home of his stepsister. He had not been invited and, according to the testimony of his stepsister's boyfriend, he was not welcome there. When Fragale entered the home, his two nephews, a family friend and his stepsister's boyfriend were present. The boyfriend testified that he asked Fragale to leave, but that Fragale refused. Fragale then went to the basement and began rummaging through the boyfriend's toolbox looking for an item he hoped to retrieve.

(6) When the boyfriend again asked Fragale to leave, Fragale challenged him to "make him" leave. The boyfriend grabbed a tire iron, but then dropped it and ran upstairs to call the police. Fragale followed him with a tool bar. As the boyfriend pick up the phone, Fragale knocked it away and hit the boyfriend with the tool bar in the legs and head. Fragale's

two nephews fled next door with the friend and called 911. The boyfriend suffered injuries to the back of his head that required two stitches. Fragale's stepsister testified that she was not at home at the time of the incident, but that Fragale had been told numerous times not to enter her home unannounced. Fragale testified that he was welcome in his stepsister's home and that he knocked before he entered on the day of the incident, but that the boyfriend did not respond. He denied attacking the boyfriend with the tool bar.

(7) Fragale claims that there was insufficient evidence to convict him of Criminal Trespass because both his stepsister and her boyfriend gave false testimony at trial about whether he was permitted to enter his stepsister's home.³ It is well-settled that the jury is charged with finding the facts at trial and has sole responsibility for determining witness credibility and resolving any conflicts in the testimony.⁴ It is clear from the record that, while Fragale testified concerning his version of events, the jury did not find his testimony that he had permission to enter his stepsister's home on the day of the incident to be credible. It was within their province to so find. In

³ Del. Code Ann. tit. 11, §823 (“[a] person is guilty of criminal trespass in the first degree when the person knowingly enters or remains unlawfully in a dwelling”)

⁴ *Chao v. State*, 604 A.2d 1351, 1363 (Del. 1992).

the absence of any evidence or error or abuse of discretion, we conclude that Fragale's claim is without merit.

(8) This Court has reviewed the record carefully and has concluded that Fragale's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Fragale's counsel has made a conscientious effort to examine the record and the law and has properly determined that Fragale could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the State of Delaware's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Carolyn Berger
Justice