

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR09-1019

JOSEPH MICHAEL HADLEY
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered February 23, 2011

APPEAL FROM PULASKI COUNTY
CIRCUIT COURT, FIRST DIVISION
[NOS. CR-2005-18; CR-2008-2609]

HONORABLE MARION
HUMPHREY, JUDGE

AFFIRMED IN PART; REVERSED
AND DISMISSED IN PART

JOHN MAUZY PITTMAN, Judge

Appellant was charged with the crimes of aggravated robbery, employing a firearm to commit that robbery, and theft of property. Based on those same allegations, the State also filed a petition to revoke the probation that appellant had been directed to serve following a prior criminal conviction. After a jury trial, appellant was found guilty of the charged offenses and was sentenced to terms of imprisonment. Immediately thereafter, a hearing was held on the State's motion to revoke appellant's probation. The trial court found that appellant had violated the conditions of his probation, revoked that probation, and imposed sentence for the underlying, earlier offense. In this appeal, appellant asserts that his convictions of aggravated robbery and theft should be reversed because the trial court abused its discretion by overruling appellant's objection to hearsay. He also argues that the trial court erred in revoking his probation because the State failed to prove that he was on probation when he

committed the acts on which his revocation was based. We affirm as to the first point and reverse as to the second.

The facts may be briefly stated. Appellant pled guilty to residential burglary and theft of property on December 6, 2005, and the trial court announced from the bench that appellant was to be placed on probation, required to perform community service, and ordered to pay restitution and court costs. This was Pulaski County Case No. CR-2005-18.

There is evidence that, on May 12, 2008, appellant took a man's automobile from the man's garage. The man called the police and went outside his house. While outside, he saw appellant exiting from the automobile and noticed that the vehicle's lights flashed, indicating that someone had used the automobile's key to remotely engage the automatic lock. The man entered another vehicle, drove a short way down his street, and politely asked appellant to return the key. Appellant first ignored him and continued walking, but then motioned for the man to come near him. When the man did so, appellant drew a pistol, pointed it at the man's face, and exclaimed, "How do you like that, [expletive]?" As the man began to drive away, appellant fired the pistol into the air. Appellant was soon apprehended by police, who found a semi-automatic pistol, spent shell casings, and the key to the stolen vehicle in appellant's possession. These events led to appellant's convictions for aggravated robbery, employing a firearm to commit that robbery, and theft of property in Pulaski County Case No. CR-2008-2609. As noted above, these events were also the basis for the State's petition to revoke appellant's probation in CR-2005-18.

Appellant's first point on appeal relates to his convictions in CR-2008-2609. Appellant asserts that a statement recorded for the police reflects knowledge correctly if the statement itself contains a recitation by the declarant that it is true. He argues that the trial court erred in allowing a witness to repeat in court a statement that he previously made to police detectives because the recorded statement did not recite an internal assertion of truthfulness. Appellant misstates the law. Arkansas Rule of Evidence 803(5) provides that hearsay is admissible, regardless of the declarant's availability, if it is in the form of a:

Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Although we held in *Lawrence v. State*, 81 Ark. App. 390, 104 S.W.3d 393 (2003), that a declarant's affirmation of the truth of a statement in the statement itself satisfied the Rule's requirement that the recordation be adopted by the declarant, it does not follow that an internal assertion of truthfulness is the only method by which such adoption can be shown. Here, the declarant testified at trial that the statement was in fact prepared and written by him, and that he was truthful when writing the statement.

Next, appellant contends that the trial court erred in revoking his probation in CR-2005-18 because the State failed to prove that he was on probation when he committed the acts on which his revocation was based. We agree. Although December 6, 2005, was the day that appellant pled guilty to residential burglary and theft of property and the trial court

announced from the bench that he was to be placed on probation in CR 2005-18, no written order regarding that pronouncement was filed and entered until April 15, 2009, almost one year after appellant committed the acts on which his revocation was based. Pursuant to Arkansas Supreme Court Administrative Order No. 2(b)(2), disposition orders are effective only after they are filed. *See Garduno-Trejo v. State*, 2010 Ark. App. 779. Our supreme court was presented with such a situation in *Ainsworth v. State*, 367 Ark. 353, 240 S.W.3d 105 (2006), where it said:

Ainsworth was jailed for a period of three weeks in 2004 for failing to comply with the terms of his probation, and he was also made to pay \$900 toward the fines imposed by the judgment. At the time of his detention and the payments, there is no evidence that the judgment pronounced in 2001 had been entered upon record, and thus it had not become effective. *See Bradford v. State*, 351 Ark. 394, 94 S.W.3d 90 (2003); *Johninson v. State*, 330 Ark. 381, 953 S.W.2d 883 (1997). This fact was acknowledged by the trial court's denial of the Appellee's petition to revoke probation.

Ainsworth, 367 Ark. at 357, 240 S.W.3d at 108. Because appellant's probation in CR-2005-18 was not effective until the judgment was filed in April 2009, the trial court erred in revoking it for acts committed by appellant in May 2008.¹

Affirmed in part; reversed and dismissed in part.

GLADWIN and ABRAMSON, JJ., agree.

¹The State's reliance on *Richardson v. State*, 85 Ark. App. 347, 157 S.W.3d 536 (2004), is misplaced for the reasons explained in *Garduno-Trejo, supra*.