In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-20-00085-CR
No. 07-20-00086-CR

KEVIN DEWAYNE GARZA, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 64th District Court
Hale County, Texas
Trial Court Nos. A21247-1909, A21248-1909, Honorable Danah Zirpoli, Presiding

February 18, 2022

MEMORANDUM OPINION

Before QUINN, C.J., and PARKER and DOSS, JJ.

By separate indictments, Appellant Kevin Dewayne Garza was charged with aggravated robbery with a deadly weapon[1] (cause number A21247-1909) and unlawful

[1] *See* TEX. PENAL CODE ANN. § 29.03(a)(2). Aggravated robbery is a first degree felony. *Id.* § 29.03(a)(2). A first degree felony is punishable by imprisonment for life, or any term of not more than 99 years or less than 5 years. In addition to imprisonment, a defendant may be punished by a fine not to exceed $10,000. *Id.* at § 12.32(a),(b).

possession of a firearm by a felon[2] (cause number A21248-1909). The cases were consolidated for trial. Appellant entered an open plea of guilty before the jury on the charge of possession of a firearm by felon; he pleaded not guilty on the charge of aggravated robbery with a deadly weapon. The jury returned a guilty verdict on both charges. Trial of both cases then proceeded to the punishment phase. Because of Appellant's prior convictions, the jury assessed enhanced punishments: 45 years of confinement in prison on the aggravated robbery charge[3] and 20 years of confinement on the felon in possession charge.[4] Sentences were imposed accordingly by the trial court, running concurrently.

In reviewing the appeal of the aggravated robbery conviction (cause number A21247-1909) we overrule Appellant's sole issue and affirm the judgment of the trial court. In reviewing the appeal of the felon in possession conviction (cause number A21248-1909), we note that Appellant's court-appointed appellate counsel has filed a

[2] *See* TEX. PENAL CODE ANN. § 46.04(a)(1). Unlawful possession of a firearm by a felon is a third degree felony. *Id*. at § 46.04(e). A third degree felony is punishable by imprisonment for any term of not more than 10 years or less than 2 years. In addition to imprisonment, a defendant may be punished by a fine not to exceed $10,000. *Id.* at § 12.34(a),(b).

[3] Appellant's sentence was enhanced according to Penal Code section 12.42(c)(1). TEX. PENAL CODE ANN. § 12.42(c)(1). This section provides if at trial of a felony of the first degree it is shown the defendant was previously convicted of a felony the range of punishment shall be imprisonment for life, or for any term of not more than 99 years or less than 15 years. In addition to imprisonment, a defendant may be punished by a fine not to exceed $10,000.

[4] Appellant's sentence was enhanced according to Penal Code section 12.42(a). TEX. PENAL CODE ANN. § 12.42(a). This section provides if at trial of a felony of the third degree it is shown the defendant was previously convicted of a felony (other than one punishment category for a state jail felony) on conviction the defendant shall be punished for a felony of the second degree. A second degree felony is punishable by imprisonment for any term of not more than 20 years or less than 2 years. In addition to imprisonment, a defendant may be punished by a fine not to exceed $10,000. *Id.* at § 12.33(a),(b).

motion to withdraw supported by an *Anders*[5] brief. We grant counsel's motion to withdraw and affirm the judgment of the trial court.

Analysis

A. Aggravated Robbery

Appellant argues the trial court reversibly erred by allowing the State to question him about other robbery charges for which he had not been convicted. Because Appellant has not challenged the sufficiency of the evidence supporting his conviction, we mention only those facts necessary for analyzing his issue.

Appellant chose to testify at the guilt-innocence phase of trial. On direct examination, he informed the jury of his prior convictions for (1) deadly conduct-reduced from aggravated assault, (2) burglary of a building, (3) possession of a controlled substance, (4) credit card abuse, and (5) unlawful possession of a firearm by a felon. However, Appellant also qualified his prior bad acts by testifying, "but I don't go around robbing people, though." Appellant twice reiterated this claim during his testimony.

A colloquy that took place during the State's cross-examination of Appellant is material to our disposition of Appellant's issue. It began in a bench conference and concluded in open court:

-Bench Conference-

> [Prosecutor]: Judge, I have a motion in Limine. Defendant said that he has never committed a robbery before, but there's an unadjudicated offense of robbery in this court, right now, pending?

[5] *See Anders v. California,* 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

[Defense Counsel]: But --

[Prosecutor]: But he is.

[The Court]: By Mr. Garza saying I don't go around robbing people, so I will allow that.

-Before the Jury-

Q. [Prosecutor to Appellant]: This case is not the first time that you have ever been arrested for robbery; is that correct?

[Defense Counsel]: Objection, Your Honor. These are unadjudicated.

[The Court]: Overruled.

Q. [Prosecutor]: Mr. Garza, this is not the first time that you have been arrested for robbery; is it?

A. [Appellant]: I have never been arrested for robbery.

Q.: You are currently facing two unadjudicated offenses in this courtroom, right now, involving robbery, that are not this case; is that correct?

A.: Yeah.

* * *

Q.: And in both of those cases, you're alleged to have had a weapon?

A.: That's what it says.

We review a trial court's ruling on the admission of evidence for an abuse of discretion. *Neil v. State,* No. 07-18-00356-CR, 2019 Tex. App. LEXIS 10159, at *7 (Tex. App.—Amarillo Nov. 22, 2019, pet ref'd) (mem. op., not designated for publication) (citations omitted). A trial court abuses its discretion when it acts without reference to any guiding rules and principles or acts arbitrarily or unreasonably. *Id.*

Assuming Appellant's objection preserved error for review, we hold the trial court did not err in permitting the State to ask Appellant about his two unadjudicated arrests for robbery. Before the prosecutor approached the bench, Appellant had three times testified

before the jury, "I don't go around robbing people." "Evidence of a crime, wrong, or other act is ordinarily not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." TEX. R. EVID. 404(b)(1). However this evidence may be admissible "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." TEX. R. EVID. 404(b)(2). Thus, evidence of other crimes, wrongs or acts may be admissible provided it, "has relevance apart from character conformity." *Moses v. State,* 105 S.W.3d 622, 626 (Tex. Crim. App. 2003). Rebuttal of the defendant's defensive theory is a recognized ground for admitting evidence under Rule 404(b). *Id.* Moreover, otherwise inadmissible evidence may become admissible when a party opens the door to that evidence. *Williams v. State,* 301 S.W.3d 675, 687 (Tex. Crim. App. 2009) (citing *Hayden v. State,* 296 S.W.3d 549, 554 (Tex. Crim. App. 2009)). The door may be opened when a party leaves a false impression with the jury that invites a response by the other side. *Hayden,* 296 S.W.3d at 554.

During Appellant's trial for the offense of aggravated robbery with a deadly weapon, he pursued the defensive theory that he did not "go around robbing people." Appellant therefore opened the door to evidence tending to rebut his blanket statement of good conduct. The trial court did not abuse its discretion in permitting the State to question Appellant about two allegations of robbery pending against him at that time. *See Daggett v. State,* 187 S.W.3d 444, 453 n.24 (Tex. Crim. App. 2005) (noting when a broad statement of good conduct is directly relevant to the charged offense the opponent may both cross-examine the defendant and offer extrinsic evidence rebutting the statement

and this is not improper impeachment on a collateral matter). Appellant's issue is overruled; the judgment of the trial court in cause number A21247-1909 is affirmed.

B. Unlawful Possession of a Weapon by a Felon

Regarding Appellant's appeal from his conviction for unlawful possession of a firearm, Appellant's court-appointed appellate counsel seeks leave to withdraw from the representation under the *Anders* standard. Counsel has certified that he conducted a thorough examination of the record and, in his opinion, the record demonstrates no reversible error on which to predicate an appeal. *Anders,* 386 U.S. at 744; *In re Schulman,* 252 S.W.3d 403, 406 (Tex. Crim. App. 2008). In compliance with *High v. State,* 573 S.W.2d 807, 813 (Tex. Crim. App. [Panel Op.] 1978), counsel has discussed why, under the controlling authorities, the record presents no reversible error. By letter with enclosures, counsel notified Appellant of his motion to withdraw; provided him a copy of the motion and *Anders* brief and the appellate record; provided notice of his right to file a petition for discretionary review with the Texas Court of Criminal Appeals; and provided notice of his right to file a pro se response in this Court. *See Kelly v. State,* 436 S.W.3d 313, 319-20 (Tex. Crim. App. 2014) (specifying appointed counsel's obligations on the filing of a motion to withdraw supported by an *Anders* brief). By letter, this Court also advised Appellant of his right to file a pro se response to counsel's *Anders* brief. We have received no response from Appellant.

Via the *Anders* brief, counsel discusses grounds that could possibly support an appeal, but concludes the appeal is frivolous. We have reviewed these grounds and made an independent review of the entire record to determine whether there are any

arguable grounds which might support an appeal. *See Penson v. Ohio,* 488 U.S. 75, 82-83, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988); *Bledsoe v. State,* 178 S.W.3d 824, 826-27 (Tex. Crim. App. 2005). We have found no arguable grounds and agree with counsel that the appeal is frivolous. Concluding there is no plausible basis for reversal of Appellant's conviction, *Bledsoe v. State,* 178 S.W.3d 824, 826-27 (Tex. Crim. App. 2005), we grant counsel's motion to withdraw. We also affirm the judgment of the trial court in cause number A21248-1909.

Conclusion

We affirm the judgment of the trial court in cause number A21247-1909. Further, after granting counsel's motion to withdraw from representation in the appeal of cause number A21248-1909, we affirm the judgment in that case as well.[6] *See* TEX. R. APP. P. 43.2(a).

Lawrence M. Doss
Justice

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[6] Counsel shall, within five days after the opinion is handed down, send Appellant a copy of the opinion and judgment, along with notification of Appellant's right to file a pro se petition for discretionary review. *See* TEX. R. APP. P. 48.4. This duty is an informational one, not a representational one. It is ministerial in nature, does not involve legal advice, and exists after the court of appeals has granted counsel's motion to withdraw. *In re Schulman,* 252 S.W.3d at 411 n.33.