

NO. 12-11-00027-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

<i>LAREY DOUGLAS BROWN,</i> <i>APPELLANT</i>	§	<i>APPEAL FROM THE 369TH</i>
<i>V.</i>	§	<i>JUDICIAL DISTRICT COURT</i>
<i>THE STATE OF TEXAS,</i> <i>APPELLEE</i>	§	<i>ANDERSON COUNTY, TEXAS</i>

MEMORANDUM OPINION

Larey Douglas Brown appeals his conviction for three counts of aggravated sexual assault, one count of aggravated kidnapping, and one count of unlawful possession of a firearm. In three issues, Appellant argues that the trial court erred in allowing the admission of certain evidence. The State did not file a brief. We affirm.

BACKGROUND

Because Appellant does not contest the sufficiency of the evidence, we will briefly state the nature of the State's case against him. At trial, the complaining witness testified that she had been trying to end her relationship with Appellant. However, she agreed to spend the night at Appellant's trailer after he repeatedly asked her to come see the renovation he was doing on the trailer. She agreed to accompany him, in part, she testified, because she thought he had some drugs or would get some and also because she felt sorry for him because his son had recently, and tragically, drowned. The two did not get any drugs that evening, but they did eat dinner at the trailer and, later, engaged in consensual sexual intercourse. The complaining witness went to sleep. She testified that she awoke from a bad dream and found Appellant in the living portion of the trailer with a rifle. She went back to sleep.

In the morning, Appellant wanted to have sex again. The witness refused, and Appellant beat her with a rifle and his hands and sexually assaulted her. Later that morning, she fled to a neighboring trailer, but Appellant caught up with her and forced her into his truck. He drove her to a lake. At the lake, Appellant beat her and told her that she was going to die. Eventually, however, he relented and took her to the home of a mutual friend. The witness was badly injured and, eventually, another friend took her to the hospital. The hospital personnel alerted the police, and the police began an investigation that led to these charges.

An Anderson County grand jury indicted Appellant on three counts of aggravated sexual assault, one count of aggravated kidnapping, and one count of unlawful possession of a firearm. Appellant pleaded not guilty, and a jury trial was held. The jury found him guilty as charged and assessed a sentence of imprisonment for thirty-seven years on each of the aggravated offenses and for ten years on the unlawful possession of a firearm charge. This appeal followed.

ADMISSION OF EVIDENCE

In three issues, Appellant argues that the trial court erred in admitting certain evidence. Specifically, he asserts that it was error to admit a photograph of the complaining witness during the guilt/innocence phase of the trial and error to admit a docket sheet and records pertaining to a prior conviction during the punishment phase of the trial.

Background

During the guilt/innocence phase of the trial, the State offered a photograph showing the complaining witness's face. The witness identified the photograph but was vague as to when it had been taken. On voir dire examination, the witness could not tell Appellant's counsel who took the picture or where it was taken. Counsel objected to the photograph on the grounds that an insufficient foundation had been laid for its admission. The trial court overruled the objection and allowed the photograph.

During the sentencing phase of the trial, the State offered records of Appellant's conviction for the misdemeanor offense of unlawful carrying of a weapon. Appellant objected to the records on the grounds that he did not have counsel when he pleaded guilty to that offense. The trial court overruled that objection and allowed the exhibit.

Finally, and also during the sentencing phase of the trial, the State offered a two page criminal docket sheet from the court's file for one of Appellant's prior convictions. Appellant

objected to the docket sheet on the grounds that it was inadmissible hearsay. The trial court overruled his objection and allowed the exhibit.

Analysis

The trial court did not err in allowing the photograph of the complaining witness's face. Photographs may be authenticated by the testimony of any witness who can testify that she has personal knowledge that the photograph accurately represents the scene or event that it purports to portray. See TEX. R. EVID. 901; *Huffman v. State*, 746 S.W.2d 212, 222 (Tex. Crim. App. 1988). The complaining witness identified the photograph of her face. She could not specifically state where the photograph was taken—it appears from her testimony that it was taken at one of two places—and she could not state who took the photograph. Neither is a requirement if a witness can state that the photograph accurately represents what it purports to represent. Her testimony that it was a photograph of her face taken two or three days after the assault and that it was an accurate depiction of her face is sufficient to authenticate the photograph. We overrule Appellant's first issue.

The trial court did not err in allowing the records of Appellant's prior conviction for unlawful carrying of a weapon. Appellant cites *United States v. Tucker*, 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972), and *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967), for the proposition that prior convictions may not be admitted at a subsequent trial if the accused did not have counsel during the earlier proceeding. These cases must be understood in their historical context. The right to counsel in state trials for felonies was established in *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). The *Tucker* and *Burgett* cases were extensions of that holding and stand for the proposition that a prior conviction may not be used if the accused was denied the right to counsel in the prior proceeding. In *Burgett*, the Court wrote that it was "unconstitutional to try a person for a felony in a state court unless he had a lawyer or had validly waived one." *Burgett*, 398 U.S. at 114, 88 S. Ct. at 261. The court noted that the certified record introduced in that case raised "a presumption that petitioner was denied his right to counsel in the [prior] proceeding, and therefore that his conviction was void." *Id.*, 398 U.S. at 114, 88 S. Ct. at 261-62. Similarly, in *Tucker*, the Court noted that another court had found that prior convictions admitted in the trial were constitutionally invalid because the defendant "had been neither advised of his right to legal assistance nor did he intelligently and understandingly waive this right to the assistance of counsel." *Tucker*, 404 U.S. 443, 445, 92 S.

Ct. at 590 (internal quotations omitted).¹

But in this case, by contrast, there is affirmative evidence that Appellant’s right to counsel was not violated in the prior proceeding. Specifically, the records admitted at trial show that, in the prior proceeding, Appellant acknowledged that he had the right to counsel and the right to appointed counsel, and that he waived his right to counsel. As such, not only did Appellant not show that his right to counsel was abrogated, but the records affirmatively show that his rights to counsel and to self-representation were honored. Because Appellant was not deprived of his right to counsel in the prior proceeding, the trial court did not err in allowing records of the prior misdemeanor conviction to be admitted. We overrule Appellant’s second issue.

Finally, Appellant argues that the trial court erred in allowing the docket sheet to be admitted because, he asserts, it is inadmissible hearsay. The rules of evidence forbid hearsay statements. See TEX. R. EVID. 801(d). By rule, hearsay is “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 asserted.” *Id.*

The docket sheet is hearsay, it being nothing more than a collection of statements made at a place other than at Appellant’s trial. However, public records are admissible as an exception to the hearsay rule. See TEX. R. EVID. 803(8). The docket sheet admitted at this trial was certified and sealed as an official document. Appellant asserts that the document was not self-authenticated as a business record under Rule 902. However, public records may be certified by a seal. See TEX. R. EVID. 902(1), (4). The docket sheet bore a seal, and so the trial court did not err in admitting it over Appellant’s hearsay objection. See *Vanderhorst v. State*, 821 S.W.2d 180, 183 (Tex. App.–Eastland 1991, pet. ref’d). We overrule Appellant’s third issue.

DISPOSITION

Having overruled Appellant’s three issues, we *affirm* the judgment of the trial court.

SAM GRIFFITH

Justice

¹ The modern practice of collateral attacks on prior convictions is slightly different. Specifically, the burden is on the party attacking the validity of a conviction to show that it cannot be used. See, e.g., *West v. State*, 720 S.W.2d 511, 519 (Tex. Crim. App. 1986) (lack of jury waiver); *Disheroon v. State*, 687 S.W.2d 332, 334 (Tex. Crim. App. 1985) (burden on defendant to prove unconstitutional lack of counsel for misdemeanor conviction used to enhance another offense).

Opinion delivered September 7, 2011.

Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)