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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-232

Filed: 5 November 2019

Johnston County, Nos. 17 CRS 52734-35, 1856

STATE OF NORTH CAROLINA

v.

WANDA KAY RICHARDSON

Appeal by Defendant from Judgment entered 29 August 2018 by Judge Beecher R. Gray in Johnston County Superior Court. Heard in the Court of Appeals 19 September 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Jessica V. Sutton, for the State.

Stephen G. Driggers for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural History

Wanda Kay Richardson (Defendant) appeals from Judgment entered on 29 August 2018 upon her convictions for Identity Theft, Financial Card Theft, and attaining Habitual-Felon status. The Record before us and evidence presented at trial tend to show the following:

The evening of 18 December 2016, Leslie Harrison (Victim) attended a visitation in Selma, North Carolina, around 5:30 p.m. She returned to her car after the service and discovered her wallet—which contained her social security card, around $300 in gift cards, and $50 in cash—was missing from her purse. At 6:58 p.m. that same day, Victim received an email from smiONE,[1] notifying her that her PIN number for her smiONE card was changed and seeking confirmation of the change. Upon receipt of that email, Victim contacted smiONE and canceled her card. The next day, her online card statement indicated two separate withdrawals were made from her account, totaling $500.

On 20 December 2016, Victim reported to the Selma Police Department that her wallet was missing and that money had been withdrawn from an ATM with her smiONE card. No further action was taken until 19 January 2017, when she met with Detective Jonathan Solomon. Victim provided Detective Solomon with her smiONE card statement, which indicated two withdrawals had been made in the amounts of $400 and $100 on 18 December 2016. Victim called smiONE from Detective Solomon's office, and, from their records, they provided her the telephone number used to change the PIN number on her smiONE card.

Victim testified that she searched the telephone number on Facebook and was directed to Defendant's Facebook page. Detective Solomon also entered the telephone

[1] A smiONE card is issued by VISA U.S.A. Inc. and is used like a debit card.

number into CJLEADS, the Selma Police Department's internal database, and Facebook. Both sites indicated that the number belonged to Defendant. Detective Solomon met with Defendant on 26 January 2017 and verified that the telephone number reported from smiONE belonged to Defendant. During their meeting, Defendant was cooperative with Detective Solomon. She provided him with access to her phone by giving him her password. She told Detective Solomon that she was the only one to use her phone and that it had a security PIN. The next day, on 27 January 2017, Defendant followed up with Detective Solomon and informed him that she reviewed her call log and there were a few numbers she did not recognize. She indicated that one of them was the call made to smiONE and told Detective Solomon she would provide him with her call log. Defendant never followed up with Detective Solomon about her call log.

On 25 April 2017, Detective Solomon obtained a warrant for Defendant's cell phone data. Under the warrant, Detective Solomon obtained call records that showed two phone calls made from Defendant's phone number to the number on the back of Victim's smiONE card just before Victim received an email that her PIN number was changed. Defendant was arrested on 7 July 2017 and indicted on 5 September 2017.

The parties began discovery on 22 September 2017. On 9 July 2018, the State filed Supplemental Discovery including notice of intent to use evidence, stating: "Pursuant to N.C.G.S. 8C-1, Rule 803(6), the State gives notice of its intent to

introduce evidence of records of regularly conducted activity of a non-party that shall be authenticated by affidavit." On 20 August 2018, Defendant filed a Motion in Limine to exclude evidence of Defendant's prior instances of probation, evidence or pictures obtained from the executed cell phone warrant irrelevant to the case, and other alleged prejudicial evidence.

On 28 August 2018, Defendant was tried before a jury in Johnston County Superior Court. Prior to the start of trial, the trial court conferred with counsel for both parties about Defendant's Motion in Limine, which the trial court allowed. During trial, the State sought to introduce into evidence the email Victim received on 18 December 2016 and her smiONE card statement as business records (Exhibit 2). The records were accompanied by an Affidavit from Jennifer Lee, custodian of smiONE records, averring:

> These 2 pages of records are kept by smiONE Card Services in the regular course of business, and it was the regular course of business of smiONE Card Services for an employee or representative of smiONE Card Services with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time of the act, event, condition, opinion, or diagnosis.

Defendant objected to admission of Exhibit 2, which the trial court overruled.

On 29 August 2018, the jury returned verdicts finding Defendant guilty of Identity Theft and Financial Card Theft. The same day, Defendant entered a plea of guilty to attaining Habitual-Felon status. At the close of trial, the trial court entered

costs and fees against Defendant as a civil judgment (Civil Judgment). However, Defendant was not present in the courtroom because she had already been remanded into custody.

On 29 August 2019, the trial court consolidated judgment in file numbers 17 CRS 052734, 052735 and sentenced Defendant in the mitigated range of 84 to 113 months. Defendant filed Notice of Appeal on 19 September 2018, outside the fourteen-day filing period required by our Rules of Appellate Procedure. *See* N.C.R. App. P. 4(a)(2). On 8 May 2019, Defendant filed a Petition for Writ of Certiorari with this Court conceding her Notice of Appeal was untimely. *See* N.C.R. App. P. 21(a)(1). In our discretion, we allow Defendant's Petition to review the trial court's Judgment.

Issues

There are two issues on appeal: (I) whether the trial court erred in admitting the email and SmiONE statement as business records over Defendant's objection and (II) whether the trial court erred in imposing attorney's fees as a civil judgment against Defendant without giving her notice and an opportunity to be heard.

Analysis

I. Rule 803(6)

Defendant first contends that the trial court erred in admitting, over her objection, business records under Rule 803(6) of the North Carolina Rules of Evidence for lack of advance notice. We review a trial court's ruling on the admissibility of

evidence over a hearsay objection de novo. *State v. Hicks*, 243 N.C. App. 628, 638, 777 S.E.2d 341, 348 (2015) (citations omitted). Similarly, the authentication of evidence is a question of law reviewed de novo. *Id.* "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citations and quotation marks omitted). Rule 803(6) of the North Carolina Rules of Evidence governs the admissibility of business records. N.C. Gen. Stat. 8C-1, Rule 803(6) (2017). It states:

> 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 (i) kept in the course of a regularly conducted business activity and (ii) 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, or by affidavit or by document under seal under Rule 902 of the Rules of Evidence made by the custodian or witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. Authentication of evidence by affidavit shall be confined to the records of nonparties, and the proponent of that evidence shall give advance notice to all other parties of intent to offer the evidence with authentication by affidavit.

Id.

A. Advance Notice

Defendant first contends that the trial court erred in admitting two pages of business records in Exhibit 2 over Defendant's objection because the State did not

provide sufficient "advance notice" of its intent to authenticate the business records in Exhibit 2 with an affidavit under Rule 803(6). Rule 803(6) requires "the proponent of that evidence shall give advance notice to all other parties of *intent* to offer the evidence with authentication by affidavit." *Id.* (emphasis added). Our courts have accepted affidavits to satisfy the authentication requirements of Rule 803(6) since at least 1998, *see In re S.W.*, 175 N.C. App. 719, 725, 625 S.E.2d 594, 598 (2006) (citing *Chamberlain v. Thames*, 131 N.C. App. 705, 716-17, 509 S.E.2d 443, 450 (1998)), and have held "[t]here is no requirement that the records be authenticated by the person who made them." *State v. Wilson*, 313 N.C. 516, 533, 330 S.E.2d 450, 462 (1985) (citations omitted). As this Court has reasoned, "the business records exception recognizes the impossibility of producing in court all the persons who observed, reported and recorded each individual transaction[.]" *State v. Allen*, ___ N.C. App. ___, ___, 812 S.E.2d 192, 195 (2018) (alterations, citations, and quotation marks omitted).

Defendant argued at trial that her receipt of the Affidavit authenticating Exhibit 2 two business days before trial did not constitute advanced notice as required under Rule 803(6). The Record before us indicates that the State initially provided general notice of its intent to offer Rule 803(6) evidence by affidavit in its Supplemental Discovery Filing, which the State filed and served on Defendant on 9 July 2018. This filing stated: "Pursuant to N.C.G.S. 8C-1, Rule 803(6), the State gives

notice of its intent to introduce evidence of records of regularly conducted activity of a non-party that shall be authenticated by affidavit." The State does not dispute that it provided Defendant with a copy of Ms. Lee's Affidavit authenticating the two pages of records submitted as Exhibit 2 in advance of trial on 24 August 2018—the day the Affidavit was received by the State—however, the State contends this was sufficient under the circumstances.

On 20 August 2018, over a month after the State first provided Defendant with notice of its intent to introduce evidence under 803(6) by affidavit, Defendant filed a Motion in Limine to exclude other evidence under Rule 404(b). N.C. Gen. Stat. § 8C-1, Rule 404(b). Defendant's Motion did not seek to exclude the email or card statement the State intended to authenticate by affidavit under Rule 803(6). Instead, Defendant objected at trial and contended that the two pages of records in Exhibit 2 were inadmissible on the basis that she did not receive Ms. Lee's Affidavit until two business days before trial. Defendant made no argument the two pages themselves had not been previously disclosed or provided by the State during discovery. Further, Defendant did not argue the Affidavit itself was inherently unreliable, indicated a lack of trustworthiness, or that she was otherwise prejudiced by receiving the Affidavit two days before trial. We conclude, on the facts of this case, Defendant was provided with adequate advance notice of the State's intent to offer evidence to be authenticated by affidavit under Rule 803(6).

B. Witness Testimony

Defendant contends, in the alternative, that Victim's testimony was insufficient to establish a foundation for the admission of Exhibit 2. Because we conclude the State satisfied the requirements of Rule 803(6) and thus the records in Exhibit 2 are admissible as business records, we do not address this contention.

II. Attorney's Fees

A trial court may impose a civil judgment for attorney's fees after an indigent defendant has been convicted. *See State v. Jacobs*, 172 N.C. App. 220, 235, 616 S.E.2d 306, 316 (2005). However, "[a] convicted defendant is entitled to notice and an opportunity to be heard before a valid judgment for costs can be entered." *State v. Webb*, 358 N.C. 92, 101, 591 S.E.2d 505, 513 (2004). The Record indicates, and the State concedes, that Defendant was not given an opportunity to be heard on the costs associated with her attorney's fees. This Court has stated "where there is 'no indication in the record that [a] defendant was notified of and given an opportunity to be heard regarding the appointed attorney's total hours or the total amount of fees imposed,' the imposition of attorney's fees must be vacated[.]" *State v. Harris*, 255 N.C. App. 653, 663-64, 805 S.E.2d 729, 737 (2017) (quoting *Jacobs*, 172 N.C. App. at 236, 616 S.E.2d at 317). As such, we vacate this Civil Judgment without prejudice. On remand, the State may apply for a judgment "provided that defendant is given notice and an opportunity to be heard regarding the total amount of hours and fees

claimed by the court-appointed attorney." *Jacobs*, 172 N.C. App. at 236, 616 S.E.2d at 317.

Conclusion

Accordingly, based on the foregoing reasons, we affirm the trial court's admission of the business records under Rule 803(6) and conclude there was no error in Defendant's criminal convictions. We vacate the trial court's Civil Judgment without prejudice to the State to seek attorney's fees on remand.

NO ERROR IN PART, VACATED IN PART AND REMANDED.

Judges ZACHARY and ARROWOOD concur.

Report per Rule 30(e).