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6/5/2019 **COA No. 01-17-00928-CR**

MARSHALL, BRODERICK Tr. Ct. No. 1498078 **PD-0435-19**

On this day, the Appellant's Pro Se petition for discretionary review has been refused.

Deana Williamson, Clerk

BRODERICK GLENN MARSHALL
ELLIS UNIT - TDCJ# 2165619
1697 FM 980
HUNTSVILLE, TX 77343

~~6/3-11~~
6/3-3-11

EJCPJAB

APPENDIX "A"

Opinion issued March 26, 2019

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00928-CR

BRODERICK GLENN MARSHALL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Case No. 1498078

MEMORANDUM OPINION

After a jury trial, Broderick Glenn Marshall was convicted of the offense of evading arrest with a motor vehicle and was sentenced to 20 years' imprisonment in the Institutional Division of the Texas Department of Criminal Justice. *See* TEX. PENAL CODE § 38.04(a).

APPENDIX "E"

On appeal, Marshall's appointed counsel filed a motion to withdraw, along with a brief, stating that the record presents no reversible error and the appeal is without merit and is frivolous. *See Anders v. California*, 386 U.S. 738 (1967).

Counsel's brief meets the *Anders* requirements by presenting a professional evaluation of the record and supplying us with references to the record and legal authority. 386 U.S. at 744; *see also High v. State*, 573 S.W.2d 807, 812 (Tex. Crim. App. 1978). Counsel indicates that she has thoroughly reviewed the record and is unable to advance any grounds of error that warrant reversal. *See Anders*, 386 U.S. at 744; *Mitchell v. State*, 193 S.W.3d 153, 155 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

Counsel advised Marshall of his right to access the record and provided him with a form motion for access to the record. Counsel further advised Marshall of his right to file a pro se response to the *Anders* brief. Marshall requested access to the record and filed a pro se response to counsel's original brief, but did not file a response to counsel's corrected brief.

We have independently reviewed the entire record in this appeal, and we conclude that no reversible error exists in the record, there are no arguable grounds for review, and the appeal is frivolous. *See Anders*, 386 U.S. at 744 (emphasizing that reviewing court—and not counsel—determines, after full examination of proceedings, whether appeal is wholly frivolous); *Garner v. State*, 300 S.W.3d 763,

767 (Tex. Crim. App. 2009) (reviewing court must determine whether arguable grounds for review exist); *Bledsoe v. State*, 178 S.W.3d 824, 826–27 (Tex. Crim. App. 2005) (same); *Mitchell*, 193 S.W.3d at 155 (reviewing court determines whether arguable grounds exist by reviewing entire record). We note that an appellant may challenge a holding that there are no arguable grounds for appeal by filing a petition for discretionary review in the Texas Court of Criminal Appeals. *See Bledsoe*, 178 S.W.3d at 827 & n.6.

We affirm the judgment of the trial court and grant counsel's motion to withdraw.[1] Attorney Cheri Duncan must immediately send Marshall the required notice and file a copy of the notice with the Clerk of this Court. *See* TEX. R. APP. P. 6.5(c). We dismiss any pending motions as moot.

PER CURIAM

Panel consists of Justices Lloyd, Kelly, and Hightower.

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

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[1] Appointed counsel still has a duty to inform appellant of the result of this appeal and that he may, on his own, pursue discretionary review in the Texas Court of Criminal Appeals. *See Ex Parte Wilson*, 956 S.W.2d 25, 27 (Tex. Crim. App. 1997).

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5/1/2019
MARSHALL, BRODERICK Tr. Ct. No. 1499443
COA No. 01-17-00929-CR
PD-0195-19

CORRECTED NOTICE: On this day, the Appellant's Pro Se petition for discretionary review has been refused.

Deana Williamson, Clerk

4203-3

BRODERICK MARSHALL
ELLIS I UNIT - TDC # 2165619
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HUNTSVILLE, TX 77343

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APPENDIX "C"

Opinion issued February 5, 2019

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00929-CR

BRODERICK MARSHALL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Case No. 1499443

MEMORANDUM OPINION

A jury found appellant Broderick Glenn Marshall guilty of aggravated robbery with a deadly weapon (a firearm). The indictment included an enhancement paragraph alleging Marshall's 2008 felony conviction for aggravated robbery. The jury assessed Marshall's punishment at forty years' imprisonment.

APPENDIX "F"

In his sole issue, Marshall asserts that the evidence is legally insufficient for the jury to have found beyond a reasonable doubt that he used or exhibited a firearm during the robbery and therefore committed aggravated robbery.

We affirm.

Background

On February 6, 2016, Angel Vasquez, a contractor, was working alone on a house on Griggs Street, having parked his Honda Civic in the driveway. A person identified as the appellant, Broderick Glenn Marshall, approached Vasquez and asked him if he was selling his car. Marshall came closer to Vasquez and asked again if he would sell his car, and Vasquez told him "no" and continued working.

Marshall pulled out a black and gold revolver and said, "Don't move." Marshall then forced Vasquez inside the house and into a bedroom and told him to remove his clothes and to give him everything he had, including his keys. Vasquez complied while facing Marshall, who was still pointing the revolver at Vasquez. After Vasquez gave Marshall all of his belongings, Marshall stuck his hand in one of Vasquez's pockets and found a ten or twenty dollar bill. Marshall became angry and hit Vasquez on the back of the head with the revolver, causing him to bleed. He then pushed Vasquez to the floor and left, taking Vasquez's car and all of his tools.

Vasquez went to a nearby gas station, where the police were called. A "BOLO" (be on the lookout) alert was issued on Vasquez's Honda Civic, and two days later, Officer Rodriguez and his patrol partner spotted the car. The driver led police on a chase, eventually stopping and getting out of the car and running. The passenger in the car remained, and she gave police Marshall's name. Twelve days after the robbery, Vasquez identified Marshall in a photo array. Officer Rodriguez and Vasquez identified Marshall at trial.

Specifically, Marshall's sole issue asserts that the evidence is insufficient to support the jury's guilt finding on aggravated robbery because the State did not prove that the gun used in the robbery was real.

Analysis

A challenge to the sufficiency of the evidence requires that we identify the essential elements of the charged offense and ask whether the evidence and reasonable inferences therefrom, viewed in the light most favorable to the conviction, would permit a rational juror to find each element of the charged offense beyond a reasonable doubt. *Braughton v. State*, __ S.W.3d __, __, No. PD-0907-17, 2018 WL 6626621, at *11 (Tex. Crim. App. Dec. 19, 2018). Whether a conviction rests on direct or circumstantial evidence, the sufficiency standard remains unchanged. *Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012). The analysis requires us to keep in mind that the jury is the sole judge of the

evidence's weight and credibility. *Braughton*, __ S.W.3d at __, 2018 WL 6626621, at *11. We presume that the jury resolved any conflicting inferences in favor of the verdict. *Id.* Although this standard mandates great deference to the jury, we do not defer to a jury's conclusions that are based on "mere speculation or factually unsupported inferences or presumptions." *Id.* (quoting *Hooper v. State*, 214 S.W.3d 9, 15–16 (Tex. Crim. App. 2007).

> A criminal conviction may be based upon circumstantial evidence. *Clayton*, 235 S.W.3d at 778; *Miller v. State*, 566 S.W.2d 614, 617 (Tex. Crim. App. 1978). "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." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007); *see Clayton*, 235 S.W.3d at 778. In circumstantial evidence cases, it is not necessary that every fact and circumstance "point directly and independently to the defendant's guilt; it is enough if the conclusion is warranted by the combined and cumulative force of all the incriminating circumstances." *Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993); *see Hooper*, 214 S.W.3d at 13.

Temple v. State, 390 S.W.3d 341, 359–60 (Tex. Crim. App. 2013); *see also Gibbs v. State*, 555 S.W.3d 718, 728 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

The State charged Marshall with aggravated robbery with a deadly weapon, alleging that he "did then and there use and exhibit a deadly weapon, to wit: a firearm." Because of that allegation in the indictment, the State was required to prove the use of a firearm beyond a reasonable doubt. *Brown v. State*, 212 S.W.3d 851, 860 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd).

The Penal Code defines "firearm" as "any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use." TEX. PENAL CODE § 46.01(3); *see also Brown*, 212 S.W.3d at 860. A revolver is a firearm. *Gomez v. State*, 685 S.W.2d 333, 336 (Tex. Crim. App. 1985).

When asked to describe the gun, Vasquez testified: "The bit that I know about weapons, I know that it was a revolver. It was like . . . yellow and black." The State offered a photograph of a gold and black revolver as an example, and Vasquez said that it looked like the gun in the robbery.

Vasquez gave the following testimony on cross-examination:

Q. Had you ever seen a revolver that looked like that color before?

A. No.

Q. And you haven't seen anything like that since?

A. No.

Q. The weapon was never fired?

A. No.

Q. And you couldn't see the markings on the weapon?

A. No.

Q. You couldn't see a name like what brand of firearm it was, nothing like that?

A. No.

Q. It just looked like a revolver?

A. I saw that it was a revolver.

Q. And it was small?

A. The size, I don't remember.

Q. Would you say it's bigger than your open hand?

A. The truth is I do not know.

Q. But once you saw the revolver, that's what you were really focused on?

A. Pardon me?

Q. You weren't looking at anything else but the revolver once you saw it?

A. I was looking at the person not at the revolver.

Officer Wooten, who investigated the robbery, testified that a revolver is a firearm and a deadly weapon. Marshall points out that, on cross-examination, Officer Wooten admitted that, without examining the revolver that was actually used in the robbery, he could not tell if it was a real firearm. But in a case where the firearm is not recovered, expert corroboration that it was in fact a firearm is not required. *See Porter v. State*, 601 S.W.2d 721, 723 (Tex. Crim. App. [Panel Op.] 1980) ("We decline appellant's invitation to require, where no weapon has been recovered, expert corroboration that that which a complainant describes as a pistol is in fact a pistol.").

Marshall argues that the State did not prove that the gun used in the robbery was real because the gun was not in evidence and because Vasquez did not testify that he knew or even believed that it was real, that he was afraid of being shot, or that he ever touched it.* Thus, Marshall concludes, Vasquez's testimony raised, at most, only a suspicion of guilt, which is insufficient to support a conviction. *See Winfrey v. State*, 323 S.W.3d 875, 882 (Tex. Crim. App. 2010).

In response, the State notes Vasquez's testimony that he knew enough about guns to testify that Marshall's gun was a revolver, Vasquez's numerous descriptions of Marshall's weapon as either a gun or a revolver, and his testimony that the weapon Marshall used was "just like" the gold and black revolver in the State's photograph exhibit. And in response to defense counsel's question whether the gun "looked like" a revolver, Vasquez said that "it was" a revolver. Additionally, Vasquez was in fear during the ordeal and bled profusely when Marshall hit him in the head with the gun.

The jury may make reasonable inferences and reasonable deductions from the evidence as presented to it within the context of the crime, and "[a]bsent any specific indication to the contrary at trial, the jury should be able to make the reasonable inference, from the victim's testimony that the 'gun' [that] was used in the commission of a crime, was, in fact, a firearm." *Cruz v. State*, 238 S.W.3d 381,

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* Vasquez did testify that he was scared, that Marshall's behavior made him afraid, and that Marshall was aggressive.s

388–89 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd); *see also Bell v. State*, No. 01-16-00774-CR, 2018 WL 1473781, at *4 (Tex. App.—Houston [1st Dist.] Mar. 27, 2018, pet. ref'd) (mem. op., not designated for publication). No evidence was offered that the Marshall's gun could have been a toy or fake gun or a nonlethal gun such as a BB or paintball gun. Further, Marshall's threatening Vasquez "with the gun in itself suggests that it is a firearm rather than merely a gun of the non-lethal variety. . . ." *Cruz*, 238 S.W.3d at 389.

A rational jury could have concluded, beyond a reasonable doubt, that the revolver that Vasquez saw was a firearm. Accordingly, the evidence is sufficient to show that the revolver Marshall used in his robbery of Vasquez was a firearm. *See id.* at 388–89; *see also Wright v. State*, 591 S.W.2d 458, 459 (Tex. Crim. App. [Panel Op.] 1979) (holding evidence sufficient to support deadly-weapon finding when complainant stated appellant pulled weapon on him and referred to it using terms "gun," "revolver," and "pistol" interchangeably throughout testimony); *Bell*, 2018 WL 1473781, at *4–5; *Williams v. State*, 980 S.W.2d 222, 224–25 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd) (holding evidence sufficient to establish firearm was used where witness described gun as black and metal-like, without a chamber like a revolver, square in front, and similar to demonstrative exhibit shown at trial); *Carter v. State*, 946 S.W.2d 507, 509 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd) (holding that victims' testimony that defendant used

gun similar to .25 caliber gun shown at trial and threatened to shoot victims if they did not do as he ordered was sufficient to authorize rational jury to find firearm was used during offense).

We overrule Marshall's sole issue.

Conclusion

We affirm the judgment of the trial court.

Richard Hightower
Justice

Panel consists of Justices Lloyd, Kelly, and Hightower.

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

Additional material from this filing is available in the Clerk's Office.