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WISCONSIN COURT OF APPEALS
District IV

06-19-2014

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

Appeal No. 2014AP000718 CR
Circuit Court Case No. 2013CM000147

TRAVANTI D. SCHMIDT,

Defendant-Appellant.

On appeal from an Order Entered
in the Circuit Court for Grant County,
the Honorable Robert P. VanDeHey, Circuit Judge, presiding.

**DEFENDANT-APPELLANT'S
REPLY BRIEF**

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The importance of the video in this case was to show whether Schmidt intentionally threw the milk, as the state contended, or whether Schmidt spilled the milk, as Schmidt contended. This was its significance and this is why the state wished to offer it into evidence. Beyond this single purpose it otherwise had no other evidentiary value. This is why the video becomes the silent witness in this case. It saw what no one else saw, not even Officer Parr.

That the state offered it as substantive evidence, as opposed to illustrative evidence, is what sets it apart from a mere photograph for authentication purposes. Officer Parr could not say the video was a fair and accurate representation of what he saw, because he and the silent witness did not see the same thing -- they were positioned at different vantage points. In fact, when the milk came out of the cell, Parr was looking the other way. (R10, Ex. #4).

As to silent witness evidence, McCormick and Blinka are in accord:

Without a percipient witness as to their accuracy, visual recordings ... are subjected to a more careful scrutiny under the "silent witness" theory of authentication. Recordings such as a tape from an automatic surveillance camera can be authenticated as the accurate product of an automated process.

2 McCormick on Evidence § 216 (Kenneth S. Broun ed., 7th ed. 2013).

As a silent witness the photograph itself is the source of proof independent of any other testimony; that is, the exhibit depicts details not within the personal knowledge of any witness. Common examples are ... pictures taken by surveillance cameras. Because the photograph itself

serves as an independent source of evidence, it must be authenticated by testimony describing the process by which the photo was taken and establishing the reliability of the process.

Daniel D. Blinka, 7 Wisconsin Practice Series: Wisconsin Evidence § 9015.9 (3d ed. 2013).

So when the state argues that the video could be authenticated through the testimony of a witness with knowledge that the matter is what the witness claims it to be, the state would be incorrect. (Resp. Br. at 10). When the result of an automated system is being offered as substantive evidence, it needs to be authenticated according to Rule 909.015(9).

The *Kandutsch* court makes the point. In *Kandutsch* the state wished to offer the results of an electronic monitoring device (EMD) to prove that Kandutsch was operating a motor vehicle while intoxicated. *See State v. Kandutsch*, 2011 WI 78, ¶2, 336 Wis.2d 478, 799 N.W.2d 865. No witness ever saw Kandutsch driving. *See Kandutsch*, 2011 WI 78, ¶2. But the EMD report showed that Kandutsch had left a house at 10:03 p.m. and drove to another house approximately 15 minutes away where he was arrested at 10:23 p.m. heavily intoxicated. *See id.* The state wanted the jury to infer that Kandutsch drove from one place to the other under the influence of intoxicants. *See id.*

To get the EMD report into evidence, the state called Kandutsch's probation agent to lay a foundation for the report. *See id.* ¶13. She described the EMD program, she explained the equipment set up, explained how it operated, explained how it was verified, and stated further that a person's movements are recorded by computer generated

reports . *See id.* ¶13-15. She testified how she had never had any problems with it in the past and stated further that she had never heard of a unit generating a false report. *See id.* ¶15.

When she was done her supervisor told the jury that electronic monitoring was a routine supervision tool and in his 20 years of experience with it he had never heard of a faulty unit or a faulty report. *See id.* ¶16.

After the two witnesses finished laying their foundation, the state successfully moved the report into evidence. *See id.* ¶17.

On review the supreme court blessed the state's work, stating specifically that the foundation laid by the probation officer and her supervisor satisfied the foundation requirements of § 909.01 by using the means outlined in § 909.015(9). *See id.* ¶46.

There is little difference between the EMD report offered in *Kandutsch* and the video offered in this case. In *Kandutsch* the electronic monitor saw what no one else saw – *Kandutsch* leaving one address and 15 minutes later arriving at another. In *Schmidt's* case the video camera likewise saw what no one else saw – the speed and trajectory with which the milk came out of the trap. Their foundation requirements are the same as they are both silent witnesses.

As for the state's reliance on the *Peterson* and *Sarinske* cases, both are inapposite. (Resp. Br. at 10-11). The video in *Peterson* restaged a boating accident and was offered as demonstrative evidence to show how the accident may have happened. *See State v. Peterson*, 222 Wis. 2d 449, 452-53, 588

N.W.2d 84 (Ct. App. 1998). The video was not a silent witness.

The same can be said about *Sarinske*. At issue there were photographs of footprints. See *State v. Sarinske*, 91 Wis. 2d 14, 43-44, 280 N.W.2d 725 (1979). The photos were properly admitted after the photographer who took them laid a foundation for them. Clearly, the photographer who testified was not a silent witness.

As for the state's claim that Officer Parr merely failed to utter certain magic words, it again misses the point. (Resp. Br. at 11). There were no magic words that Parr could say to authenticate the video because he never saw what the camera saw. Had he testified that the video was a fair and accurate representation of what he saw, he would have testified untruthfully.

So when the state says Schmidt failed to allege sufficient facts to warrant a *Machner* hearing, it seems to have missed the point about how and when § 909.015(9) applies. The state offered the surveillance video into evidence without a proper foundation and defense counsel should have objected to its admission.

As to its second point - that the defense wanted the jury to see the video - the state is postulating. (Resp. Br. at 9). If by "defense" it means defense counsel wanted the jury to see the video then it is merely guessing. Until defense counsel testifies at a *Machner* hearing as to her reasons for mentioning the video in her opening statement no one will ever know what she wanted.

On the other hand, if by "defense" the state means Schmidt, well then, the state is just wrong. Schmidt was better

off before the silent witness testified. Until then the state had nothing more than a he-said, she-said case.

CONCLUSION

To reiterate, the trial court denied Schmidt's motion contending he presented only conclusory allegations in his moving papers. Schmidt respectfully disagrees. He told the trial court exactly why defense counsel erred and he properly linked the error to the prejudice he suffered.

He likewise disagrees with the state when it says his motion failed to allege sufficient facts to warrant a hearing. Again he told the trial court about the evidentiary error, how defense counsel failed to object to the error, and how he was prejudiced as a result. His motion should be granted.

Dated this _____ day of June 2014.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 1,200 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding appendix, if any, which complies with the requirements of s. 809(19)(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this ____ day of June 2014.

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