

ARKANSAS COURT OF APPEALS

DIVISION I

No. CACR10-873

Opinion Delivered March 30, 2011

ARKEIN L. SETTLES

APPELLANT

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT, FIRST
DIVISION [NO. CR-2009-2989]

V.

STATE OF ARKANSAS

APPELLEE

HONORABLE MARION
HUMPHREY, JUDGE

AFFIRMED

DAVID M. GLOVER, Judge

Arkein Settles was convicted by a Pulaski County jury of one count of aggravated residential burglary and two counts each of aggravated robbery and theft of property. He now appeals an evidentiary ruling, arguing that he was prejudiced by the admission of ATM photos and the DVD/CD from which the photos were taken because the State failed to lay a proper foundation for the evidence. We affirm.

Because Settles is not contesting the sufficiency of the evidence to support his convictions, only a brief recitation of the facts is necessary. In the early morning hours of June 22, 2009, Settles and an accomplice knocked on the door of Raul Rojas's residence, holding themselves out to be police officers. Rojas and Ramon Ruiz, a friend of Rojas's who was also

at the residence, were held at gunpoint while Settles and his accomplice took both men's wallets and cell phones, as well as loose change from Rojas's bedroom and Ruiz's bank card and a camera from his car. The men called the police after Settles and his accomplice left, and a report was made. Later that morning Settles returned, still claiming to be a police officer, and requested the title to Ruiz's car. Ruiz was able to leave Rojas's house under the guise of retrieving the title to his car; instead, he called the police, and Settles was arrested in Rojas's front yard.

Settles's specific point on appeal concerns the admission of photos of him at a Bank of America ATM attempting to use Ruiz's bank card, and the DVD/CD from which they were taken. Settles argues that the trial court's admission of these items without proper foundation was prejudicial to him.

The decision to admit or exclude evidence is within the sound discretion of the circuit court, and that decision will not be reversed absent a manifest abuse of discretion. *Pace v. State*, 2010 Ark. App. 491, ___ S.W.3d ___. An appellate court will not reverse a circuit court's ruling on a hearsay question unless the appellant can demonstrate an abuse of discretion. *Id.* An abuse of discretion is a high threshold; it does not simply require error in the circuit court's decision, but requires that the circuit court acted improvidently, thoughtlessly, or without due consideration. *Id.*

The testimony at issue is that of Kathy Jensen, a Bank of America banking-center manager, who testified that she was the keeper of certain records for the bank, but that the records of the ATM videos were not actually kept at the banking center. Jensen stated that

there was a central-ATM-security division located in Dallas, Texas, that handled all of the technology that kept the files. She said that she was not one of the people who was authorized to keep those records, but she clarified that statement by saying that to her, “keeper of the records” meant that she had the physical records in her office, which she did not. Jensen testified that she had access to any records she needed; that if she needed to view anything from the camera systems, she contacted the security division; that the ATM security cameras recorded the events at the time they were happening; that the camera system would have knowledge of what was happening; that the records were absolutely kept in the regular course of Bank of America’s business and it was the bank’s regular practice to record the ATM information; and that she was a custodian of the records of Bank of America.

When the State attempted to introduce one of the ATM photographs, defense counsel objected on the basis that Jensen was not the custodian of the records; rather, she was just given possession of the items and brought them to court. The State argued that Jensen was custodian of the records because she had access to the records. Defense counsel argued that the records were kept in Dallas, Texas, at a security office, and that the records had not been properly authenticated under Rule 901 of the Arkansas Rules of Evidence. The trial court overruled defense counsel’s objection and stated that it would let Jensen testify as custodian.

Defense counsel requested and was granted the right to voir dire Jensen. During voir dire, she admitted that she did not have any first-hand knowledge as to the manner in which the CD containing the photographs was created. She said that she knew that it came from the bank’s technology department, but that the CD was not sent to her (it was sent to a detective

at the Little Rock Police Department). Jensen also said that she did not have any communications with the persons in Dallas. The trial court then reversed its earlier determination and sustained defense counsel's objection.

But the arguments continued. The State asserted that the keeper of the records did not have to bring the records to court, that she just had to authenticate that it was a record. When the trial court questioned how Jensen could authenticate the record if she had never seen it, the State responded that it could be played for Jensen in the trial court's chambers, and Jensen could testify that it was an ATM in North Little Rock with which she was familiar. At that point, the trial court allowed Jensen to testify further. She stated that the video cameras are on twenty-four hours a day, seven days a week; that they film anyone who walks up or drives up to the ATM; and that anything done in front of the ATM will be recorded. She testified that the CD containing the ATM video was created in Dallas and that the image was recorded instantaneously at the ATM. Although she stated that the video was made in June 2009, Jensen did not know the exact date, and she could not recall the condition of the ATM machine in question during June 2009. Although defense counsel argued that the exhibit had not been properly authenticated, the trial court again reversed its decision, stating that it would receive the exhibit.

Following the admission of the State's exhibit, Jensen testified that the photos were taken on June 22, 2009; that Ruiz's account was accessed; and that access was denied. Jensen also stated that she was familiar with the ATM in the photos and that the ATM was located in downtown North Little Rock.

Settles acknowledges that Arkansas Rule of Evidence 803(6) (2010) provides an exception to the hearsay rule for records of regularly conducted business activity. Business records are defined in this exception as

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses [sic], made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Rule 901(a) of the Arkansas Rules of Evidence provides, “The requirement of authentication or identification as a condition precedent to admiss[i]bility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims.” An example of authentication or identification that conforms with the requirements of this rule includes testimony of a witness with knowledge that a matter is what it is claimed to be. Arkansas Rule of Evidence 901(b)(1) (2010).

The State argues that Settles has changed his argument—that at trial, Settles objected to the admission of the CD and the photos taken from it for lack of a proper foundation under Rule 901 of the Arkansas Rules of Evidence, and that on appeal, Settles now argues that the CD and photos should not have been admitted because Jensen was not a qualified custodian under the business-record hearsay exception found in Rule 803(6) of the Arkansas Rules of Evidence. The State points out that Settles failed to get a specific ruling from the trial court

as to whether the CD and photos came in under Rule 901 or Rule 803(6), that it was his burden to obtain a ruling, and that his failure to do so waives the issue on appeal. We agree with the State.

In *Hooper v. State*, 311 Ark. 154, 842 S.W.2d 850 (1992), our supreme court summarily dismissed an evidentiary argument because appellant first objected in the trial court to the admission of telephone records on the basis that they were not authenticated, but then on appeal appellant argued that the telephone records were hearsay and did not fit under the business-records exception. Our supreme court held that in order to preserve an issue for appellate review, the objection below must be specific enough to apprise the trial court of the particular error, and a party may not change the ground for objection from the one made at trial to a different one on appeal. These are the exact two provisions that are at issue in the present case. Settles argued Rule 901 at trial, but he attempts to argue Rule 803(6) on appeal. Because Settles did not obtain a specific ruling, his argument is waived.

We note that even if the trial court erroneously admitted the ATM photos and DVD/CD, we still would not reverse because it is harmless error. Even if a circuit court errs in admitting evidence, the appellate courts will not reverse the conviction and will deem the error harmless if the evidence of guilt is overwhelming and the error is slight. *Rodriguez v. State*, 372 Ark. 335, 276 S.W.3d 208 (2008). The appellate courts look to see if the appellant was prejudiced by the erroneously admitted evidence to determine if the error is slight; prejudice is not presumed, and a conviction will not be reversed absent a showing of prejudice. *Id.* If the erroneously admitted evidence is cumulative, there is no prejudice, and

the appellate courts will not reverse a conviction for harmless error in the admission of evidence. *Id.*

Here, the evidence of guilt was overwhelming and the error was slight. The ATM pictures and the DVD/CD from which they were made were merely cumulative. Both Rojas and Ruiz identified Settles as one of the men who entered Rojas's home, held them at gunpoint, and took possessions belonging to both men, including Ruiz's bank card. The photos of Settles attempting to use Ruiz's bank card are cumulative evidence, and Settles cannot show prejudice with regard to the introduction of the photos and the DVD into evidence, even if they were erroneously admitted.

Affirmed.

GLADWIN and WYNNE, JJ, agree.