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ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR11-304

Opinion Delivered November 2, 2011

RAY LEE ANTHONY APPELLANT	APPEAL FROM THE CRAIGHEAD COUNTY CIRCUIT COURT, WESTERN DISTRICT [CR-2009-575]
V.	HONORABLE VICTOR HILL, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

DAVID M. GLOVER, Judge

Appellant Ray Anthony was tried by a jury and found guilty of the offenses of aggravated robbery, first-degree battery, forgery, and fraudulent use of a credit card in connection with an attack on a secretary at St. Paul's United Methodist Church in Jonesboro, Arkansas. Anthony was sentenced to a total of 150 years in the Arkansas Department of Correction. He raises two points of appeal: 1) the trial court erred in denying his "motion to suppress" evidence, 2) the trial court erred in allowing a previous conviction to be used to enhance his sentence. We affirm.

For his first point of appeal, Anthony contends that the trial court erred in denying his "motion to suppress" evidence, in particular a knife, items of clothing, a hat, and shoes. He argues that there was a break in the chain of custody for these items, which made them untrustworthy. We disagree.

The admissibility of evidence is left to the trial court's discretion, and this court will not reverse an evidentiary ruling absent an abuse of that discretion. *Gill v. State*, 2010 Ark. App. 524, 376 S.W.3d 529. A chain of custody is maintained for evidence that is to be introduced in a criminal trial in order to prevent the introduction of evidence that is not authentic or that has been tampered with. *Pryor v. State*, 314 Ark. 212, 861 S.W.2d 544 (1993). It is not necessary to eliminate every possibility of tampering, but the trial court must be satisfied that in all reasonable probability the evidence has not been tampered with. *Id.*; *Gill*, *supra*.

Here, Vickie Jo Mueller was attacked in her office at the church on Friday morning, May 22, 2009. She was stabbed three times during the attack. Her attacker then grabbed her purse from under her desk and ran out of the building. She was able to dial 911; the police and an ambulance arrived shortly thereafter. Anthony was then video-taped attempting to use Ms. Mueller's credit cards and checks to make purchases at Wal-Mart and Target. His vehicle was identified, and he was arrested at approximately 3:30 p.m. the same day. Sergeant Todd Nelson retrieved a knife from Anthony's front pocket, which appeared to Nelson to have blood and tissue on it. In addition, the sergeant recovered Mueller's missing credit cards and one of her missing checks from Anthony's wallet. The same day, his hat, shoes, and clothes were retrieved. It is undisputed that the evidence was not handled in accordance with the Jonesboro Police Department policy because the evidence was placed in bags and was locked in Detective Chris Poe's office at the end of the day on Friday, May 22, rather than being placed in the evidence locker; it

was not logged into the evidence-tracking system until the following Monday morning, May 25, 2009. However, these items were individually identified as the items that were retrieved from Anthony as they were introduced into evidence; likewise, the officers who had keys to Detective Poe's office all testified that they did not enter his office after it was locked on Friday afternoon.

The trial court was satisfied that the evidence had not been tampered with and denied the "motion to suppress." These were not interchangeable items like drugs or blood, which require more certainty. *See Guydon v. State*, 344 Ark. 251, 39 S.W.3d 767 (2001). We find no abuse of discretion in that denial.

For his remaining point of appeal, Anthony contends that the trial court erred in overruling his objection to the State's use of a prior Illinois conviction for aggravated robbery. The basis of his objection was that the Illinois Department of Correction's "pen pack" did not sufficiently establish that he had been represented by counsel. He noted that the only indication of representation appears in a document with the letterhead: "Office of the State's Attorney—Cook County, Illinois." It recites the correct defendant, case number, trial judge, prosecutor, and sentencing date. The reference to representation by counsel appears in the middle of the page on the left-hand side: "Attorney: Public Defender."

In *Stewart v. State*, 300 Ark. 147, 148–49, 777 S.W.2d 844, 844–45 (1989), our supreme court explained:

> The State has the burden of proving a defendant's prior convictions.

> For the purpose of sentence enhancement pursuant to our habitual offender code provisions [Ark. Code Ann. §§ 5-4-501–5-4-504 (1987)], the State may prove a prior conviction by *any evidence* that satisfies the court beyond a reasonable doubt that the defendant was convicted or found guilty. On appeal, the test is whether there is substantial evidence that the appellant was previously convicted of the felonies in question.
>
> *Unless the records of prior convictions show that the defendant was represented by counsel, there is a presumption that the defendant was denied assistance of counsel, and the convictions cannot be used to enhance punishment under our habitual offender provisions*.
>
> . . . .
>
> Likewise, in the case at bar, docket sheets, as well as other documents, show that Stewart was represented by counsel. In enhancing Stewart's sentence under our habitual offender provisions, the trial court considered the *records of the Arkansas Department of Correction* (*the proverbial "pen pack"*) and certified documents from the Circuit Clerk of Woodruff County. These records and documents, admitted into evidence as State's Exhibit No. 2, included docket sheets, a plea statement, judgments, an admission summary, and transcriptions of Stewart's plea and arraignment proceedings, all in reference to appellant's four convictions in Woodruff Circuit Court . . . .

(Citations omitted; emphasis added.)

In *Byrum v. State*, 318 Ark. 87, 94, 884 S.W.2d 248, 252 (1994), our supreme court explained:

> A prior conviction cannot be used to enhance punishment unless the defendant was represented by counsel or validly waived counsel. *In the event the record of the prior conviction does not show the defendant was represented by counsel, a presumption arises the defendant was denied assistance of counsel and the conviction cannot be used to enhance punishment under our habitual offender provisions.* The State has the burden of proving a defendant's prior conviction. On appeal, the test is whether there is substantial evidence the defendant was previously convicted of the felony in question.

(Citations omitted & emphasis added.) The *Byrum* court did not address the issue of whether the documents relied on by the State were too ambiguous to prove

representation because it was raised for the first time on appeal. In *Tims v. State*, 26 Ark. App. 102, 106, 760 S.W.2d 78, 80 (1989), our court found merit to a challenge to a conviction from Jacksonville Municipal Court:

> On that sheet there is column for the name of the arresting officer. *In that column, appears the words, "Atty. O'Bryan." The appellant argues that this could be either the name of the defense attorney or the name of the prosecuting attorney.* Although we agree with the State that this is not a silent record, . . . , *we do find that, in the absence of any other evidence, the issue of whether the appellant was represented or validly waived counsel is too ambiguous to be relied on.* Careful adherence should be given the decisions regarding proof of prior convictions in these cases. Therefore, we find that the trial court erred in using evidence of a prior conviction to enhance the appellant's sentence.

(Emphasis added.)

In *Mangiapane v. State*, 46 Ark. App. 64, 66–67, 876 S.W.2d 610, 611–12 (1994), our court recounted its decisions in several cases and explained the distinctions among the cases' holdings:

> In recent times we have dealt with this issue on three occasions. First, in *Tims v. State, supra*, the appellant had been convicted of DWI, fourth offense. We found error in the use of one of the previous convictions where the words, "Atty. O'Bryan," appeared under a column for the name of the arresting officer. We deemed this designation as being too ambiguous to be relied upon to show that the appellant had been represented or had waived counsel. On the other hand, in *Rodgers v. State*, . . . , we upheld a conviction for DWI, fourth offense, where a challenge was made to two prior convictions evidenced by documents containing the entries "Jeff Duty, Atty." *We sustained the use of these convictions because the clerk of the court from which the convictions were obtained explained that the entries signified that Jeff Duty had been appointed as defense counsel.* In *Neville v. State*, . . . , we found proof of representation *lacking where the two docket sheets in question listed the respective names of Richard Lewallen and Susan Wilson under the column designated "Atty."* As in *Tims, supra*, we considered those listings to be too ambiguous, standing alone, to support a finding that the appellant was represented or had waived counsel. *The distinction between the decisions in* Tims *and* Neville*, and the decision in* Rodgers*, is that in* Rodgers *the docket entries were supplemented with other proof of representation.*

> In the case at bar, the trial court allowed the usage of the Grant County conviction finding that the entry "B. Murphy appted. . . ." indicated that an attorney had been appointed to represent appellant. *In so finding, the trial court took note of the fact appellant was represented at the time the guilty plea was accepted since the docket contained no entry showing that counsel had been relieved.*
>
> As in the cases discussed above, we are not faced with a silent record from which representation or the waiver of counsel cannot be presumed. The question here is whether there is substantial evidence to support the trial court's determination that appellant was represented by counsel in the earlier proceeding. *We consider this case as falling somewhere between the decisions in* Tims *and* Neville *on one end of the spectrum, and* Rodgers *on the other. From our review, however, we conclude that the trial court's finding is supported by substantial evidence. The docket sheet in question includes an express notation from which it can reasonably be inferred that counsel was appointed to represent appellant. We also cannot disagree with the trial court's conclusion that representation continued throughout the course of the proceedings since there was no entry showing that counsel had been dismissed.*

(Emphasis added.)

Here, the letter containing the reference to appellant's representation by counsel was part of the "pen pack" from Illinois. The narrow question presented is whether the reference, "Attorney: Public Defender," is sufficient to prove that appellant was represented by counsel regarding his Illinois conviction for aggravated robbery. There was no supplemental testimony explaining the reference, but we think it is clear that a "public defender" can only reasonably reference representation for the defendant; we are not disturbed by the fact that the public defender was not specifically named. We conclude that the designated reference in the pen pack is sufficient to satisfy the State's burden in this case.

Affirmed.

ROBBINS, J., agrees.

WYNNE, J., concurs.

Paul J. Teufel, for appellant.

Dustin McDaniel, Att'y Gen., by: *Nicana C. Sherman*, Ass't Att'y Gen., for appellee.

ROBIN F. WYNNE, Judge, concurring. I agree with the majority's decision in this case. However, I write separately in order to point out to the State that, although this court has held that the documentation contained in the "pen pack" from Illinois is sufficient to demonstrate that appellant was represented by counsel when he pled guilty to a charge of aggravated robbery in 2000, the better practice would be to include a copy of a signed plea agreement or some other similar documentation in instances in which the judgment and commitment order entered in the prior conviction does not indicate whether the defendant was represented by counsel.