

DIVISION I

ARKANSAS COURT OF APPEALS

No. CACR07-55

HORACE RHODES	
	APPELLANT
V.	
STATE OF ARKANSAS	
	APPELLEE

Opinion Delivered October 24, 2007

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
FOURTH DIVISION [CF2005-4646]

HONORABLE JOHN LANGSTON,
JUDGE

AFFIRMED

DAVID M. GLOVER, Judge

Horace Rhodes was convicted on September 26, 2006, by a Pulaski County jury of robbery and misdemeanor theft of property. He was sentenced as an habitual offender to a total of thirty years in the Arkansas Department of Correction and fined a total of \$6,000. Rhodes does not contest the sufficiency of the evidence to support these convictions; his sole point of appeal is that the trial court abused its discretion in refusing to allow him to cross examine the victim, Christian Barrow, about his prior conviction for fraudulent use of a credit card in light of the fact that the State had failed to prove that this conviction had been expunged. We affirm.

The decision to admit or exclude evidence is within the sound discretion of the trial court. *LeFever v. State*, 91 Ark. App. 86, 208 S.W.3d 812 (2005). This court will not reverse a trial court's evidentiary ruling absent an abuse of discretion and a showing of prejudice. *Id.*

This case was essentially a swearing match between the victim, Christian Barrow, and appellant Rhodes. Barrow claimed that after they had asked him for change, which Barrow had given them, Rhodes and another man held him at gunpoint and took the rest of his change and his billfold out of his pockets. Immediately upon seeing a police officer driving by, Barrow flagged down the officer and told him that he had been robbed; when the officer got out of the car and ordered both men to stop, Rhodes told the officer that he did not rob anyone, that the other guy had robbed Barrow, and began to walk faster. When the officer told him to stop a second time, Rhodes refused and began running, but was apprehended by the officer after a foot chase. Rhodes, testifying in his own defense, asserted that after he asked Barrow for some change, some other man came up to Barrow and it looked to Rhodes that he was attempting to rob Barrow. Rhodes denied robbing Barrow.

The issue on appeal arose during Rhodes's cross-examination of Barrow. When defense counsel inquired about Barrow's past criminal history, the State admitted at a bench conference that Barrow had a 1998 conviction for misdemeanor theft of property that was admissible for impeachment purposes, but that Barrow had a 1998 incident for fraudulent use of a credit card that had been expunged under Act 346 and was therefore inadmissible. Defense counsel argued that the State had not produced an order of expungement on this case, and therefore, defense counsel did not know if it was actually expunged. The trial court ruled:

Three forty-six is not a conviction. If he was sentenced under 346, any expungement is a ministerial act, and the Court says that even if it hasn't been officially expunged, it should have been expunged if he's completed it. If he's completed the probation without being – So, it's not admissible under that.

Act 346 is codified at Arkansas Code Annotated section 16-93-303 (Repl. 2006).¹

Subsection (a)(1)(A) of that statute provides:

Whenever an accused enters a plea of guilty or nolo contendere prior to an adjudication of guilt, the judge of the circuit or district court, in the case of a defendant who had not been previously convicted of a felony, without entering a judgment of guilt and with the consent of the defendant may defer further proceedings and place the defendant on probation for a period of not less than one (1) year, under such terms and conditions as may be set by the court.

Subsection (b) of that statute states:

Upon fulfillment of the terms and conditions of probation or upon release by the court prior to the termination period thereof, the defendant shall be discharged without court adjudication of guilt, whereupon the court shall enter an appropriate order which shall effectively dismiss the case, discharge the defendant, and expunge the record, if consistent with the procedures established in § 16-90-901 et seq.

Expungement is defined as “that the record or records in question shall be sealed, sequestered, and treated as confidential in accordance with the procedures established by this subchapter.” Ark. Code Ann. § 16-90-901(a)(1) (Repl. 2006). Arkansas Code Annotated section 16-90-902(b) provides, “Upon the entry of the uniform order to seal records of an individual, the individual’s underlying conduct shall be deemed as a matter of

¹Arkansas Code Annotated section 16-93-303 was amended after Rhodes’s trial by Act 744 of 2007. Accordingly, this amendment is inapplicable here, but it provides, in pertinent part, that under this statutory provision, during the period of probation and after the successful completion of probation, the defendant is considered as not having a felony conviction except for the purpose of impeachment as a witness under Rule 609 of the Arkansas Rules of Evidence. Therefore, even if a conviction has been expunged under this subsection, it can now still be used for impeachment purposes under Rule 609.

law never to have occurred, and the individual may state that no such conduct ever occurred and that no such records exist.”

Rhodes relies upon *Davidson v. State*, 363 Ark. 86, 210 S.W.3d 887 (2005), in support of his argument. In that case, our supreme court affirmed the trial court’s decision to allow the State to introduce a prior conviction over Davidson’s objection that the conviction had been expunged because Davidson had failed to include in the record proof that the conviction had in fact been expunged in accordance with statutory provisions.

Likewise, in this case, the State offered no proof that Barrow’s conviction had been expunged in accordance with statutory provisions. In fact, the State offered no more than the deputy prosecuting attorney’s bare assertions that Barrow had been sentenced under Act 346 and that the conviction had been expunged. This is not proof that Barrow’s conviction, even presuming that the conviction occurred under Act 346, had been expunged.

We still affirm this case, however, because Rhodes must not only show that the trial court’s ruling was an abuse of discretion, which it was, but he must also be able to show prejudice from the trial court’s evidentiary ruling. In this swearing match, we cannot hold that Rhodes suffered prejudice as a result of the trial judge’s decision for two reasons. First, defense counsel was allowed to introduce Barrow’s 1998 conviction for misdemeanor theft of property to impeach his credibility. Similar use of the 1998 conviction for fraudulent use of a credit card to impeach his credibility would merely have been cumulative. Even relevant evidence may be excluded if it is cumulative. Ark. R.

Evid. 403. Second, there was other credible evidence that when ordered to stop by a police officer, Rhodes refused to do so but instead he ran away. Fleeing from the scene of a crime by an accused is a fact that may be considered with other evidence in determining guilt. *Kendrick v. State*, 37 Ark. App. 95, 823 S.W.2d 931 (1992).

Affirmed.

VAUGHT and HEFFLEY, JJ., agree.