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No. _____

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

JAMEL McLELLAND FOWLER, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Hunt County

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

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NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

*The parties to the trial court's judgments are the State of Texas and Appellant, Jamel McLelland Fowler.

*The cases were tried before the Honorable Andrew Bench, 196th Judicial District Court, Hunt County, Texas.

*Counsel for Appellant at trial was Russell Brooks, P.O. Box 1905, 2512 Washington Street, Greenville, Texas 75403-1905.

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No. _____

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

JAMEL McLELLAND FOWLER, Appellant

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* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

When a copy of a recording is offered, the inquiry has three parts: 1) whether the copy accurately depicts the contents of the original, 2) whether the content is relevant, and 3) whether the content accurately depicts what happened.[1] In this case, the court of appeals held that "screenshot" video of security footage could not be authenticated without the testimony of a store employee. Can a video of a video be authenticated by circumstantial evidence combined with the jury's ability to determine whether something looks like what it is purported to be?

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[1] *See Angleton v. State*, 971 S.W.2d 65, 67 (Tex. Crim. App. 1998) (outlining admissibility inquiry for an "enhanced" copy of an audiotape).

STATEMENT REGARDING ORAL ARGUMENT

The State does not request oral argument. Although this case serves as an important reminder of how to apply authenticity law in an ever-changing environment, the law itself is clear and the facts are undisputed.

STATEMENT OF THE CASE

Appellant was found guilty of theft of an all-terrain vehicle (ATV) based in large part on a video showing him making a purchase memorialized by a receipt found near the recovered ATV. The court of appeals held that the video was inadmissible because no one from the store testified to its accuracy.

STATEMENT OF PROCEDURAL HISTORY[2]

The court of appeals reversed appellant's conviction in a published opinion.[3] It withdrew its opinion after it denied the State's motion for rehearing and issued a new published opinion.[4] No further motion for rehearing was filed. The State's petition is due April 17, 2017.

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[2] Appellant was also convicted of burglary of a building in a related case but the trial court acquitted him following a motion for new trial. *State v. Fowler*, No. 06-16-00032-CR, __S.W.3d__, 2017 Tex. App. LEXIS 2118 (Tex. App.–Texarkana Mar. 14, 2017). The State Prosecuting Attorney has filed a petition for discretionary review in that case, PD-0307-17.

[3] *Fowler v. State*, No. 06-16-00038-CR, 2017 Tex. App. LEXIS 734 (Tex. App.–Texarkana Jan. 27, 2017) (designated for publication but withdrawn Feb. 14, 2017).

[4] *Fowler v. State*, __S.W.3d__, 2017 Tex. App. LEXIS 2304 (Tex. App.–Texarkana Mar. 17, 2017).

GROUND FOR REVIEW

May the proponent of a video sufficiently prove its authenticity without the testimony of someone who either witnessed what the video depicts or is familiar with the functioning of the recording device?

ARGUMENT AND AUTHORITIES

Facts

While investigating a burglary of a company's building, Officers Torrez and Meek found an ATV hidden near one of the company's other buildings.[5] The ATV was stolen.[6] Numerous items were found nearby, including a receipt from Family Dollar.[7] The receipt showed that a box cutter was purchased.[8] The packaging for the box cutter was found near the ATV.[9]

Torrez and Meek went to Family Dollar to see if there was any video that could be helpful.[10] They asked the manager to pull security video matching the date and time on the receipt.[11] The video provided showed what Torrez believed to be a man

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[5] 10 RR 35, 42, 46.

[6] 10 RR 46.

[7] 10 RR 36, 67 (three feet away).

[8] 10 RR 42.

[9] 10 RR 42, 46 (15 to 20 feet away), 69. They are also referred to a "plastic cutters."

[10] 10 RR 37, 65.

[11] 10 RR 48, 60-61.

purchasing a box cutter.[12] Unsure whether they could obtain an original copy of the recording from the store, Meek recorded the security playback with a police video camera.[13] Torrez tried multiple times to find a manager who could provide an original video of the security footage, to no avail.[14]

At trial and on appeal

Appellant made multiple objections to the admission of the video.[15] The judge had only one: "I don't know what date and time it purports to depict. And it's not relevant unless I know that."[16] Appellant ultimately focused on the State's failure to establish, through the Family Dollar employee who pulled the video, the date and time the original video was made.[17] Once Torrez testified that he believed the Family Dollar employee pulled the correct video because the date and time on the video matched those on the receipt, the trial court admitted the video.[18]

On appeal, appellant focused primarily on the functioning of the surveillance

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[12] 10 RR 63.

[13] 10 RR 48, 83.

[14] 10 RR 89-90.

[15] 10 RR 52-56.

[16] 10 RR 59.

[17] 10 RR 57-60, 60 ("That's my point. I'm objecting to that.").

[18] 10 RR 61-62.

system with regard to the date/time stamp on the video.[19] The court of appeals agreed that the officers' video was irrelevant. It summarized the problem thus:

> While the date and time on the lower center part of the screen on Torrez' recording of the store recording generally corresponds with the date and time on the receipt found near the ATV, there was no evidence that the surveillance system was working properly on the date in question, that its on-screen clock was correctly set and functioning properly, or that the original accurately portrayed the events that purportedly occurred at the time and on the date shown in the video recording.[20]

Rule 901 encourages creativity, not rigidity.

A trial court's ruling on authenticity is governed by Texas Rule of Evidence 901. "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."[21] It has no relevance otherwise.[22] Like other preliminary questions, the trial court need only decide whether there are sufficient facts to support a reasonable jury determination of authenticity.[23] "The ultimate question whether an item of evidence is what its proponent claims then becomes a

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[19] *See*, *e.g.*, App. Br. at 35-36 ("We do not know whether the time and date stamp seen on the screen was programmed accurately. Because we know nothing about the functioning of the surveillance system or its programming, there is no way to know whether or not the time stamp on the video and the one reflected on the Family Dollar receipt actually show the same transaction.")

[20] Slip op. at 10.

[21] TEX. R. EVID. 901(a).

[22] *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012).

[23] *Id*. *See* TEX. R. EVID. 104(b) ("When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.").

question for the fact-finder—the jury, in a jury trial."[24] Because this is a "'liberal standard of admissibility,'"[25] reviewing courts "should not interfere" if admission was "at least 'within the zone of reasonable disagreement.'"[26]

Rule 901 is also liberal in terms of what evidence is required. In *Angleton v. State*, this Court rejected the idea that Rule 901 carried forward pre-Rules authentication requirements that include the testimony of a witness with knowledge or satisfaction of a seven-factor test.[27] "[A]ttempting to cling to [that] test after the enactment of Rule 901 will result in unwarranted confusion for practitioners, trial courts, and appellate courts."[28] By contrast, "Rule 901 is straightforward, containing clear language and understandable illustrations."[29] "[T]he best or most appropriate method for authenticating electronic evidence will often depend upon the nature of the evidence and the circumstances of the particular case."[30] Applicable here, authenticity can be sufficiently proven by "[t]he appearance, contents, substance,

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[24] *Tienda*, 358 S.W.3d at 638.

[25] *Butler v. State*, 459 S.W.3d 595, 600 (Tex. Crim. App. 2015) (quoting Cathy Cochran, Texas Rules of Evidence Handbook 922 (7th ed. 2007-08)).

[26] *Tienda*, 358 S.W.3d at 638.

[27] 971 S.W.2d at 68-69 (overruling *Kephart v. State*, 875 S.W.2d 319 (Tex. Crim. App. 1994), which approved the application of pre-Rules common law tests for admissibility).

[28] *Id*. at 69.

[29] *Id*.

[30] *Tienda*, 358 S.W.3d at 639.

internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances."[31]

The court of appeals disregarded the substance of Angleton.

The court of appeals addressed *Angleton* at length,[32] but its characterization is revealing: "It is our belief that *Kephart* was overruled primarily because of its improper incorporation of caselaw in its analysis that existed prior to the adoption of the Rules."[33] The problem was not the age of the caselaw; as illustrated by this case, rigid adherence to a newer set of factors is just as bad.

The crux of the lower court's holding is that the police video was irrelevant without testimony from a person with knowledge that the video, and specifically the date/time stamp, functioned properly. It is true that the most common way to authenticate a video without testimony from someone who witnessed what it depicts is with testimony that the process or system that produced the video is reliable.[34] It is also true that no one from Family Dollar testified about how video works, the functioning of its video equipment, the accuracy of the date/time stamp, or the

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[31] TEX. R. EVID. 901(b)(4).

[32] Slip op. at 8-10 (discussing and attempting to distinguish *Angleton*).

[33] Slip op. at 9 n.12.

[34] *Standmire v. State*, 475 S.W.3d 336, 344 (Tex. App.–Waco 2014, pet. ref'd). Once the process is proven, the images "speak for themselves." *Reavis v. State*, 84 S.W.3d 716, 719 (Tex. App.–Fort Worth 2002, no pet.) (quoting *United States v. Harris*, 55 M.J. 433, 438 (C.A.A.F. 2001)).

incremental steps taken to find and display the original video to the police. Under Rule 901, however, the contents of the video and the surrounding circumstances can sufficiently prove authenticity without that witness.

Alternative hypotheses and coincidence are considerations for the jury.

Although the general functioning of the video equipment was questioned, there is no real argument that moving images cannot be accurately captured[35] or that the store's video system failed to do so. As proof, the court of appeals had no problem concluding that, "the Family Dollar video depicted a person making the transaction that was linked to the ATV whom the jury could have easily determined was [appellant]."[36]

With regard to the date/time stamp, its accuracy is sufficiently proven by the contents of the video combined with the surrounding circumstances. Law enforcement requested the video from a specific date and time based on a receipt showing the purchase of a specific item. The video pulled by a Family Dollar employee depicts someone buying that item on that date at that time. This evidence was enough to satisfy the "liberal standard of admissibility" embodied by Rule 901, as found by the trial court. While it is conceivable that the date/time stamp is horribly

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[35] *Cf. Harris*, 55 M.J. at 438 ("Any doubt as to the general reliability of the video cassette recording technology has gone the way of the BETA tape.").

[36] Slip op. at 14. In most cases, the gatekeeper (and fact-finder) can determine whether a particular recording device is capable of accurately recording a man buying an item at a store by asking if the image looks like a man buying an item at a store.

inaccurate and appellant purchased that item on a different day and time, the likelihood of a huge coincidence was a matter for the jury, not the court of appeals.[37]

A straightforward approach is the best.

As Justice Kennedy wrote 40 years ago, "Even if direct testimony as to foundation matters is absent, . . . the contents of a photograph itself, together with such other circumstantial or indirect evidence as bears upon the issue, may serve to explain and authenticate a photograph sufficiently to justify its admission into evidence."[38] This reasoning is reflected in the straightforward language of Rule 901. Beginning with *Angleton*, this Court has encouraged lower courts to take a realistic, rather than formalistic, approach to authenticity. The court of appeals failed on that count.[39]

While rigid tests requiring specific types of witnesses and evidence "may often yield the same results and may sometimes employ similar reasoning to that required

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[37] *See Tienda*, 358 S.W.3d at 645-46 (jury is entitled to assess the likelihood and weight of alternative scenarios, such as "the appellant [being] the victim of some elaborate and ongoing conspiracy" to frame him using a fraudulent MySpace page).

[38] *United States v. Stearns*, 550 F.2d 1167, 1171 (9th Cir. 1977).

[39] Other courts of appeals have heeded this Court's guidance. For example, the court cites the Tenth Court of Appeals for "suggesting criteria to consider when analyzing authentication of security video 'such as those used after hours in convenience stores and freestanding automatic teller machines.'" Slip op. at 10 n.13 (citing *Standmire*, 475 S.W.3d at 344). The Tenth Court did list a number of factors commonly used, *Standmire*, 475 S.W.3d at 344, but also made it clear that, "Any notion that this type of evidence is always required for authentication of video or audio recordings has clearly been rejected by the Court of Criminal Appeals[,]" citing *Angleton*. *Id*. n.6.

under Rule 901, that is not invariably the case."[40] Courts and practitioners have to be reminded that authentication is a fluid inquiry, changing with the facts of each case. In *Butler* and *Tienda*, this Court applied Rule 901 to new media—text messages and MySpace pages, respectively. The lesson in this case is that, once a "new" technology becomes established, trial courts should be more accommodating and reviewing courts less insistent on dated frameworks.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals grant this Petition for Discretionary Review and reverse the judgment of the court of appeals.

Respectfully submitted,

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[40] *Angleton*, 971 S.W.2d at 69.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool the applicable portion of this document contains 2,897 words.

/s/ John R. Messinger
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CERTIFICATE OF SERVICE

The undersigned certifies that on this 17th day of April, 2017, the State's Petition for Discretionary Review was served electronically on the parties below.

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APPENDIX

In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-16-00038-CR

JAMEL MCLELLAND FOWLER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 196th District Court
Hunt County, Texas
Trial Court No. 30456

Before Morriss, C.J., Moseley and Burgess, JJ.
Opinion by Justice Moseley

O P I N I O N

Jamel McLelland Fowler was convicted of theft of a Kawasaki mule all terrain vehicle (ATV) valued at $1,500.00 or more, but less than $20,000.00.[1] On appeal,[2] Fowler challenges the sufficiency of the evidence, claims error in the admission of extraneous offense evidence, and claims reversible error by the trial court in admitting an unauthenticated video exhibit into evidence. While we find the evidence sufficient to sustain Fowler's conviction, we also find that the trial court reversibly erred in admitting an unauthenticated video exhibit into evidence; consequently we reverse the trial court's judgment and remand to the trial court for a new trial.

I. Trial Court Proceedings

In 2014, Fowler was charged by three separate indictments with three separate crimes. In the indictment which led to the conviction on appeal in this matter, Fowler was accused of stealing the ATV from Paul Blassingame. The other two indictments alleged burglaries of buildings. In one of the other charges, Fowler was accused of breaking into a building owned by William Martin and stealing various items (Burglary Case No. 1);[3] in the other, Fowler was charged with burglarizing a building and stealing a trailer (Burglary Case No. 2).[4] All three indictments were

[1]*See* Act of May 29, 2011, 82d Leg., R.S., ch. 1234, § 21, 2011 Tex. Gen. Laws 3302, 3310 (amended 2015) (current version at TEX. PENAL CODE § 31.03(e)(4)(A) (West Supp. 2016)).

[2]Originally appealed to the Fifth Court of Appeals, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001 (West 2013). We are unaware of any conflict between precedent of the Fifth Court of Appeals and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

[3]After the jury returned a guilty verdict in Burglary Case No. 1, Fowler moved to set aside the jury's verdict, and the trial court granted that motion. Fowler subsequently amended his request to a motion for new trial, which the trial court also granted. The trial court ultimately entered a judgment of acquittal in Burglary Case No. 1.

[4]The State dismissed Burglary Case No. 2 after three days of testimony.

returned in Hunt County. The State moved to try the cases together, alleging that they "constitute[d] the same criminal episode because they [were] the repeated commission of similar acts." Fowler did not oppose consolidation of the three cases.

II. The Evidence

The facts of the three alleged offenses are intertwined and will have some bearing on the issues Fowler presents in this appeal. As previously stated, this appeal is of Fowler's conviction of the theft of the ATV. Blassingame testified that the ATV had been located on property he owned in Hunt County, which he visited often. In November 2014, he went to that property, where he discovered that the ATV was missing, a fact that he duly reported to the Hunt County Sheriff's Office as a theft. Law enforcement officers in Royse City of neighboring Rockwall County found the ATV on December 6, 2014, while investigating a burglary at a concrete supply business. The ATV was identified by its vehicle identification number and returned to Blassingame.

The ATV was found hidden in a wooded area beyond a field on property owned by Lattimore Materials,[5] a ready-mix concrete business that had suffered a series of burglaries over the months preceding the discovery of the ATV. While investigating one of the burglaries that occurred at Lattimore Materials in December 2014, Royse City policemen noticed tire tracks (which they believed were made by an ATV) which led from the building that had been burglarized to a tree line; just beyond the tree line was the copse of trees in which the ATV was hidden. There was trash scattered on the ground around the ATV, among which was a receipt from a Family

[5]At the time of the burglaries, the Lattimore Materials facility located on the subject property was non-operational. Duane Wetteland, the area manager for Lattimore Materials, described other facilities owned by the company and explained that business needs determined whether the facility on the property at issue was operational or not. Wetteland testified that he periodically checked on the facility when it was non-operational.

Dollar store that included the time and date of its issuance. Further, within fifteen feet or so of the ATV, the policemen found packaging in which a box cutter had been located, and a box cutter was one of the items listed on the Family Dollar store receipt. Royse City Police Officer Jaime Torrez took the receipt to the store that had issued it and was able to view the store's surveillance video recording showing what appeared to be the purchase memorialized by the receipt. The store was unable to duplicate the recording or render it to a format Torrez could take with him, so he and an officer he was training used Torrez' department-issued camera to record the surveillance footage as it played on the store's video monitor. The footage's date and time information corresponded generally to the date on the receipt. Particularly of note to the State's case, the recording showed a man entering the store then completing a purchase, and it was the State's theory at trial that that man was Fowler.

In addition to those circumstances, in the weeks leading up to the December discovery of Blassingame's ATV, officers had found a blue Nissan Xterra vehicle in the area under suspicious circumstances. On November 3, 2014, at about 1:45 a.m., Royse City Police Sergeant Ryan Curtis and Rockwall County Deputy Brad Dick found the truck parked on a dirt road behind some industrial businesses in a poorly lit area.[6] Virginia Cox (eventually named as a co-defendant with Fowler in one or more of his indictments) was sitting in the Xterra. Cox's explanation to the law enforcement officers of her whereabouts was that she and her boyfriend had run out of gasoline and that he had gone back to a gas station for fuel. Because one of the businesses (Four Brothers, a mower and tractor dealer) behind which Cox's vehicle was parked had been the victim of

[6]Curtis described the area where the Xterra was parked as "a dirt road that you really can't even travel through." He continued, "I mean, I'm unaware of any vehicles being able to travel through it for years."

multiple burglaries in the past, Curtis was suspicious of Cox. Curtis saw several sets of bolt cutters in the Xterra[7] and got another police officer to go to the nearest gas station. That officer encountered no one purporting to be in search of gasoline for a stalled vehicle. When Curtis asked Cox to attempt to start the vehicle, it started with no problem (thereby casting doubt on Cox's story that it had no fuel).

At about 6:00 a.m. that same day, Royse City Police Officers William Potter and Tim West observed the same blue Xterra in another part of Royse City parked on the side of a local county road. As previously, the vehicle was occupied only by Cox, and when she was questioned by the policemen, she made reference once again to a male companion. Later that morning, Potter and West again encountered the Xterra, this time containing both Cox and Fowler. Between these two encounters, Potter had responded to a call regarding an alleged theft at the Four Brothers mower and tractor dealership. The dealership representatives called Potter's attention to three mowers, each of which had their gasoline caps removed and none of which held any gasoline in their tanks.[8]

After that, Potter returned to the Xterra and questioned Fowler about involvement in any theft of gasoline, which Fowler denied. From our reading of the record, Potter took no further action with respect to Fowler after that point.[9] There was another encounter between West and

[7]The issue of consent to the search of the vehicle was not challenged by Fowler at trial or in this appeal.

[8]Potter actually said the gas cans were empty; from the context, he likely was referring to the mowers' tanks, but he never testified that anyone at Four Brothers told him there had been gas in the tanks the night before. Nonetheless, Potter did testify that he was responding to a report of stolen gasoline, and he left the dealership telling "management that [he] had a suspect and that [he] was going to go back and talk with them."

[9]A recording of that encounter, recorded via the dash camera of Potter's police car, was admitted into evidence. There was much discussion and argument over the recording. The exhibit provided to this Court has several files; there are three video recordings, each less than thirty seconds in duration, which contain no audio. The final file is an audio/video recording that is two minutes and twenty-eight seconds in duration which captured Potter asking Fowler about any involvement in theft of gasoline from Four Brothers. Potter suggested during this exchange that the business had surveillance videos. When Fowler stated that he was done talking with the officer, the video ended. From the

Potter, on the one hand, and Fowler and Cox, on the other, on either November 3 or 10 wherein Fowler allowed the officers to look inside the Xterra. At that time, the officers noticed that there were three bolt cutters, binoculars, and a pry bar inside the vehicle. When questioned about those items, Fowler attempted to explain the presence of the tools in his vehicle by saying he was an electrician. That explanation failed to quell West's suspicions of Fowler because (as West explained) he ran a construction company and was aware of the tools and equipment used by electricians, and those items would not ordinarily be used by electricians.[10] This encounter occurred near Lattimore Materials, which had suffered multiple recent burglaries.

Testimony about the burglaries at Lattimore Materials revealed that a part of the method of operation of the burglars was to sever cables or heavy wires and remove them from the site. In addition, the burglars had cut padlocks on the gates of the premises more than once. While investigating one of the burglaries, Torrez found three sets of bolt cutters near some of the cut cables, and he suspected that the bolt cutters had been used to cut the cables.

III. Store's Surveillance Video Insufficiently Authenticated

Fowler contends that because the video surveillance footage from the Family Dollar store was not properly authenticated, the trial court erred by admitting it into evidence. We agree.

The challenged video recording was a copy of another recording from a surveillance camera at the Family Dollar store. The Family Dollar store receipt found by Torrez near the stolen ATV evidencing the sale of a box cutter (the packaging of which had likewise been found near the

discussions at the bench by the parties and the trial court, it appears that this audio/video recording was played for the jury.

[10]Fowler's objection to this testimony was sustained, but he did not request an instruction to disregard.

ATV) revealed the time and date of its issuance. Torrez took the receipt to the issuing Family Dollar store and discovered that the store had a surveillance video recording from the date and time the receipt was issued. The State maintains that the surveillance video recording captured the image of a man the State alleged to be Fowler entering the Family Dollar store a few minutes before the time and date set out on the receipt found by Torrez near the ATV, then, several minutes later, buying items. However, the video made by the Family Dollar store was not saved in a format that could be copied, so Torrez (and another officer who was accompanying him) focused Torrez' police-department-issued video camera on the screen displaying the Family Dollar video and made a video recording of a portion of the Family Dollar surveillance video. The fact that the challenged video recording is a recording of a recording is not the problem which must be addressed. A problem, however, exists because there is no evidence that the original video recording portrayed what the State maintains that it depicts.

"To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." TEX. R. EVID. 901(a). "Video recordings or motion pictures sought to be used in evidence are treated as photographs and are properly authenticated when it can be proved that the images reflect reality and are relevant." *Cain v. State*, 501 S.W.3d 172, 174 (Tex. App.—Texarkana 2016, no pet.) (citing *Huffman v. State*, 746 S.W.2d 212, 222 (Tex. Crim. App. 1988)).

"In ruling on the admission or exclusion of photographic evidence, the trial court is accorded considerable discretion." *Huffman v. State*, 746 S.W.2d 212, 222 (Tex. Crim. App. 1988). "The trial judge does not abuse his or her discretion in admitting evidence where he or she reasonably believes that a reasonable juror could find that the evidence has been authenticated or

identified." *Druery v. State*, 225 S.W.3d 491, 502 (Tex. Crim. App. 2007). "[A]uthentication or identification . . . . is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims." TEX. R. EVID. 901(a).

The problem here is that while the State authenticated the video exhibit sponsored by Officer Torrez, there was no evidence presented that the video recording copied by Torrez accurately portrayed any relevant information. Torrez adequately demonstrated that the recording he made of the store's surveillance monitor was a duplicate copy of the relevant part of the original surveillance recording. However, there was no evidence presented by the State which purports to precisely describe what Torrez recorded or which sets out the circumstances that existed when the original recording was made.

In *Angleton v. State*, 971 S.W.2d 65 (Tex. Crim. App. 1998), the Texas Court of Criminal Appeals addressed authentication of an audiotape purportedly recording a conversation between Angleton and his brother. Angleton was accused of capital murder of his wife; the court of appeals had ordered reasonable bail be set after finding that the State failed to present sufficient evidence to warrant Angleton be held without bail.[11]

At issue in *Angleton* was an audiotape recording obtained by police from Angleton's brother, a recording in which two men discuss the murder of a woman. The State offered an enhanced copy of the audiotape, the enhancement being the improvement of the sound quality and the reduction of the background noise which existed on the original. A sponsoring witness said

[11]A defendant charged with capital murder may be held without bail "when the proof is evident." TEX. CONST. art. I, § 11; TEX. CODE CRIM. PROC. ANN. art. 16.15 (West 2015).

that he had spoken on multiple occasions to both Angleton and his brother and recognized their voices as the ones heard on the audiotape. *Id.* at 66.

The Texas Court of Criminal Appeals found that the tape was properly authenticated as required by Rule 901, as well as by "treatment of this issue in the federal courts." *Id.* at 68. Specifically, the sponsoring witness testified that he had reviewed both the original and enhanced recordings and that the enhanced copy "accurately depict[ed] the contents of the original." *Id*. The officer also was familiar with the voices of the defendant and his brother and thus could identify the speakers on the tape. Finally, there was "no evidence that the tape contained any pauses or breaks in the recording," and its contents revealed specific inculpatory planning preparatory to the murder of Angleton's wife. *Id*. Thus, the circumstances surrounding the tape (including its being found in the possession of the defendant's brother, one of the participants in the recorded conversation) was "some evidence that the tape was not a fraudulent composition designed to frame [Angleton]." *Id*.[12]

[12]*Angleton* overruled *Kephart v. State*, 875 S.W.2d 319 (Tex. Crim. App. 1994) (per curiam), which bears some factual similarities to the Family Dollar video recording at issue here. Kephart was charged with possession of illegal drugs. At her trial, the State introduced a video recording acquired when police searched a motel room occupied by two people, neither of whom was Kephart. Kephart appeared in the recording, incrementally displaying greater and greater degrees of intoxication. Beneficial to the State's case is that there was also footage of Kephart talking with one of the people in whose motel room the video recording was discovered. "On the table in the video is a white substance and a baggie with what appears to be marihuana." *Id.* at 320. The video also contained an audible conversation between Kephart and one of the motel room occupants. *Id.*

The Texas Court of Criminal Appeals ruled that the video had not been sufficiently authenticated and that the trial court committed harmful error by admitting it to evidence. While a police officer testified that the video was an accurate copy of the original,[12] "he had no personal knowledge of where or when the tape had been made" and "could not also state that the tape accurately represented the actual scene or event at the time it occurred." *Id.* at 322–23.

Angleton found fault in *Kephart*'s "suggest[ion] that Rule 901 was consistent with the pre-rules [of Evidence] authentication requirements." The court disavowed this approach and held, "Rule 901 is straightforward, containing clear language and understandable illustrations. *Kephart* is overruled." *Angleton*, 971 S.W.2d at 69. *Angleton* made clear that the Court of Criminal Appeals firmly believes Rule 901 speaks for itself when it states that the proponent of evidence must demonstrate that the evidence "is what the proponent claims it is." TEX. R. EVID. 901(a). It is our belief that *Kephart* was overruled primarily because of its improper incorporation of caselaw in its analysis that existed prior to the adoption of the Rules.

Here, however, there was nothing presented to show that the store's surveillance video was what the State purported it to be (an accurate recording or rendition of events in that particular store on a particular day at a particular time). While the date and time on the lower center part of the screen on Torrez' recording of the store recording generally corresponds with the date and time on the receipt found near the ATV, there was no evidence that the surveillance system was working properly on the date in question, that its on-screen clock was correctly set and functioning properly, or that the original accurately portrayed the events that purportedly occurred at the time and on the date shown in the video recording.[13] Without such proof, there was no showing that the store's video recording was made on the same day as the receipt or that it accurately portrayed what the State alleged that it portrayed. Because the Family Dollar's original surveillance recording was not properly authenticated, the trial court abused its discretion in admitting the video recording into evidence.

Absent such proof, there was no showing that the store's video recording was made on the same day as the receipt or that it accurately portrayed what the State alleged that it portrayed.

Like the video in *Kephart* (and unlike the recording in *Angleton*), there is no evidence in the record which establishes the origin of the original recording which was subsequently copied and presented as evidence. *Cf. Hines v. State*, 383 S.W.3d 615 (Tex. App.—San Antonio 2012, pet. ref'd) (arresting officer's dashboard camera did not function; another officer's camera did, and arresting officer able to testify second officer's video recording accurately represented events witnessed by arresting officer at scene).

[13]*Cf. Page v. State*, 125 S.W.3d 640, 648–49 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (finding sufficient evidence of authentication where the sponsoring witness explained how the store's digital camera system worked, testified that he obtained the recorded images from the system shortly after the robbery there at issue, reviewed the recording with the police, copied the recording onto a videotape, gave the videotape to the officers, viewed the videotape before trial, and concluded that it had not been altered); *see also Standmire v. State*, 475 S.W.3d 336, 344 (Tex. App.—Waco 2014, pet. ref'd) (suggesting criteria to consider when analyzing authentication of security video "such as those used after hours in convenience stores and freestanding automatic teller machines").

Because the Family Dollar's original surveillance recording was not properly authenticated, the trial court abused its discretion in admitting the video recording into evidence.[14]

We must now assess the error in admitting the evidence to determine whether it harmed Fowler, i.e., whether it affected his substantial rights. "Generally, errors resulting from admission or exclusion of evidence are nonconstitutional." *Gotcher v. State*, 435 S.W.3d 367, 375 (Tex. App.—Texarkana 2014, no pet.) (citing *Walters v. State*, 247 S.W.3d 204, 219 (Tex. Crim. App. 2007)). We see nothing in this circumstance that would elevate the erroneous admission of the video to the level of a constitutional violation of Fowler's rights. *See* TEX. R. APP. P. 44.2(b). As nonconstitutional error, harm resulted if Fowler's substantial rights were affected. *See Johnson v. State*, 72 S.W.3d 346, 348 (Tex. Crim. App. 2002); TEX. R. APP. P. 44.2(b). "[A] substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." *Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000) (quoting *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997)). In making our assessment, we consider everything in the record, the nature of the evidence supporting the verdict, the character of the alleged error, and how it relates to other evidence in the record. *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002).

Essentially, the State's case can be outlined as follows:

1. Blassingame reported his ATV stolen.

2. The ATV, identified by its vehicle identification number, was found (after investigating a seemingly unrelated burglary).

[14]To rule otherwise could encourage the circumvention of problems in the admissibility of an original recording by simply making a copy of the original and offering the copy and not the original.

3. Within feet of the ATV was a receipt from a Family Dollar store which indicated that a box cutter had been purchased at a certain time and date. A box cutter package was also discovered nearby.

4. Law enforcement officials took the Family Dollar store receipt to the issuing store and were shown a security surveillance video recording of the store which corresponded to the time and date on the receipt.

5. Officers recorded sections of the security video recording which they believed corresponded with the receipt's information and used this to identify Fowler as a subject.

6. The officers' video recording of the Family Dollar video recording was presented as evidence in trial.

7. Presumably, the jury compared the person on the video with Fowler's appearance at trial and other evidence presented and concluded that Fowler was the person who had purchased the box cutter and dropped the paper evidence of the purchase near the stolen ATV. This tied Fowler to the stolen ATV.

Here, the error undoubtedly affected Fowler's substantial rights and was, therefore, harmful. The Family Dollar video recording was the evidence linking Fowler to the stolen ATV. We, therefore, sustain this point of error.

III. Sufficiency of the Evidence

In evaluating legal sufficiency, we review all the evidence in the light most favorable to the trial court's judgment to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (plurality op.) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *Hartsfield v. State*, 305 S.W.3d 859, 863 (Tex. App.—Texarkana 2010, pet. ref'd). Our rigorous legal sufficiency review focuses on the quality of the evidence presented. *Brooks*, 323 S.W.3d at 917–18 (Cochran, J., concurring). We examine legal sufficiency under the direction of the *Brooks* opinion, while giving deference to the responsibility of the jury "to fairly resolve conflicts in

testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318–19); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

Legal sufficiency of the evidence is measured by the elements of the offense as defined by the measure known as the hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The "hypothetically correct" jury charge is "one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id*.

"[A] conviction can be supported solely by circumstantial evidence." *Kuciemba v. State*, 310 S.W.3d 460, 462 (Tex. Crim. App. 2010). As the Court of Criminal Appeals has stated,

> [E]vidence merely tending to affect the probability of the truth or falsity of a fact in issue is logically relevant. Moreover, the evidence need not by itself prove or disprove a particular fact to be relevant; it is sufficient if the evidence provides a small nudge toward proving or disproving some fact of consequence.

Montgomery v. State, 810 S.W.2d 372, 376 (Tex. Crim. App. 1990).

Moreover, in performing a review of the sufficiency of the evidence, we must consider all of the evidence admitted at trial, even if that evidence was improperly admitted. *Moff v. State*, 131 S.W.3d 485, 489–90 (Tex. Crim. App. 2004). Consequently, we consider the key evidence of Fowler's guilt—the Family Dollar video recording—in our sufficiency analysis, even though, as we have already concluded, that evidence was improperly admitted at trial.[15]

[15]We frankly acknowledge that, absent this video recording, the evidence would be legally insufficient to support Fowler's conviction, its existence being vital to the conviction.

In this case, the evidence was sufficient for a rational jury to have found beyond a reasonable doubt that Fowler stole Blassingame's ATV. To reiterate that evidence, we note that the stolen ATV was found under suspicious circumstances, hidden in a wooded area near a business which had sustained multiple burglaries, and there was evidence that bolt cutters had been used in those burglaries. Multiple bolt cutters were found in Fowler's truck. After one of the burglaries, ATV tracks were found leading off through a field, and just beyond where the tracks ended, officers found Blassingame's ATV. Fowler and/or the truck Fowler was driving at the time were found a few times in odd hours and under suspicious circumstances in the neighborhood of that business. The Family Dollar receipt found near the stolen ATV was linked to a transaction at the store. Most importantly, the Family Dollar video depicted a person making the transaction that was linked to the ATV whom the jury could have easily determined was Fowler.[16] This evidence is legally sufficient to support Fowler's conviction. We, therefore, overrule this point of error.[17]

[16]Fowler argues that the trial court realized it had erred in admitting some evidence and "tried to correct it during trial." Fowler argues, "[T]he court made statements to the effect that he allowed certain evidence in because the State made representations about what the evidence would be that did not turn out to be accurate." His argument continues, "The trial court even announced on the record that it had made a mistake in allowing certain evidence to be admitted before the jury." The portions of the record to which Fowler cites in making this argument concern the trial court excluding evidence of a trailer, which the State argued was used by Fowler to move the ATV to the location where it was found. The court found that no connection had been made between that trailer and Fowler and excluded testimony and evidence related to the trailer. As we pointed out above, the State was trying three different offenses involving three different transactions and time periods, so there was a great deal of evidence to present. We find nothing in the record suggesting that Fowler opposed the State's motion to consolidate the three cases. In fact, he appears to have agreed to the consolidation.

[17]Because resolution of the issue is dispositive, we need not address Fowler's point of error challenging the introduction of extraneous offense evidence.

Nevertheless, in light of the viewing by the trier of fact of the erroneously-admitted and harmful video recording, we reverse the trial court's judgment and remand this case for a new trial.[18]

Bailey C. Moseley
Justice

Date Submitted: October 6, 2016
Date Decided: March 17, 2017

Publish

[18]The United States Supreme Court has clearly and unequivocally distinguished between the consequences that flow from reversals caused by trial error, such as in this case, and those resulting from insufficient evidence to convict:

> [R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e. g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.

Burks v. U.S., 437 U.S. 1, 15 (1978).