

# Is a Video of a Video Admissible in a Criminal Trial?

A look at Texas Rule of Evidence 901.

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Technology has changed the dynamics of evidence admissibility. As digital evidence evolves rapidly, criminal lawyers must continually update best practices of evidence authentication. In *State v. Fowler*, the 6th Court of Appeals in Texarkana considered one man's conviction for state jail felony theft and the admissibility of a non-audio video of a video.

## Video Surveillance Assists in a Burglary Case

Police were called to a burglary at a Royse City business, where they collected mangled cables and box cutters, yet did not have leads on suspects. One month later, police were called to investigate the same scene for a second burglary. This time, fresh tire tracks led to a field where they found a Family Dollar receipt a few feet from a stolen ATV. Even more curious were the items on the receipt, which included duct tape and box cutters. Police used the timestamp and address on the receipt to request surveillance footage from the store.

Family Dollar pulled footage that corresponded with the time on the receipt found at the scene. During the investigation, police used body cameras to record the surveillance footage as it played on the store's monitors. The incriminating footage placed an individual inside the store at a specific time, purchasing identical items on the receipt from the crime scene.

Investigators named Jamel Fowler as the suspect. At trial, the state introduced the body camera video of the Family Dollar footage. The defense objected, arguing that the video was incomplete because the body camera zoomed in on one part of the surveillance panel that was divided into four sections and was not properly authenticated. The trial court overruled the objections, admitting the body camera footage. Fowler was convicted of theft of property for stealing the ATV; the jury sentenced Fowler to two years' imprisonment.

## Appellate Courts Consider the Authentication Issue

Fowler appealed, claiming "the trial court reversibly erred in admitting into evidence the surveillance video from Family Dollar."<sup>1</sup> Agreeing with Fowler, the 6th Court of Appeals reversed, holding that the "trial court com-

mitted reversible error by admitting an unauthenticated videotape exhibit into evidence."<sup>2</sup>

The state petitioned for discretionary review from the Court of Criminal Appeals, presenting the question: May prosecutors authenticate video footage without the testimony of a witness who describes what the video depicts? The CCA examined Texas Rule of Evidence 901.

## Texas Rule of Evidence 901 and the Authenticity Requirement

Texas Rule of Evidence 901 governs the authentication requirement for admissibility of evidence. Generally, the person offering the evidence must produce items or data sufficient to support a finding that the item or data is what the proponent claims.

"Authenticity may be established with evidence of 'distinctive characteristics and the like,' which include [t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances."<sup>3</sup>

## Applying Rule 901 to a Non-Audio Video of a Video

The CCA concluded that the proponent of a video may sufficiently authenticate without the testimony of someone who witnessed what the video depicts, but it is a fact-specific endeavor.

The court acknowledged, "the State could have done more [to prove up the evidence presented]."<sup>4</sup> However, the court continued, "even though the most common way to authenticate a video is through [witness testimony], that is not the only way."<sup>5</sup> The court explained that "video recordings without audio are treated as photographs and are properly authenticated when it can be proved that the images accurately represent the scene in question and are relevant to a disputed issue."<sup>6</sup>

The court noted:

- (1) that police made an in-person request of the manager of the store to pull surveillance for a specific date and time;
- (2) there were distinctive characteristics in the video, namely the timestamp, written digitally on the footage;

- (3) the date and time on the videotape corresponded with the receipt; and
- (4) the videotape pulled by the manager revealed Fowler at the store on the same date and time purchasing the items listed on the receipt.<sup>7</sup>

Considering all facts together, the court concluded that the trial court did not err in allowing the evidence to be admitted under Rule 901.

## Takeaway

Attorneys should build the base for the authentication by leveraging relevant facts. The more contributory facts there are to scaffold under a piece of evidence, the more likely it will be that a trial judge will allow the evidence under Rule 901 and that the admission of the evidence will withstand appeal. **TBJ**

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## Notes

1. *Fowler v. State*, No. PD-0343-17 (Tex. Crim. App. Apr. 18, 2018), available at <http://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=df7c32fc-5838-4f57-83d8-49c4ed95e472&coa=coccca&DT=OPINION&MediaID=0332c257-61e3-4244-ab05-5a78962e030e>.
2. *Fowler v. State*, 517 S.W.3d 167 (Tex. App.—Texarkana 2017), withdrawing and superseding *Fowler v. State*, No. 06-16-00038-CR, 2017 WL 378758 (Tex. App.—Texarkana Jan. 27, 2017).
3. Tex. R. Evid. 901(b)(4); see *Drury v. State*, 225 S.W.3d 491, 502 (Tex. Crim. App. 2007). Conclusive proof of authenticity before allowing admission of disputed evidence is not required.
4. *Fowler v. State*, No. PD-0343-17 (Tex. Crim. App. Apr. 18, 2018), available at <http://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=df7c32fc-5838-4f57-83d8-49c4ed95e472&coa=coccca&DT=OPINION&MediaID=0332c257-61e3-4244-ab05-5a78962e030e>.
5. *Id.*
6. *Id.*; *Huffman v. State*, 746 S.W.2d 212, 222 (Tex. Crim. App. 1988).
7. *Fowler v. State*, No. PD-0343-17 (Tex. Crim. App. Apr. 18, 2018), available at <http://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=df7c32fc-5838-4f57-83d8-49c4ed95e472&coa=coccca&DT=OPINION&MediaID=0332c257-61e3-4244-ab05-5a78962e030e>.



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