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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1651**

State of Minnesota,
Respondent,

vs.

Dean Bradley Pehl,
Appellant.

**Filed July 30, 2012
Reversed
Worke, Judge**

Washington County District Court
File No. 82-CR-11-347

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Peter J. Orput, Washington County Attorney, Karin L. McCarthy, Assistant County Attorney, Stillwater, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Worke, Judge; and Cleary, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges his aiding-and-abetting-third-degree-burglary conviction, arguing that the district court abused its discretion by admitting surveillance video and a

still photograph that were not properly authenticated and allowing police officers to provide identification evidence. Because the district court abused its discretion by admitting unauthenticated evidence and appellant was thereby prejudiced, we reverse.

D E C I S I O N

Appellant Dean Bradley Pehl argues that the district court abused its discretion by admitting a surveillance video and a still photograph into evidence. “Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced.” *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citations omitted). If the district court erroneously admitted evidence, the reviewing court determines “whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.” *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994). If there is a reasonable possibility that the verdict might have been more favorable to the defendant without the evidence, then the error is prejudicial. *Id.*

Appellant argues that the video and photograph were inadmissible because they were not authenticated. A videotape is classified as a photograph for the purpose of proving its content. Minn. R. Evid. 1001(2). To be admissible, a photograph must be authenticated, which is accomplished if the evidence is “sufficient to support a finding that the matter in question is what its proponent claims.” Minn. R. Evid. 901(a). Rule 901(b) provides examples of authentication methods “[b]y way of illustration only, and not by way of limitation.”

This court has described methods by which a proponent can authenticate a videotape. *In re Welfare of S.A.M.*, 570 N.W.2d 162 (Minn. App. 1997). *S.A.M.* involved the admissibility of a surveillance videotape from a city bus. *Id.* at 163. The state failed to provide a witness with personal knowledge that the “matter is what it is claimed to be,” which this court identified as the pictorial-witness theory. *Id.* at 164-65. But this court explained an alternative method under rule 901 for authentication known as the silent-witness theory, under which a proponent offers evidence of the reliability of the process by which the videotape was made. *Id.* at 165. In *S.A.M.*, a video technician testified regarding how the video was made, stated that the video produced an accurate result, and provided some evidence on the chain of custody. *Id.* at 166. This court concluded that the videotape was properly admitted because it was authenticated in accordance with rule 901(a) by producing evidence showing that the tape is what its proponent claimed. *Id.* at 166-67.

The state argues that there are ways to authenticate the videotape other than those enumerated in rule 901. The state cites to *State v. Hager*, to support its claim that the court need not find that the evidence is what it claims to be, only that there is sufficient evidence for a jury to reach such a conclusion. 325 N.W.2d 43 (Minn. 1982). But *Hager* involved the authentication of marijuana, what the court identified as “real evidence.” *Id.* at 44. The supreme court stated, “When the object of real evidence is unique, and thus identifiable in court on the basis of its distinctive appearance, evidence that the object is the same object, and is in substantially the same condition, can usually be offered through the testimony of . . . witnesses who [] possess personal knowledge.” *Id.* (quotation

omitted). The supreme court concluded that after a proponent lays foundation for an item of *real evidence* and opposing counsel conducts voir dire on the foundation offered, the district court considers the evidence as a whole and determines whether the evidence is sufficient to support a finding by a reasonable juror that the matter is what its proponent claimed. *Id. Hager* is inapplicable to this matter because this case is not a matter of the admission of “real evidence.” To be properly authenticated, the state was required to either call a witness with personal knowledge that the video and photograph were what they claimed to be or present evidence regarding the reliability of the process that produced the video and photograph.

Here, there was no evidence on which the district court could have based a determination, required by rule 901(a), that the “matter in question is what its proponent claims.” Officer Mary Warke, who responded to the call on March 1, 2010, testified that employees of Keller Williams Realty reported that a burglary occurred the previous evening and that several items were missing, including bags and a laptop. Officer Warke obtained a copy of a surveillance video recorded on February 28, 2010, that shows two males in a stairwell and then, approximately ten minutes later, shows one of the males carrying bags holding various items, including a laptop. A still photograph was taken from the video and distributed to law enforcement agencies in an attempt to identify the males. An agency identified appellant as the male carrying the bags. Photographs of appellant were compared to the video and photograph.

Officer Warke testified that Keller Williams is housed in a building called Park Place, which has a surveillance system monitoring the common areas and hallways. The

surveillance video was duplicated and Officer Warke picked it up from staff at Keller Williams. She did not know from whom Keller Williams received the video. Additionally, the video is only a 30-second redacted portion of a 24-hour period. Officer Warke did not have any information regarding what was depicted during the remainder of the video. Officer Warke did not play a part in redacting the video, she could not identify who did the redaction, nor did she have information regarding the accuracy of the redaction.

The district court abused its discretion when it failed to require the state to authenticate the video using one of the two methods described in *S.A.M.* The district court's abuse of discretion in admitting the evidence mandates reversal only if the admission of the videotape was prejudicial to appellant; that is, only if "there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *Post*, 512 N.W.2d at 102 n.2. Prejudice exists here. The video and the photograph were the only evidence linking appellant to the offense. There is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict; therefore, appellant's conviction must be reversed.

Because we have determined that the video and the photograph were improperly admitted into evidence and that appellant's conviction should be reversed as a result, we decline to address appellant's challenge to the admission of identification evidence.

Reversed.