Opinion issued August 25, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00647-CR
NO. 01-15-00648-CR

JAY COLBY FITZGERALD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 180th District Court
Harris County, Texas
Trial Court Case Nos. 1474580 and 1474585

MEMORANDUM OPINION

Appellant Jay Colby Fitzgerald was indicted for two aggravated robberies with a deadly weapon that occurred the morning of July 2, 2014: one against Natty Gonzalez-Roman and the other against Dora Jimenez. Fitzgerald pleaded not guilty to both charges. Following a consolidated jury trial, Fitzgerald was found

guilty on both charges and sentenced by the trial court to 40 years' confinement in the Texas Department of Criminal Justice, Institutional Division, for each, with the sentences to run concurrently.

Fitzgerald appealed both judgments, but his counsel has filed an *Anders* brief and a motion to withdraw in the appeal relating to the aggravated robbery of Gonzalez-Roman. *See Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967). With respect to the conviction for the aggravated robbery of Jimenez, however, Fitzgerald challenges the sufficiency of the evidence. We grant counsel's motion to withdraw in cause number 01-15-00647-CR, the case relating to Gonzalez-Roman, and we affirm the trial court's judgments in both causes.

Background

Gonzalez-Roman Robbery

Natty Gonzalez-Roman testified at trial that she stopped at the Fiesta grocery store at 10401 Jensen at about 8:00 a.m. on July 2, 2014. While Gonzalez-Roman was in the store, surveillance video of the parking lot shows a black car parking next to Gonzalez-Roman's vehicle. Gonzalez-Roman testified that as she was putting her groceries into her car, she noticed the black car was very close to her car. Gonzalez-Roman testified that, as she finished loading groceries, the driver of the black car exited his vehicle and moved toward her with one hand inside his pocket and the other behind his back. Gonzalez-Roman testified that, as he

approached, he said "give me your fucking purse." Gonzalez-Roman refused, and the man pulled out a gun, holding it in front of his belt and facing Gonzalez-Roman. Screaming, Gonzalez-Roman ran toward a fire truck in the Fiesta parking lot. Gonzalez-Roman told the firemen that a man with a gun wanted to kill her and take away her purse. Gonzalez-Roman pointed toward the black car as it drove away. Gonzalez-Roman identified Fitzgerald in court as the perpetrator.

Bryan Cody Sewell, a fireman for the Houston Fire Department, also testified about the robbery of Gonzalez-Roman. That morning, Sewell was among several fireman shopping at the same Fiesta as Gonzalez-Roman. Sewell testified that, as they were loading groceries into the fire truck, he heard a woman screaming and then saw her running towards him. He recalled hearing the woman say that a man was trying to kill her and that he had a gun. Sewell testified that he saw an individual in a black car leaving the scene at that moment, and that he had previously noticed that there was only one person in that car. The firemen reported the robbery to citywide dispatch.

Officer D. Stone with the Houston Police Department ("HPD") responded to the scene. Officer Stone testified that he spoke with a witness at the scene who was able to get a partial license plate from the suspect vehicle: 6455. Officer Stone testified that Gonzalez-Roman described the perpetrator as a "Black, African-American male, 30 to 35 years old, about five nine, five ten in height, 200 to 250 in

weight, black hair, brown eyes, dark brown complexion." While he was at the Fiesta parking lot, Officer Stone heard another robbery call go out. Noting similar descriptions in the robbery suspect and vehicle, Officer Stone included the case number for that second call in his report regarding the Gonzalez-Roman robbery.

Jimenez Robbery

At around 8:30 a.m. that same morning, Jimenez was standing near her truck outside J & L Appliance, which is within two miles of the Fiesta on Jensen. Jimenez testified that a newer model black car driven by a black man pulled into the parking lot and its driver approached as she was trying to get into her truck. She testified that he blocked her from closing her door. She began to scream, and the man told her to "shut up." Jimenez testified that he then reached out and put one hand around her throat while his other hand pulled at her purse. Unable to pull the purse away, Jimenez recalled that he then pulled a gun from his front waistband. At that point, Jimenez let him take her purse, and the man fled in the black car. According to Jimenez, her purse contained a $350 check written to her, a money order, $1,000 in cash, her wallet, and her wedding rings.

Jimenez reported the robbery outside J & L Appliance to police, and HPD Officers M. Pesses and N. Hernandez responded to the scene. Officer Pesses testified at trial that she observed a large red spot on Jimenez's neck that was consistent with Jimenez's claim that the perpetrator put his hands to her throat.

According to Officer Pesses's report, Jimenez described the perpetrator as a tall black male with a dark complexion and shiny teeth wearing a black jersey with a white logo.

The investigation

HPD's Officer J. Olivarez testified regarding the investigation into these two robberies. Officer Olivarez testified that, on the morning of June 3, 2014, he and his partner reviewed incoming aggravated robbery reports from their area. Officer Olivarez explained that, based on similar descriptions of the suspect and the vehicle in the Gonzalez-Roman and Jimenez robberies, he and his partner believed the two robberies could be related, and they began to work the cases.

Relying on surveillance video from the Fiesta parking lot, the officers determined that the suspect there drove a black 2011 Ford Taurus. The officers ran the partial plate information provided by a witness to the Gonzalez-Roman robbery. The officers found only one black 2011 Ford Taurus with the partial plate 6455. The officers identified Crystal Young as the registered owner of that car. The officers further connected Fitzgerald to Young's Ford Taurus because Fitzgerald received a traffic citation while driving Young's Ford Taurus in January 2014.

Officer Olivarez testified that he and his partner observed similarities in Fitzgerald's appearance and witness descriptions of the perpetrator for both

robberies. The officers prepared a photo array including Fitzgerald and showed that photo array to Jimenez, who identified someone other than Fitzgerald as the perpetrator.[1] Next, the officers showed Gonzalez-Roman a second photo array including Fitzgerald. Gonzalez-Roman identified Fitzgerald as the perpetrator, and a warrant issued for Fitzgerald's arrest.

HPD Officer C. Rozek testified that, while working in an undercover capacity the afternoon of July 8, 2014, he and other involved officers observed erratic driving and traffic violations by the driver of Young's 2011 black Ford Taurus. HPD Officer M. Little testified that he initiated a traffic stop of the vehicle and identified Fitzgerald as the driver. Fitzgerald was placed under arrest and officers conducted an inventory of Young's black Ford Taurus. Officer Rozek testified that he found Jimenez's driver's license and a $350 check written to Jimenez in the center console.

Defense Testimony

Fitzgerald testified on his own behalf and denied both charges. Fitzgerald testified that Crystal Young was his former girlfriend, and that he and Young had a falling out on June 30, 2014, at which point he moved his belongings out of her apartment. According to Fitzgerald, he was not in contact with Young again until

[1] The State claims that the photo array was first shown to Gonzalez-Roman. Appellee's Br. at 4. However, according to the record, Officer Olivarez unequivocally testified that it was first shown to Jimenez.

she called him wanting to get back together on July 7, 2014. Fitzgerald denied knowing that Jimenez's driver's license and a check stolen from Jimenez were in the center console when he borrowed Young's car on July 8, 2014. Fitzgerald testified that, based on messages he saw on Facebook, he suspected Young had been involved with another man between June 30 and July 7, 2014.

Fitzgerald testified that he was familiar with the Fiesta on Jensen where the first robbery occurred and that it was within 15 minutes of Young's apartment. He further testified that he is five feet, eight inches tall and weighs approximately 190 pounds. Fitzgerald identified several tattoos on his face, neck, and hands—none of which were mentioned in witness identifications.

Cause No. 01-15-00648-CR (Jimenez Robbery)

In his sole issue, Fitzgerald contends that insufficient evidence supports his conviction for the aggravated robbery of Jimenez at J & L Appliance because the State relied solely on evidence of his possession of Jimenez's property to establish guilt.

A. Standard of Review

When evaluating the legal sufficiency of the evidence in jury trials and in bench trials, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319,

99 S. Ct. 2781, 2789 (1979); *Whatley v. State*, 445 S.W.3d 159, 166 (Tex. Crim. App. 2014); *Brooks v. State*, 323 S.W.3d 893, 902 (Tex. Crim. App. 2010). The standard is the same for both direct and circumstantial evidence cases. *See King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) ("Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt."). "Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of the incriminating circumstances is sufficient to support the conviction." *Hooper*, 214 S.W.3d at 13.

On appeal, we do not resolve any conflict of fact, weigh any evidence, or evaluate the credibility of any witnesses, as this is the function of the trier of fact. *See Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999). We therefore resolve any inconsistencies in the evidence in favor of the verdict, *Matson v. State*, 819 S.W.2d 839, 843 (Tex. Crim. App. 1991), and "defer to the [trier of fact's] credibility and weight determinations." *Marshall v. State* 210 S.W.3d 618, 625 (Tex. Crim. App. 2006). To the extent that the record contains evidence supporting conflicting inferences, we presume that the jury resolved conflicts in favor of its verdict. *Rabb v. State*, 434 S.W.3d 613, 622 (Tex. Crim. App. 2014).

B. Applicable Law

A person commits the offense of robbery if:

> [I]n the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

TEX. PENAL CODE § 29.02. If the actor uses or exhibits a deadly weapon, the offense becomes aggravated robbery, a first degree felony. TEX. PENAL CODE § 29.03(a)(2).

Ordinarily, an inference of guilt may be drawn when a defendant is found in possession of recently stolen property and fails to provide a reasonable explanation for honest acquisition of the property. *Uyamadu v. State*, 359 S.W.3d 753, 760 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd) (first citing *Hardesty v. State*, 656 S.W.2d 73, 76–77 (Tex. Crim. App. 1983), then citing *Poncio v. State*, 185 S.W.3d 904, 905 (Tex. Crim. App. 2006)). To support that inference of guilt from the sole circumstance of possession of stolen property, the State "must establish that such possession was personal, recent, unexplained, and involved a distinct and conscious assertion of the property by the defendant." *Sutherlin v. State*, 682 S.W.2d 546, 549 (Tex. Crim. App. 1984); *see also Rollerson v. State*, 227 S.W.3d 718, 728 (Tex. Crim. App. 2007). "Remote possession of stolen property, unaccompanied by other facts connecting the defendant with the unlawful taking of

the property, is insufficient to support a conviction under the above rule of law." *Sutherlin*, 682 S.W.2d at 549.

C. Analysis

Fitzgerald argues that the evidence is insufficient to connect him to the Jimenez robbery because the State failed to establish that his possession of items stolen from Jimenez was personal, recent, unexplained, and involved a distinct and conscious assertion of the right to the property. *See Sutherlin*, 682 S.W.2d at 549 (remote possession of stolen property, standing alone, is insufficient to support conviction). In *Sutherlin*, a John Deere bulldozer was reported stolen. *Id.* at 548. Roughly four months later, appellant loaned a bulldozer to Jock, who got the borrowed bulldozer stuck in the mud and called the Sheriff's Officer for assistance. *Id.* The responding deputy discovered that the serial number of the borrowed bulldozer matched the serial number of the stolen bulldozer, and appellant was arrested and convicted for theft. *Id.* The Court of Criminal Appeals reversed appellant's conviction, explaining that appellant's mere possession of the stolen bulldozer some four months after its theft was insufficient to give rise to a presumption of guilt. *Id.* at 459.

Contrary to Fitzgerald's assertion on appeal, the State's evidence against Fitzgerald for the Jimenez robbery was not limited to the sole circumstance of discovering Jimenez's stolen driver's license and check in the center console of the

vehicle Fitzgerald was driving at the time of his arrest. *Cf. Sutherlin*, 682 S.W.2d at 549–50 (concluding that mere possession of stolen bulldozer four months after actual theft, unaccompanied by any other evidence connecting appellant to actual theft, was legally insufficient to support theft conviction). Viewed in the light most favorable to the verdict, the State presented sufficient circumstantial evidence beyond Fitzgerald's possession of stolen property to support his conviction. Fitzgerald admitted that he had been in a relationship with Young. Uncontested evidence showed that Young owned a black 2011 Ford Taurus and that Fitzgerald occasionally borrowed Young's Taurus. Additional evidence demonstrating that Fitzgerald occasionally borrowed Young's Taurus included the uncontroverted facts that (a) Fitzgerald was ticketed while driving Young's Taurus in January 2014, and (b) Fitzgerald was driving Young's Taurus six days after the robberies when he was stopped by police and arrested. Thus, the evidence suggested that he had access to and control of the vehicle containing Jimenez's possessions.

Testimony and video evidence further proved that just after 8:00 a.m., on July 2, 2014, Fitzgerald committed aggravated robbery against Gonzalez-Roman in a Fiesta parking lot. Gonzalez-Roman described Fitzgerald to police as a tall black man with a dark complexion. Gonzalez-Roman explained that Fitzgerald approached her as she was trying to get into her vehicle, drew a gun from his waistband, and demanded her purse. Gonzalez-Roman positively identified

Fitzgerald as the perpetrator, and both Gonzalez-Roman and an eyewitness fireman testified that Fitzgerald was the only person in Young's Taurus at the time. Surveillance video from the Fiesta parking lot showed the suspect vehicle appeared to be a black 2011 Ford Taurus, and a witness identified a partial plate number for the suspect vehicle. The partial plate provided by a witness to the Fiesta robbery committed by Fitzgerald matched only one black Ford Taurus in HPD's database: Young's Taurus.

Within 30 minutes and two miles of Fitzgerald committing aggravated robbery against Gonzalez-Roman while driving Young's Taurus, Jimenez was robbed at gun point in a parking lot outside an appliance store by a man she described as a tall black man with a dark complexion driving a newer-model black car. Thus, the record indicates that someone driving a vehicle similar to one Fitzgerald had used to commit aggravated robbery immediately before and matching a general description of Fitzgerald robbed Jimenez. Jimenez testified that her attacker approached as she was getting into her truck, drew a gun from his waistband, and stole only her purse. Thus, the evidence further shows substantial similarity between the robbery of Gonzalez-Roman, committed by Fitzgerald, and the robbery of Jimenez.

The jury was free to disbelieve evidence suggesting someone other than Fitzgerald committed the aggravated robbery against Jimenez. *See Chambers v.*

State, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991) (providing that fact finder is entitled to judge credibility of witnesses and can believe all, some, or none of testimony presented). Fitzgerald testified on his own behalf and maintained that was not responsible for either robbery. He maintained that, though he occasionally borrowed Young's Taurus while they were in a relationship, he and Young were estranged at the time of the charged offenses. Fitzgerald testified that he was again driving Young's Taurus on the day of his arrest because he and Young reconciled only shortly before.

Though Fitzgerald's possession of Jimenez's stolen property at the time of arrest does not independently establish his guilt, his possession of stolen property does permit an inference of guilt. *See Rollerson v. State*, 227 S.W.3d 718, 724–25 (Tex. Crim. App. 2007) ("[A] defendant's unexplained possession of property recently stolen in a burglary permits an inference that the defendant is the one who committed the burglary."). Coupled with the State's circumstantial evidence of Fitzgerald's guilt set out above, sufficient evidence supports the verdict. In sum, viewing the evidence in the light most favorable to the verdict, we conclude that a rational jury could have determined beyond a reasonable doubt that Fitzgerald committed the aggravated robbery against Jimenez. *See Howard v. State*, 306 S.W.3d 407, 412 (Tex. App.—Texarkana 2010) (concluding evidence sufficient to prove appellant committed robbery where (1) appellant owned vehicle in which

suspect fled, (2) officer saw suspect in flight driving appellant's vehicle and noted that suspect had facial tattoo, (3) appellant had same facial tattoo, and (4) physical evidence of offense found in appellant's vehicle), *aff'd*, 333 S.W.3d 137 (Tex. Crim. App. 2011); *Roberson v. State*, 16 S.W.3d 156, 167 (Tex. App.—Austin 2000, pet. ref'd) (providing that State may prove identity by circumstantial evidence and by inference).

We overrule Fitzgerald's sole issue on appeal.

Cause No. 01-15-00647-CR (Gonzalez-Roman Robbery)

With respect to Fitzgerald's conviction for the aggravated robbery of Gonzalez-Roman, Appellant's counsel on appeal has filed a motion to withdraw, along with an *Anders* brief stating that the record presents no reversible error and therefore the appeal is without merit and is frivolous. *See Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967).

An attorney has an ethical obligation to refuse to prosecute a frivolous appeal. *In re Schulman*, 252 S.W.3d 403, 407 (Tex. Crim. App. 2008). If an appointed attorney finds a case to be wholly frivolous, his obligation to his client is to seek leave to withdraw. *Id.* Counsel's obligation to the appellate court is to assure it, through an *Anders* brief, that, after a complete review of the record, the request to withdraw is well-founded. *Id.*

We may not grant the motion to withdraw until:

(1) the attorney has sent a copy of his *Anders* brief to his client along with a letter explaining that the defendant has the right to file a pro se brief within 30 days, and he has ensured that his client has, at some point, been informed of his right to file a pro se PDR;

(2) the attorney has informed us that he has performed the above duties;

(3) the defendant has had time in which to file a *pro se* response; and

(4) we have reviewed the record, the *Anders* brief, and any pro se brief.

See id. at 408–09. If we agree that the appeal is wholly frivolous, we will grant the attorney's motion to withdraw and affirm the trial court's judgment. *See Garner v. State*, 300 S.W.3d 763, 766 (Tex. Crim. App. 2009). If we conclude that arguable grounds for appeal exist, we will grant the motion to withdraw, abate the case, and remand it to the trial court to appoint new counsel to file a brief on the merits. *See Bledsoe v. State*, 178 S.W.3d 824, 826–27 (Tex. Crim. App. 2005).

Here, counsel's brief reflects that he delivered a copy of the brief to appellant and informed him of his right to examine the appellate record and to file a response. *See Schulman*, 252 S.W.3d at 408. Appellant filed a *pro se* response.

Counsel's brief meets the *Anders* requirements in that it presents a professional evaluation of the record. *See Anders*, 386 U.S. at 744, 87 S. Ct. at 1400; *see also High v. State*, 573 S.W.2d 807, 812 (Tex. Crim. App. 1978). Counsel supplies us with references to the record and provides us with citation to legal authorities. Counsel indicates that he has thoroughly reviewed the record and that he is unable to advance any grounds of error that warrant reversal. *See*

Anders, 386 U.S. at 744, 87 S. Ct. at 1400; *Mitchell v. State*, 193 S.W.3d 153, 154 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

We have independently reviewed the entire record, as well as appellant's *pro se* response, and conclude that no reversible error exists in the record, that there are no arguable grounds for review, and that therefore the appeal is frivolous. *See Anders*, 386 U.S. at 744, 87 S. Ct. at 1400; *see also Garner v. State*, 300 S.W.3d 763, 767 (Tex. Crim. App. 2009) (explaining that frivolity is determined by considering whether there are "arguable grounds" for review); *Bledsoe*, 178 S.W.3d at 826–27 (emphasizing that reviewing court—and not counsel—determines, after full examination of proceedings, whether the appeal is wholly frivolous); *Mitchell*, 193 S.W.3d at 155 (noting that reviewing court's role in *Anders* appeal is limited to determining whether arguable grounds for appeal exists or whether the appeal is wholly frivolous). Appellant may nevertheless challenge a holding that there are no arguable grounds for appeal by filing a petition for discretionary review in the Court of Criminal Appeals. *See Bledsoe*, 178 S.W.3d 827 & n.6.

We grant counsel's motion to withdraw[2] and affirm the trial court's judgment in Cause No. 01-15-00647-CR. Michael A. McEnrue must immediately

[2] Appointed counsel still has a duty to inform Fitzgerald of the result of this appeal and that he may, on his own, pursue discretionary review in the Texas Court of

send the notice required by Texas Rule of Appellate Procedure 6.5(c) and file a copy of that notice with the Clerk of this Court. *See* TEX. R. APP. P. 6.5(c).

Conclusion

We affirm the trial court's judgments.

Rebeca Huddle
Justice

Panel consists of Justices Keyes, Brown, and Huddle.

Do not publish. TEX. R. APP. P. 47.2(b).

Criminal Appeals. *See Bledsoe v. State*, 178 S.W.3d 824, 826–27 (Tex. Crim. App. 2005).