THIRD DIVISION
June 22, 2011

No. 1-10-0191

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 C6 61776
	)	
JAIME LOPEZ,	)	Honorable
	)	Frank G. Zelezinski,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE STEELE delivered the judgment of the court.
Presiding Justice Quinn and Justice Neville concurred in the judgment.

O R D E R

HELD: Where the State failed to establish an adequate foundation for computer-generated business records, their admission into evidence was reversible error. Retrial is not barred by double jeopardy because the evidence presented was sufficient to sustain defendant's conviction.

Following a bench trial, defendant Jaime Lopez was convicted of theft and misappropriation of financial institution property and sentenced to two years of probation. On appeal, defendant

contends the trial court erred when it admitted copies of certain bank records into evidence; the evidence was insufficient to establish a *corpus delecti* or to prove the charges beyond a reasonable doubt; and the trial court improperly shifted the burden of proof by indicating, in the course of announcing its judgment, that it had wanted to hear defendant's explanation. For the reasons that follow, we reverse and remand for a new trial.

Defendant's conviction arose from events that occurred in August 2007, when defendant was employed as an assistant manager and teller at the Calumet City branch of TCF Bank. Based on these events, defendant was charged with one count of theft of $13,600 from TCF Bank and one count of misappropriation of between $10,000 and $100,000 entrusted to the custody of TCF Bank.

Prior to trial, defendant filed a motion *in limine* seeking to bar certain bank records as evidence at trial. At the hearing on the motion, defendant argued that the computer-generated bank records which the State intended to produce at trial were not made in the regular course of business but rather were produced for litigation, that there was no evidence to establish their accuracy and foundation, and that the original documents were destroyed and the copies were not sufficiently reliable. After hearing counsel's arguments and reading the cases provided by the

parties, the trial court decided to defer ruling on the motion, stating, "This is more of a matter which I have to see what those records are as they are so presented by the State." The court indicated that it would make its determinations as to admissibility and weight during trial, at the time of introduction.

At trial, Cheryl Stevens-Collins testified that on August 7, 2007, she went to the Calumet City branch of TCF Bank, where she had a checking account. Stevens-Collins wrote an $80 check to herself and went to a teller to cash the check. After the teller gave her the cash, Stevens-Collins left the bank. Some time later, she received notification from the bank that her account had a negative balance. Stevens-Collins contacted the branch manager, Atlantis Mason-Williams, and was told there had been a withdrawal of $5,400 from her account. At trial, Stevens-Collins testified that she did not make such a withdrawal or authorize anyone else to do so.

Tony Flowers testified that on August 20, 2007, he went to the Calumet City branch of TCF Bank to make a cash withdrawal of $1,200 from his checking account. He filled out the relevant paperwork and took it to the teller, who processed the transaction. After receiving his cash, Flowers left the bank. A day or two later, Flowers called the bank and learned his account had been closed. He went to the bank and spoke with Mason-

Williams, who informed him that $5,200 had been debited from his account on August 20, 2007. Flowers testified that he did not make a withdrawal of $5,200 on that date and did not give anyone else permission to make such a withdrawal.

Atlantis Mason-Williams, the senior manager of the Calumet City branch of TCF Bank, testified that after speaking with Flowers, she contacted her regional manager, Brian Basick. A few days later, on August 30, 2007, Basick and Joseph Kranz, an investigator for TCF Bank, came to the branch. They spoke with defendant, and then after defendant left, asked Mason-Williams to audit his teller drawer, which she did with the assistance of another employee. After refreshing her recollection with the surprise audit paperwork, Mason-Williams testified that the audit revealed defendant's teller drawer contained $2,539.12. According to Mason-Williams, the drawer should have contained $3,000 more, for a total of $5,539.12.

Mason-Williams explained that each teller is assigned a unique number, has an individual password, and uses his or her own drawer, which can only be accessed in a vault with a manager present. Tellers do not count the money in their drawers at the beginning of a shift. Rather, at the end of a shift, the teller counts the money in the drawer and enters the figure into a balancing sheet on the computer. When asked how she determined, for auditing purposes, what amount of money a teller drawer

started with, Mason-Williams explained, "You get it from the computer," and "You would pull it from the computer." Mason-Williams further testified that surprise teller drawer audits are not unusual and that surprise audit paperwork is created in the normal course of business.

Joseph Kranz, a corporate investigator for TCF Bank, testified that he was assigned to investigate Stevens-Collins's and Flowers's claims. Kranz testified that all transactions conducted by a TCF Bank teller are automatically entered into an electronic database program as they are keyed, and that a unique teller number is stamped on each transaction a particular teller makes. Kranz went through the bank's teller journals on the electronic database and found that the same teller number was stamped on both of the transactions he had been assigned to investigate. Further research revealed that teller number had been assigned to defendant. Kranz searched the branch's teller journals for transactions with defendant's teller number that were conducted on August 7, 2007, and August 20, 2007, and printed out those pages of the teller journals. In court, he identified copies of those documents, indicated that they were in the same condition as when he printed them, with no alterations, and stated that such documents were kept by TCF Bank in the normal course of business.

The State moved to admit the teller journals into evidence. Defendant objected, arguing that they were computer printouts, as opposed to original documents, and were produced for the purpose of an investigation. He further argued that the State had not laid the appropriate foundation to establish the reliability of the computer system used to generate the records. The trial court found that the documents were business records "not made in the course of an investigation." The court noted that Kranz had retrieved the documents from the pool of records which were made in the course of everyday business. Accordingly, the trial court allowed the documents into evidence, noting that any hand-written notations would be disregarded.

Kranz testified that when reviewing the teller journals, he found that defendant had processed a withdrawal of $5,400 at 6:36 p.m. on August 7, 2007, and that amount was debited from Stevens-Collins's account. The record of the transaction included the code "F," which indicated that defendant had given managerial approval for the withdrawal -- a requirement for large cash withdrawals -- and forced the transaction through. The transaction also included the code "1756," which Kranz explained indicated the transaction was a "non-account holder check cashing." However, no corresponding check was located in the processing records. The next transaction on Stevens-Collins's

account was a withdrawal of $80 via check, processed by defendant 37 seconds later.

Kranz's review of the teller journals also revealed that defendant had processed a withdrawal of $5,200 on Flowers's account at 12:51 p.m. on August 20, 2007. Again, the teller journal indicated that defendant had coded the transaction "F" and had designated it as a "check cash," but no corresponding check ever went through processing. The next transaction on Flowers's account was a cash withdrawal of $1,200, which defendant processed 12 seconds later.

On August 30, 2007, Kranz went to the Calumet City branch of TCF Bank. There, he and the regional manager, Brian Basick, spoke with defendant in a conference room. When Kranz showed him the teller journals and asked about the transactions, defendant denied having any involvement with the loss of the money, threw his keys and identification badge on the table, and directed Kranz to talk to his lawyer if he had additional questions.

Kranz testified that TCF Bank returned $5,400 to Stevens-Collins and $5,200 to Flowers. Those amounts were not recovered by the bank.

Brian Basick testified that in August 2007, when he was the regional manager of TCF bank, Atlantis Mason-Williams alerted him regarding missing checks at the Calumet City branch. On August 30, 2007, he and Joseph Kranz went to the branch and spoke with

defendant. Basick testified that he and Kranz asked defendant about the two checks that the bank could not find. Defendant refused to answer questions, threw his keys down, and said, "You can talk to my attorney." Basick informed defendant that his teller drawer was going to be audited and invited him to stay for the process, but defendant chose to leave. Defendant did not return to work and was subsequently terminated.

Basick testified that the manner in which defendant had coded the cashing of the two checks in question, that is, coding them "F" for a forced manager override, was not a standard practice. Basick also explained that in order to cash a check, a customer must have at least that amount of money in his or her account, and it is against bank policy to cash checks that will cause an account to become overdrawn. After looking at bank records in court, Basick testified that Stevens-Collins did not have enough money in her checking account to cover a check for $5,400, and Flowers did not have enough money in his checking account to cover a check for $5,200.

Jim O'Dette, a senior investigator for TCF Bank, testified that in August 2007, he received a request to investigate two unauthorized check cashings at the Calumet City branch. O'Dette gave the assignment to Kranz and reviewed his investigation. In court, O'Dette reviewed the teller journals and explained that

they showed transactions conducted at the Calumet City branch by a particular teller.

According to the journals, at 6:36 p.m. on August 7, 2007, the teller processed a withdrawal of $5,400. The teller entered the transaction code "F," indicating that a manager forced the transaction, and the code "1756," indicating that it was "a non-TCF customer check cashing." The next transaction by the teller was 37 seconds later, when he cashed a check for $80 against Stevens-Collins's account. A few weeks later, on August 20, 2007, the teller processed a withdrawal of $5,200 from Flowers's account, again using the transaction codes "F" and "1756." Then, 12 seconds later, the teller conducted a withdrawal of $1,200 from the account.

O'Dette testified that the transaction code "1756" is rarely used. He explained that the code would be entered only when a non-TCF customer cashes a check from a non-TCF account. The code would not be used for transactions by a TCF Bank customer.

At the close of the State's case, the trial court admitted into evidence the surprise teller drawer audit paperwork over defendant's objection. The trial court also admitted a DVD of surveillance footage depicting Stevens-Collins and Flowers making their respective withdrawals. Defendant made a motion for a directed finding, which the trial court denied.

Defendant testified on his own behalf and denied having taken money from TCF Bank. He stated that he conducted a $5,200 withdrawal for Flowers and a $5,400 withdrawal for Stevens-Collins, and that he handed both customers their respective amounts. When asked why he used the "1756" code on those transactions, defendant responded that the customers must have given him money orders, cashiers checks, or travelers checks, as he would not have been able to balance his drawer at the end of the day on August 7 and August 20 without physical checks for those amounts.

According to defendant, the situation was a big misunderstanding. Defendant testified that when he met with Kranz and Basick, they tried to make him confess to something he did not do. He stated that he was not invited to stay for the audit of his teller drawer. Defendant agreed that everyone was lying except him.

Following closing arguments, the trial court convicted defendant of theft and misappropriation of financial institution property. In the course of doing so, the trial court made the following statement: "The court has extensively looked at all of the evidence which I have here and the court particularly wanted to hear from the defendant as he gave his explanation and I don't buy his explanation; I do believe the State has proven this case beyond a reasonable doubt."

Defendant thereafter filed a motion for a new trial, arguing that the teller journals and the teller drawer audit paperwork should not have been admitted into evidence because they did not fall within the business records exception to the hearsay rule and because the State did not provide an adequate evidentiary foundation for the admission of computer-generated records. Defendant further argued that he was not proved guilty beyond a reasonable doubt and that the trial court improperly shifted the burden of proof. Following a hearing, the trial court denied the motion. Subsequently, the trial court sentenced defendant to two years of probation.

On appeal, defendant's first contention is that the trial court erred when it admitted copies of the teller journals and the surprise teller drawer audit paperwork into evidence. He argues that the trial court should have granted his motion *in limine* to bar these bank records because they were not records kept in the normal course of business, but instead, were documents created for litigation. Defendant asserts that the State failed to present any foundation evidence establishing that the computer systems used to produce the teller journals and the audit paperwork were trustworthy and reliable, or that the documents produced at trial were accurate reproductions of the originals. Defendant further argues that while the surprise audit paperwork initially may have been created in the regular

course of business, the paperwork was altered with handwritten notations, assembled, and copied for anticipated litigation.

The business records exception to the hearsay rule recognizes that records or reports of events or occurrences are generally trustworthy when they are made as a matter of routine in the regular course of business. *People v. Alsup*, 373 Ill. App. 3d 745, 755 (2007). Under the rule, the party seeking to admit a business record into evidence must show that the record was made as a memorandum or record of the act, that the record was made in the regular course of business, and that it was the regular course of the business to make such a record at the time of the act or within a reasonable time thereafter. 725 ILCS 5/115-5(a) (West 2008); *People v. Universal Public Transportation*, 401 Ill. App. 3d 179, 196 (2010). Other circumstances surrounding the making of such writing or record, including lack of personal knowledge by the entrant or maker, may affect the weight of a record, but not its admissibility. 725 ILCS 5/115-5(a) (West 2008).

When the business record in question is computer-generated, a proper foundation requires an additional showing that standard equipment was used, that the particular computer generates accurate records when used appropriately, that the computer was used appropriately, and that the sources of the information, the method of recording utilized, and the time of preparation

indicate that the record is trustworthy and should be admitted into evidence. *Universal Public Transportation*, 401 Ill. App. 3d at 196, 197; *People v. Johnson*, 376 Ill. App. 3d 175, 180 (2007). The determination of whether business records are admissible is within the sound discretion of the trial judge, and will not be reversed absent an abuse of discretion. *Universal Public Transportation*, 401 Ill. App. 3d at 197.

In the instant case, the State sought to admit into evidence the teller journals and the teller drawer audit paperwork. Accordingly, it elicited testimony from several witnesses that these records were created in the regular course of business. However, because these records were computer-generated, the State carried an additional foundational burden, which it failed to meet.

With regard to the information contained in the teller journals, Kranz testified that it was stored in TCF Bank's internal, unified "computer system." He stated that records of transactions were kept in the normal course of business in "an electronic database or electronic program." Kranz explained that all transactions conducted by tellers are automatically entered into the "computer system" as they are keyed, and that a unique teller number is stamped on each transaction that particular teller makes. He further testified that he searched the Calumet City branch's teller journals for transactions with defendant's

teller number and printed out the pages relevant to his investigation.

With regard to the teller audit paperwork, although it was in large part hand-written, the beginning balance for the audit calculations was provided by a computerized process. Mason-Williams was the only witness to describe the audit procedure at trial. When she was asked how she determined, for auditing purposes, what amount of money a teller drawer started with, she responded, "You get it from the computer," and "You would pull it from the computer." She explained that at the end of a shift, a teller counts the money in his or her drawer and enters the figure in the computer, but that tellers do not physically count the money in their drawers at the beginning of a shift.

The State failed to elicit any testimony from Kranz, Mason-Williams, or any other witness as to the type of software programs or computer systems used by TCF Bank. No evidence was presented that standard computer equipment was used, that the particular computer used generates accurate records when used appropriately, or that the computer was used appropriately. The evidence that was presented fell short of establishing a foundation for computer-generated business records. In the absence of an adequate foundation, the admission of the bank records was error. *Johnson*, 376 Ill. App. 3d at 180 (reversed conviction based on inadequate foundation for computer-generated

records); *People v. Friedland*, 202 Ill. App. 3d 1094, 1101 (1990) (same).

Because the bank records provided the bulk of the evidence of the crimes charged, we cannot say beyond a reasonable doubt that their admission did not contribute to defendant's conviction. Therefore, the error was not harmless. Accordingly, we reverse and remand for a new trial. See *Johnson*, 376 Ill. App. 3d at 180-81; *Friedland*, 202 Ill. App. 3d at 1101.

On retrial, if the State seeks to introduce the computer-generated business records, it must make some showing that standard equipment was used, that the particular computer generates accurate records when used appropriately, that the computer was used appropriately, and that the sources of the information, the method of recording utilized, and the time of preparation indicate that the records are trustworthy and should be admitted into evidence. *Universal Public Transportation*, 401 Ill. App. 3d at 196, 197; *Johnson*, 376 Ill. App. 3d at 180.

Because the issues may arise on retrial, we briefly address defendant's additional arguments regarding the foundation for the teller journals and the surprise teller drawer audit paperwork. Specifically, defendant has argued that the copies of the destroyed originals were not accurate, and that they were prepared in anticipation of litigation. We note that reproductions of business records that are prepared incident to

or in anticipation of litigation, but which are based upon an original record made and kept in the regular course of business, are admissible because their trustworthiness is based upon the original record. *People v. Mormon*, 97 Ill. App. 3d 556, 565 (1981). Additionally, accurate computer data is not rendered inadmissible just because it was retrieved in anticipation of litigation. *People v. Houston*, 288 Ill. App. 3d 90, 98 (1997). On retrial in this case, the State may elicit testimony from its witnesses regarding the preparation of the original records, destruction of original paperwork, and accuracy of the copies.

We are mindful that second or successive trials are, in general, forbidden by the double jeopardy clause. *People v. Olivera*, 164 Ill. 2d 382, 393 (1995); *Johnson*, 376 Ill. App. 3d at 182. However, double jeopardy does not bar a new trial that is needed to correct an error in the proceedings, even where the conviction could not have been sustained without erroneously admitted evidence. *Olivera*, 164 Ill.2d at 393. Where the evidence presented was sufficient to convict, retrial is not barred. *Johnson*, 376 Ill. App. 3d at 182.

On appeal, defendant has raised a contention that the evidence was insufficient to establish the *corpus delecti* or to prove the charges against him beyond a reasonable doubt. He argues that the State's failure to produce evidence of a loss of cash necessitates reversal; that the testimony of State witnesses

established that computer error, not criminal conduct, caused debits to customer accounts; and that there was no competent evidence of a beginning cash balance on the day of the surprise teller audit.

When reviewing the sufficiency of the evidence, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). In the instant case, the evidence, including the bank records, showed that defendant conducted cash withdrawals against Stevens-Collins's and Flowers's accounts for $5,400 and $5,200, respectively; that neither customer withdrew those amounts; that both were reimbursed by TCF Bank; and that on the day of the surprise teller audit, defendant's drawer was short $3,000. Thus, viewed in the light most favorable to the State, the evidence was sufficient to establish that defendant committed theft and misappropriation of $13,600 of TCF Bank funds. Double jeopardy does not bar a new trial.

In light of our disposition, we need not address defendant's contention that the trial court improperly shifted the burden of proof when, in the course of announcing its decision, it stated that it "particularly wanted to hear from the defendant as he gave his explanation and I don't buy his explanation."

For the reasons explained above, we reverse the judgment of the circuit court of Cook County and remand for a new trial.

Reversed and remanded.