

[Cite as *State v. Vermillion*, 2016-Ohio-1295.]

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
ATHENS COUNTY

STATE OF OHIO, :  
 :  
Plaintiff-Appellee, : Case No. 15CA17  
 :  
vs. :  
 :  
TROY A. VERMILLION, : DECISION AND JUDGMENT  
 :  
 : ENTRY  
Defendant-Appellant. :

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APPEARANCES:

Timothy Young, Ohio Public Defender, and Carrie Wood, Assistant State Public Defender, Columbus, Ohio, for Appellant.

Keller J. Blackburn, Athens County Prosecuting Attorney, and Merry M. Saunders, Athens County Assistant Prosecuting Attorney, Athens, Ohio, for Appellee.

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CRIMINAL CASE FROM COMMON PLEAS COURT  
DATE JOURNALIZED: 3-14-16  
ABELE, J.

{¶ 1} This is an appeal from an Athens County Common Pleas Court judgment of conviction and sentence. A jury found Troy A. Vermillion, defendant below and appellant herein, guilty of petty theft in violation of R.C. 2913.02(A)(1). Appellant assigns the following error for review:

“THE TRIAL COURT VIOLATED EVID.R. 901(A) WHEN IT PERMITTED INTRODUCTION OF A VIDEO WHEN THE STATE FAILED TO PRODUCE EVIDENCE THAT THE VIDEO SURVEILLANCE SYSTEM WHICH RECORDED AND COPIED THE VIDEO WAS RELIABLE WITH RESPECT TO

ACCURATELY REPRODUCING VIDEO FROM A SPECIFIED DATE AND TIME AND THAT ANY DATE AND TIME STAMP ON THE VIDEO WAS ACCURATE AND RELIABLE, INTRODUCTION OF THE VIDEO VIOLATED EVID.R. 901(A) [SIC].”

{¶ 2} On December 27, 2013, brothers Woodser and Elson Rouse were playing pool at Union Street Bar. Appellant and his friend also were at the bar. Appellant sat at the table where the Rouse brothers had left their personal belongings, including Elson’s cell phone. Shortly after appellant left the table, Elson discovered that his cell phone was missing. Woodser believed that appellant took Elson’s phone. Woodser went outside and saw appellant’s friend, but not appellant. Woodser began yelling at the friend “to get [appellant] back there and to get the phone back that had just been stolen or [he] would call the police.” As he was yelling, Woodser noticed appellant walking from the corner of Congress and Union Street. He confronted appellant, but appellant denied that he took the cell phone. Woodser called the police.

{¶ 3} When the police arrived, they asked appellant to empty his pockets. Appellant complied, but he did not have Elson’s cell phone. The officers completed a police report and left the scene.

{¶ 4} After the officers left, Woodser and Elson decided to look around the area for the cell phone. They walked toward the corner of Congress and Union Street, where Woodser had spotted appellant walking when he was yelling at appellant’s friend. Within a few minutes, they found the phone in a trash can located outside Fusion Noodle, a restaurant. Woodser informed the officers that he found the cell phone. One of officers noted a security camera on the Fusion

Noodle building that pointed toward the trash can and suggested that they obtain footage during operating hours.

{¶ 5} After approximately a week and one-half, the officers had not obtained the footage from Fusion Noodle. Woodser then decided to see if he could obtain the footage from the night Elson's cell phone was stolen and placed in the trash can. Woodser met with a Fusion Noodle employee and gave the employee the time frame documented in the police report. Upon examining the footage, Woodser noticed appellant by the trash can where he had found Elson's cell phone. The Fusion Noodle employee downloaded the footage to a flash drive and gave it to Woodser. Woodser immediately took the flash drive to the police department.

{¶ 6} On March 12, 2015, the trial court held a jury trial. Athens City Police Officer Ross Holter testified that on December 27, 2013, at approximately 11:15 p.m., he responded to a reported cell phone theft from Union Street Bar. Shortly after Officer Holter "cleared the scene," he received a call that advised him that Woodser and Elson discovered the cell phone in a trash can located on Union Street. Officer Holter located appellant and took his photograph to document appellant's appearance on that night, so that if they located a video recording from an area business on the night in question, the officers could compare appellant's appearance to anyone seen on the video in the vicinity of the trash can on the night of the cell phone theft.

{¶ 7} Athens Police Officer Brian Follrod testified that he helped investigate the alleged cell phone theft. He stated that Woodser retrieved a video recording from Fusion Noodle and brought it to the police department. Officer Follrod testified that the video "portray[ed] the scene as [he] saw it that night."

{¶ 8} Woodser testified that he found the cell phone in a trash can located on the corner of Congress and Union Streets, in front of Fusion Noodle. Woodser stated that approximately a week and one-half after the cell phone theft, he went to Fusion Noodle to see if he could obtain video footage from the night the cell phone was taken. Woodser testified that he gave a Fusion Noodle employee the relevant time frame and that he and the employee looked at the video. Woodser explained that he saw appellant appear on the video during the specified time frame. Woodser stated that the employee copied the footage to a flash drive and gave it to Woodser. After Woodser left Fusion Noodle, he took the flash drive to the police department.

{¶ 9} Appellant objected to the video evidence and argued that the state failed to authenticate the video. The trial court overruled appellant's objection.

{¶ 10} On March 16, 2015, the jury found appellant not guilty of tampering with evidence, but guilty of petty theft. On April 27, 2015, the court sentenced appellant to serve one hundred eighty days in jail, with one hundred fifty days suspended. This appeal followed.

{¶ 11} In his sole assignment of error, appellant contends that the trial court erred by allowing the state to use the Fusion Noodle video as evidence at trial. In particular, appellant asserts that the state failed to authenticate, or demonstrate the reliability of, the video.

{¶ 12} “‘The admission or exclusion of relevant evidence rests within the sound discretion of the trial court.’” State v. Dean, — N.E.3d —, 2015-Ohio-4347, ¶91, quoting State v. Sage, 31 Ohio St.3d 173, 510 N.E.2d 343 (1987), paragraph two of the syllabus. Consequently, “a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that created material prejudice.” State v. Morris, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶14, quoting State v. Diar, 120 Ohio St.3d 460,

2008-Ohio-6266, 900 N.E.2d 565, ¶66; accord State v. Adams, 2015-Ohio-3954, ¶198, citing State v. Sage, 31 Ohio St.3d 173, 182, 510 N.E.2d 343 (1987). “An abuse of discretion is more than a mere error of law or judgment.”<sup>1</sup> State v. Thompson, 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶91; accord State v. Johnson, — N.E.3d —, 2015-Ohio-4903, ¶75. Instead, “[a] trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary.” State v. Keenan, 143 Ohio St.3d 397, 398, 2015-Ohio-2484, 38 N.E.3d 870, 872, ¶7, quoting State v. Darmond, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶34. An abuse of discretion includes a situation in which a trial court did not engage in a “sound reasoning process.” State v. Morris, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶14, quoting AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp., 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). Moreover, “[a]buse-of-discretion review is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court.” State v. Darmond, 135 Ohio St.3d 343, 351, 2013♥Ohio♥966, 986 N.E.2d 971, 978, ¶34 (2013).

{¶ 13} Before a trial court may admit evidence, Evid.R. 901 requires the proponent to identify or authenticate the evidence. Evid.R. 901(A) states: “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Evid.R. 901(B) outlines a non-exclusive list of the means by which a proponent may demonstrate authenticity.

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<sup>1</sup> In Hobbs v. Hobbs, 36 N.E.3d 665, 2015-Ohio-1963 (4<sup>th</sup> Dist.), fn.3, we pointed out that some courts and commentators questioned whether a trial court may commit an error of law without abusing its discretion. Nonetheless, the Ohio Supreme Court, as recently as December 2015, indicated that a mere error of law is insufficient to find an abuse of discretion. State v. Johnson, — N.E.3d —,

See id. (stating that the examples listed in the rule serve as “illustration only” and not as limitations). For instance, a proponent may identify or authenticate evidence by presenting “[t]estimony that a matter is what it is claimed to be.” Evid.R. 901(B)(1).

{¶ 14} Circumstantial, as well as direct, evidence may be used to show authenticity. State v. Reno, 4th Dist. Ross No. 04CA2759, 2005-Ohio-1294, ¶18. Moreover, the threshold standard for authenticating evidence pursuant to Evid.R. 901(A) is low, and ““does not require conclusive proof of authenticity, but only sufficient foundational evidence for the trier of fact to conclude that \* \* \* [the evidence] is what its proponent claims it to be.”” Reno at ¶18, quoting State v. Easter, 75 Ohio App.3d 22, 25, 598 N.E.2d 845 (4<sup>th</sup> Dist. 1991); Wellston v. Brown, 4th Dist. Jackson No. 03CA25, 2005-Ohio-532, ¶18. Accord State v. Horton, 8th Dist. Cuyahoga No. 101100, 2015-Ohio-99, ¶19, quoting State v. Roseberry, 197 Ohio App.3d 256, 2011–Ohio–5921, 967 N.E.2d 233, ¶65 (8th Dist.) (stating that the proponent “only needs to demonstrate a ‘reasonable likelihood’ that the evidence is authentic”).

“The admissibility of photographic evidence is based on two different theories. One theory is the ‘pictorial testimony’ theory. Under this theory, the photographic evidence is merely illustrative of a witness’ testimony and it only becomes admissible when a sponsoring witness can testify that it is a fair and accurate representation of the subject matter, based on that witness’ personal observation. \* \* \* A second theory under which photographic evidence may be admissible is the ‘silent witness’ theory. Under that theory, the photographic evidence is a ‘silent witness’ which speaks for itself, and is substantive evidence of what it portrays independent of a sponsoring witness.”

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2015-Ohio-4903, ¶75 (stating that “a mere error of law or judgment \* \* \* is insufficient to prevail on abuse-of-discretion review”).

Midland Steel Prods. Co. v. U.A.W. Local 486, 61 Ohio St.3d 121, 129–130, 573 N.E.2d 98 (1991), quoting Fisher v. State, 7 Ark.App. 1, 5–6, 643 S.W.2d 571 (1982). Accord State v. Pickens, 141 Ohio St.3d 462, 2014-Ohio-5445, 25 N.E.3d 1023, ¶150.

{¶ 15} In Midland Steel Prods. Co., the court determined that the proponent adequately demonstrated the authenticity of video footage obtained from a surveillance system under the “silent witness” theory. The proponent presented testimony from the individual who “personally monitored and operated the camera from a control room as it recorded the [relevant] conduct.” Id. at 123-124. This individual described the layout and features of the area viewed on the tape. The court determined that the individual “impliedly authenticated the accuracy of the surveillance system and the videotapes each time he described the location of these known features.” Id. at 130. The court then concluded that because the videotape accurately depicted the known features, “it was likely that it also depicted the \* \* \* misconduct accurately.” Id. The court also noted that the individual “was the custodian of the videotapes, that he knew of no method of altering the videotapes, that he had not altered the videotapes, and that the videotapes accurately depicted what he had seen while he personally monitored the surveillance system.” Id. The court thus determined that the proponent “adequately showed the reliability of the surveillance system and the videotapes produced by it.” Id.

{¶ 16} Likewise, in Pickens, the court determined that video footage obtained from an apartment complex’s surveillance system was admissible under the “silent witness” theory. Id. at ¶151. In Pickens, the property manager testified “from personal knowledge about the installation of the surveillance system, the positioning of the cameras, and the method used for recording the video taken inside and outside the apartment building.” Id. at ¶151. The court

rejected any contention that expert testimony was “required to substantiate the reliability of the surveillance system.” Id. at ¶151. The court additionally noted that the defendant did “not argue on appeal that there is any defect as to what was depicted in the footage.” The court thus determined that “the state adequately showed the reliability of the surveillance system and the videos produced by it” and “[t]hus, the surveillance videos were properly authenticated.” Id. at ¶151.

{¶ 17} Courts have, however, upheld the admission of video surveillance footage even in the absence of testimony from an individual with personal knowledge of the surveillance system’s recording process. In State v. Johnson, 140 Ohio App.3d 385, 393♥94, 747 N.E.2d 863, 870 (1st Dist. 2000), the defendant asserted that the state failed to properly authenticate a videotape that purported to show the defendant engaging in an illegal drug transaction. The appellate court disagreed and noted that an officer who had been present during the drug transaction testified that the videotape “fairly and accurately depicted the events that had occurred in the warehouse on the date in question.” The court found that the officer’s testimony sufficiently authenticated the video footage. The court specifically rejected the defendant’s argument that the surveillance system operator’s testimony was required to authenticate the video footage. Id. at 393-394.

{¶ 18} In State v. Farrah, 10th Dist. Franklin No. 01AP♥968, 2002-Ohio-1918, the court upheld a trial court’s decision to admit surveillance video that depicted a store robbery, even though the state (the proponent of the evidence) did not present testimony from the individual responsible for the surveillance system. Instead, the court determined that the state established authenticity by presenting testimony from an officer who investigated the robbery. The officer



stated that he had been in the store on prior occasions and that the video accurately portrayed how the store looked at the time of the robbery. The appellate court determined that the officer's testimony sufficiently supported "a finding that the videotape was genuine and accurately depicted the store at the time of the robbery." Id. at \*5. Accord State v. Coots, 2015-Ohio-126, 27 N.E.3d 47 (2<sup>nd</sup> Dist.) (determining that video surveillance footage properly authenticated when investigating officer testified that the video depicting the crime was the same video taken from surveillance cameras in the area); State v. Hoffmeyer, 9th Dist. Summit No. 27065, 2014-Ohio-3578 (concluding that trial court did not abuse its discretion by admitting video surveillance footage when investigating officers testified that the video accurately portrayed the location on the night in question); State v. Freeze, 12<sup>th</sup> Dist. Butler No CA2011-11-209, 2012-Ohio-5840 (determining trial court did not abuse its discretion by admitting surveillance video when investigating officer testified that he obtained the video and that video was an accurate representation of what he originally viewed).

{¶ 19} In the case at bar, after our review of the record we do not believe that the trial court abused its discretion by admitting the video footage obtained from Fusion Noodle's surveillance system. Rather, the trial court reasonably could have concluded that the state satisfied the threshold to demonstrate authenticity. The state introduced testimony that Woodser went to Fusion Noodle and requested an employee to review surveillance video footage from the time surrounding the cell phone theft. Woodser stated that he was present when the employee reviewed the footage, and that he saw appellant on the video footage during the relevant time frame. The employee copied the footage to a flash drive and gave it to Woodser. Woodser testified that he then took the flash drive immediately to the police department. Woodser also

testified that the video is a clear and accurate representation of the scene that night. Moreover, Woodser testified that he noted appellant walking away from Fusion Noodle shortly after the cell phone theft. Additionally, one of the officers testified that the video accurately portrayed the scene as he observed it on the evening of December 27, 2013. Furthermore, the video shows appellant wearing the same clothes that he had been wearing the night of the cell phone theft. Under these circumstances, we believe that the trial court could have reasonably determined that the video footage was what the state claimed it to be.

{¶ 20} The absence of testimony from a Fusion Noodle employee with personal knowledge of the surveillance system's recording process does not render the video footage inadmissible. While such testimony likely may be helpful to demonstrating authenticity, courts have not imposed it as an absolute precondition to admissibility under Evid.R. 901(A). Farrah, supra; Johnson, supra. Consequently, we disagree with appellant that the trial court abused its discretion by admitting the video recording into evidence.

{¶ 21} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & Hoover, J.: Concur in Judgment & Opinion

For the Court

BY: \_\_\_\_\_  
Peter B. Abele, Judge

**NOTICE TO COUNSEL**

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.