

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR09-270

BENJAMIN SCOTT

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered February 3, 2010

APPEAL FROM THE SALINE
COUNTY CIRCUIT COURT
[NO. CR-08-553B-2]

HONORABLE GARY M. ARNOLD,
JUDGE

AFFIRMED

WAYMOND M. BROWN, Judge

Appellant Benjamin Scott was found guilty of theft of property by a Saline County jury and was sentenced as an habitual offender to twenty-five years' imprisonment. He argues on appeal that the trial court erred in admitting testimony over his hearsay objection. We find no error and affirm.

Appellant was charged with theft of property valued in excess of \$500 but less than \$2,500 pursuant to Ark. Code Ann. § 5-36-103 (Repl. 2006). On August 8, 2008, at approximately 4:30 p.m., appellant and Michael Wayne Rayfus went into the Ten Mile Grocery Store located on Highway 70 in Saline County. Rayfus distracted the clerks while appellant entered the back office and took the "money bag" out of a briefcase. Marion Loprinzi, a clerk at the store, was able to give the police a description of appellant and Rayfus,

as well as a description of the vehicle and its license plate number. Loprinzi was also able to inform the police that the suspects were heading into Hot Springs. The vehicle was found in Garland County on the side of the road some time later. A perimeter was set around the wooded area and appellant and Rayfus were eventually apprehended. The suspects were searched and appellant was found to have approximately \$466 on his person; Rayfus had \$200. Appellant told officers that he had between sixty-five and seventy dollars prior to going into the store; Rayfus stated that he had \$145 to \$150 before going into the store. After interviewing Rayfus, officers learned that appellant hid some of the money in the woods where he was apprehended. The following day, officers searched the area and was able to locate an additional \$503. Subsequent to this, \$1,171 was returned to the store.

Appellant's jury trial took place on December 9, 2008. Susy Deweerd testified that she owned and operated Ten Mile Grocery Store. She stated that she was responsible for doing the store's paperwork and deposits each day. According to Deweerd, every day the employees would count the money and place it in the money bag at the end of each shift. The money bag would then be placed inside a briefcase located in the office. Deweerd testified that she would collect and deposit all the money the next morning. During Deweerd's testimony, the following colloquy took place:

APPELLANT'S ATTORNEY: She has prepared basically the way she has calculated what was taken and I talked to Pete about this and, you know, we just [sic] to make sure if she didn't actually prepare the numbers herself and knows exactly how much money was there then it falls under business exception, you know, commonly held business records to make sure then [sic] can actually prove how much was taken. She's got a number here but I don't know if she was the one that counted it or --

COURT: Well she'll be subject to cross examination and that will go to the weight to be given to her testimony as far as the jury is concerned. They can believe or not believe her. You're not going to [t]ry to introduce this, are you?

STATE: No.

APPELLANT'S ATTORNEY: I'm just concerned that the amount she would say would be hearsay since she doesn't have personal knowledge.

COURT: She can say, well, I think she can probably lay a foundation for her to be able to say what she thinks was stolen.

STATE: Okay.

COURT: You would have to lay a foundation, though.

Deweerd stated that she prepared the deposits for August 9, 2008. She testified that the store made \$4,756.27 on August 8, but that she deposited only \$2,346.00. According to Deweerd, the \$2,346.00 was from second shift and an additional \$1,233.84 was actually credit-card sales. Deweerd stated that the deposit was short by \$1,176.43.

On voir dire, Deweerd testified that the \$1,176.43 was collected between 6:00 a.m. and 2:00 p.m. on August 8, 2008. According to Deweerd, she did not get a chance to count the money; however, first shift counted the money before placing it in the briefcase. Deweerd stated that she generally re-counted the money the next morning before depositing it. She said that she did not have a chance to re-count the first shift's money from August 8 because the money bag was stolen.

At the conclusion of voir dire, appellant objected to Deweerd's testimony concerning the valuation of the stolen money arguing that it was hearsay. According to appellant, because Deweerd did not personally count the money collected on August 8, 2008, the

testimony was “pure hearsay.” The court overruled the objection, stating that there was no basis for appellant’s objection because Deweerd pulled the register receipts for the day in question and subtracted the money collected during second shift as well as the credit-card sales to come up with the missing amount.

Deweerd continued to explain how she came up with a total loss of \$1,176.43. She testified that there was a daily close report conducted everyday and that she was responsible for compiling that report and checking it against the store receipts.

On cross, Deweerd stated that she did not personally count the \$1,176.43 she alleged was taken by appellant on August 8; however, she stated that her manager counted it.

Detective Robert J. Hammons of the Saline County Sheriff’s Office testified that he and Det. Gary Roberts responded to a call at Ten Mile Store on August 8, 2008. He stated that they secured the scene and interviewed the cashiers. According to Det. Hammons, he and Det. Roberts also viewed tapes. Det. Hammons testified that they dusted for fingerprints but were unable to find any usable prints. Det. Hammons stated that he later came in contact with appellant in some woods in nearby Garland County. He said that law enforcement set up a perimeter and called for the Arkansas Department of Correction’s dog and tracking unit to come in and help locate the suspects. Det. Hammons said that when he heard over the radio that appellant and Rayfus had been located, he headed to the area. Det. Hammons testified that appellant had eighty-five dollars in his socks and an additional \$381 in his front pocket; Rayfus had \$200 in his pocket. Det. Hammons stated that approximately \$670.90 was found on the suspects at that time. According to Det. Hammons, appellant waived his

rights at the police station and informed Det. Hammons that he (appellant) robbed the store but that it was not a planned robbery. Appellant told Det. Hammons that prior to going to the store, he had between sixty-five to seventy dollars on him. Det. Hammons stated that Rayfus stated that he had between \$145 to \$150 before going into the store. Rayfus also informed Det. Hammons that appellant had stashed some money in the woods where they were captured. Det. Hammons stated that they went back to the woods the next morning and were eventually able to find \$503 hidden under a rotten log. Det. Hammons said that \$1,171 was returned back to the store.

On cross, Det. Hammons stated that he gave the store all the money that was found. He said that he did not take into account the cash appellant and Rayfus claimed to have had prior to taking the money from the store.

At the conclusion of the State's case, appellant made another motion concerning the valuation of the money taken by appellant. The court stated that Det. Hammons's testimony was enough to show that more than \$500 was taken by appellant. The court also found that Deweerd was competent to testify about the missing money based upon the register receipts and what was accounted for. The court concluded that there were two independent sources that proved that appellant took more than \$500 from the Ten Mile Grocery Store and denied appellant's motion.

Appellant was found guilty and was subsequently sentenced to twenty-five years' imprisonment. This appeal followed.

Appellant argues that the trial court should not have allowed Deweerd to testify about the amount of money taken from the Ten Mile Store because her testimony was based on hearsay. This argument is not convincing.

Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter.” Ark. R. Evid. 801. Hearsay is inadmissible except as provided by the exceptions set forth in Arkansas Rule of Evidence 803. *Howard v. State*, 348 Ark. 471, 79 S.W.3d 273 (2002). Rule 803(6) provides that records of regularly conducted business activity are admissible as follows:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, 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

We do not reverse a trial court’s ruling regarding a hearsay issue unless the trial court abused its discretion. *Peterson v. State*, 349 Ark. 195, 76 S.W.3d 845 (2002).

In the instant case, the trial court denied appellant’s motion to exclude Deweerd’s testimony concerning the amount of money missing from her store following appellant’s theft of a money bag. Deweerd presented the court with evidence of the missing amount by pulling the register receipts showing the total amount of sales made by the Ten Mile Grocery Store on August 8, 2008. From that total, she subtracted the credit-card sales and the amount collected during second shift. The difference was the amount she testified appellant had stolen. Appellant objected to the testimony, arguing that Deweerd had no personal

knowledge that the money was counted and placed in the bag he took from the store. The trial court properly denied the motion, stating that it would go to the weight to be given the testimony, not the admissibility itself. Therefore, we affirm.

Even if the testimony was admitted in error, we would still affirm. Appellant has failed to demonstrate that he was prejudiced by the trial court's ruling. An appellate court will not reverse a circuit court's evidentiary ruling absent a showing of prejudice. *See Harris v. State*, 366 Ark. 190, 234 S.W.3d 273 (2006). The testimony from Det. Hammons that over \$670 was found on appellant's and Rayfus's persons following the theft and that an additional \$503, which appellant had hidden, was found the following day was more than enough to prove that appellant stole over \$500 from the Ten Mile Grocery Store.

Affirmed.

GRUBER and GLOVER, JJ., agree.