

NOTICE
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2018 IL App (5th) 170277-U

NO. 5-17-0277

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Jackson County.
)	
v.)	No. 16-CF-528
)	
JOHN E. PERTEET III,)	Honorable
)	Ralph R. Bloodworth III,
Defendant-Appellee.)	Judge, presiding.

PRESIDING JUSTICE BARBERIS delivered the judgment of the court.
Justice Moore concurred in the judgment.
Justice Cates specially concurred.

ORDER

- ¶ 1 *Held:* The circuit court’s order is affirmed where the State failed to provide sufficient foundation regarding the reliability of the process that produced the recordings.
- ¶ 2 This case arises on the State’s interlocutory appeal from the circuit court’s order granting a motion *in limine* to bar the admission of audio-video recordings obtained by a confidential source. The defendant, John Perteeet III, argued, and the court agreed, that the audio-video recordings were inadmissible at trial unless the State produced the confidential source to testify.

¶ 3 On appeal, the State contends that the circuit court erred by barring the State's use of audio-video recordings of the defendant's controlled drug buys because the confidential source, who wore the video surveillance device, was unavailable to testify at trial. The State asserts that the agreed-upon stipulations set forth at the motion *in limine* hearing removed any need for the State to present the confidential source because the stipulations satisfied the foundational requirements under the "silent witness" theory. For the following reasons, we affirm.

¶ 4 I. Background

¶ 5 On December 1, 2016, following the defendant's arrest, he was subsequently charged by information with the following counts: unlawful manufacture or delivery of a controlled substance, in that on or about November 23, 2016, he knowingly and unlawfully delivered to a confidential source, acting under the direct supervision of Detective Tyler Pingolt, more than 15 but less than 100 grams of substance containing cocaine, a Class X felony (count I) (720 ILCS 570/401(a)(2)(A) (West 2012)); unlawful manufacture or delivery of a controlled substance, in that on or about November 29, 2016, the defendant knowingly and unlawfully delivered to a confidential source, acting under the direct supervision of Detective Pingolt, more than 15 but less than 100 grams of substance containing cocaine, a Class X felony (count II) (*id.*); unlawful manufacture or delivery of a controlled substance, in that on or about November 30, 2016, the defendant knowingly and unlawfully possessed with the intent to deliver more than 15 but less than 100 grams of substance containing cocaine (count III) (*id.*); unlawful manufacture or delivery of a controlled substance, in that on or about November 30, 2016, the defendant

knowingly and unlawfully possessed with the intent to deliver more than 15 but less than 100 grams of substance containing heroin (count IV) (*id.* § 401(a)(1)(A)); unlawful use of weapons by a felon, in that on or about November 30, 2016, the defendant knowingly possessed a firearm, specifically a 40-caliber handgun, after having been previously convicted of a felony (count V) (720 ILCS 5/24-1.1(a) (West 2012)); unlawful use of weapons by a felon, in that on or about November 30, 2016, the defendant knowingly possessed a firearm, specifically a 9-millimeter Glock handgun, after having been previously convicted of a felony (count VI) (*id.*).

¶ 6 On July 5, 2017, the defendant filed a motion *in limine* asserting that if the State failed to produce the confidential source to testify at the defendant's trial, the defendant would object to the admission of the audio-video recordings. Specifically, the defendant argued that "a person who has first hand knowledge of the scene depicted in the video must testify for it to be admissible. If the confidential source is not present to testify as to the accuracy of the video recording, whether or not he had first hand knowledge of the scene depicted in the video, and whether or not there have been any alterations or changes to the video, defendant will object to its introduction."

¶ 7 On July 6, 2017, the defendant filed a memorandum of law in support of his motion *in limine*, arguing that the "admission of the recording without the presence of the confidential source would also deprive Mr. Perteet of his right to confront the witness against him as the confidential source is the only State witness said to have been present when the alleged drug deliveries took place." Moreover, the defendant asserted that "without the testimony of the person who made the recording, a person who was a paid

informant, a person who was the only eyewitness to an alleged criminal act, a person who is now apparently unavailable to testify *** any verdict against Mr. Perteet [would be] unjust and based upon unsound evidence.” As such, the defendant argued that the “silent witness” theory typically applied to footage from passive surveillance cameras, not those attached to or actively operated by “human actors.”

¶ 8 On July 7, 2017, the circuit court held a hearing on the defendant’s motion *in limine*. In response to the defendant’s argument that the audio-video recordings were inadmissible at trial unless the confidential source was available to testify, the State asserted that it could properly authenticate and admit the recordings with just the officer’s testimony pursuant to the “silent witness” theory. In lieu of live testimony, the parties stipulated to the following testimony. Detective Pingolt would testify that he “has been trained and is experienced” in the use of covert audio and video recording devices. On November 23, 2016, after placing a covert audio and video recording device on the confidential source, Detective Pingolt, along with other officers, took the confidential source to an apartment complex in Carbondale, Illinois, for the controlled drug buy.

¶ 9 Detective Pingolt would then testify that after the confidential source exited the vehicle, he and the other officers maintained surveillance of the confidential source as the confidential source entered apartment 1206. While inside, no active audio or video was transferred to the officers, although the confidential source had the recording device on his or her person while inside the apartment. Detective Pingolt would also testify that after the confidential source exited apartment 1206, the confidential source returned directly to the officers’ vehicle. At that point, Detective Pingolt removed the device from

the confidential source's person. Upon returning to the Carbondale Police Department, Detective Pingolt placed the device into a computer to determine whether both audio and video had successfully recorded. Detective Pingolt would testify that he believed that the audio and video recording worked properly. Detective Pingolt then made a master copy of the recording and placed it into evidence, where it remained at the Carbondale Police Department, free of alterations or deletions by police.

¶ 10 Following the parties' arguments on the defendant's motion *in limine*, the circuit court granted the defendant's motion. In doing so, the court indicated that the officers lost sight of the confidential source when the confidential source entered the apartment for the controlled drug buy. In granting the defendant's motion, the court stated:

“A situation has developed, and the basis of the motion is that the confidential source is for whatever reason unavailable to testify at the trial in this case as currently scheduled next week. That is the basis for the motion *in limine*.

*** The motion *in limine* is granted to the extent that the confidential source is unavailable to testify. That's what the Court's ruling on this issue is going to be today. *** In this [case] the officers did not have direct sight of the confidential source inside the apartment building or the apartment when the transactions allegedly took place, did not have an active recording device although I understand a camera is a camera is a camera, a recording is a recording is a recording and the best evidence. That's going to be the Court's ruling on this issue today.”

The State filed a certificate of substantial impairment and a timely notice of appeal.

¶ 11

II. Analysis

¶ 12

A. Standard of Review

¶ 13 The parties dispute the standard of review. The State contends that this court should review the circuit court's decision to grant the defendant's motion *in limine* under

a *de novo* standard. The defendant contends, however, that an abuse of discretion standard is warranted. We agree with the defendant.

¶ 14 Reviewing courts should defer to the circuit court’s evidentiary rulings even if they involve legal issues, unless the court’s “exercise of discretion has been frustrated by an erroneous rule of law.” *People v. Williams*, 188 Ill. 2d 365, 369 (1999). The admission of a videotape into evidence is within the sound discretion of the circuit court and will not be disturbed absent an abuse of discretion. *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 284 (2003). An abuse of discretion occurs when the circuit court’s ruling is fanciful, unreasonable, or when no reasonable person would adopt the court’s view. *People v. Baez*, 241 Ill. 2d 44, 106 (2011).

¶ 15 Here, we cannot find that the circuit court’s discretion was frustrated by an erroneous rule of law, as the State contends. Rather, the court asserted that, unlike cases cited by the parties, here, “the officers did not have direct sight of the confidential source inside the apartment building or the apartment when the transactions allegedly took place, did not have an active recording device.” As such, because the confidential source was unable to testify, and the State failed to lay an adequate foundation, the court granted the defendant’s motion *in limine* as to the video and audio surveillance recordings. Because the preservation of the chain of custody was reduced, the court granted the defendant’s motion *in limine*. Thus, our review is abuse of discretion.

¶ 16 B. Admissibility of Audio-Video Recordings

¶ 17 The principal issue presented in this case is whether the circuit court properly granted the defendant’s motion *in limine* to bar the State’s use of audio-video recordings

at trial, despite the State’s argument that the recordings are admissible under the “silent witness” theory. In particular, the State argues that the defendant failed to present evidence at the motion *in limine* hearing, but, instead, relied on an erroneous legal argument that “in all cases where a confidential source has made a video recording of a controlled drug buy, the confidential source must be present at trial to testify, or the officers must simultaneously observe the transaction through a live feed in order for the video recording to be admissible.” The State also asserts that the defendant ignored, and the circuit court failed to consider, the “silent witness” theory, which provides that admissions of video recordings are admissible, without live feed or testimony by a confidential source, “if there is sufficient proof of the reliability of the process that produced the video recording.”

¶ 18 Traditionally, a recording’s foundation would be laid by an available witness authenticating the content by testifying that the recording accurately represented what he or she personally saw or heard. *People v. Taylor*, 2011 IL 110067, ¶ 32. In addition, most jurisdictions allow photographs and videotapes to be introduced as substantive evidence so long as proper foundation is laid, and such evidence is generally admitted under the “silent witness” theory. *Id.* Moreover, under the “silent witness” theory, a recording can be admitted without testimony of an eyewitness if sufficient proof of the reliability of the process that produced the recording is provided. *Id.* In such a case, “the evidence is received as a so-called silent witness or as a witness which ‘speaks for itself.’ ” (Internal quotation marks omitted.) *Id.*

¶ 19 In *Taylor*, the Illinois Supreme Court addressed the “silent witness” theory of admission of a video recording and the foundational requirements for admitting it into evidence. *Id.* ¶ 35. The Illinois Supreme Court stated that photographic or videotape evidence may be admitted without an eyewitness to establish accuracy of the images depicted if there is sufficient proof of the reliability of the process that produced the photograph or videotape. *Id.* In reaching its conclusion, the court applied several factors to consider when faced with an issue concerning the “silent witness” theory, such as: “(1) the device’s capability for recording and general reliability; (2) competency of the operator; (3) proper operation of the device; (4) showing the manner in which the recording was preserved (chain of custody); (5) identification of the persons, locale, or objects depicted; and (6) explanation of any copying or duplication process.” *Id.* The Illinois Supreme Court stated that the above-mentioned list of factors was nonexclusive, and that “[e]ach case must be evaluated on its own and depending on the facts of the case, some of the factors may not be relevant or additional factors may need to be considered. The dispositive issue in every case is the accuracy and reliability of the process that produced the recording.” *Id.*

¶ 20 The State asserts that the stipulation of the parties in this case satisfies three factors, specifically: (1) whether the State demonstrated the camera and system were able to record and were generally working properly; (2) whether the State showed an adequate chain of custody; (3) whether evidence existed that the video recording was the result of tampering or fabrication. Essentially, the State argues that the reliability of the process that produced the recording is the key determinative factor for this court to consider.

More specifically, the State contends that the circuit court erred in applying an erroneous rule of law where it agreed with the defendant's argument that "an occurrence witness must appear to authenticate the video recording." Instead, the State asserts that "[m]erely because the traditional way the silent witness theory is presented in Illinois is through affixed camera surveillance videos, the mere fact that this surveillance camera was affixed to a person, does not remove this case from the purview of the silent witness doctrine." In response, the defendant argues that because the officers did not fully observe the confidential source when he or she entered apartment 1206, no one knows whether or not the video surveillance was tampered with or altered. As such, the defendant contends that because of this gap in the chain of custody, the State would present an insufficient foundation at trial without the confidential source's testimony.

¶ 21 We first note that the circuit court's order does not strictly state that because the confidential source was unable to testify, the video and audio evidence could not be admitted, as the State argues. Rather, based on a review of the order, the circuit court granted the defendant's motion *in limine* for several reasons. In fact, the court stated two additional, and in our opinion, important reasons for granting the defendant's motion. First, the officers lost sight of the confidential source in the apartment and apartment building, and second, the officers lacked automatic or live video and audio of the controlled drug buy while it occurred. Thus, taking into consideration these important facts, we find it reasonable that the court would find the audio-video recordings inadmissible without the confidential source's testimony to authenticate the recordings.

¶ 22 Lastly, we recognize that a strict proof of chain of custody is not necessary if there are other factors to demonstrate the authenticity of the recording (*Taylor*, 2011 IL 110067, ¶ 41 (citing *Garvey v. Chicago Rys. Co.*, 339 Ill. 276, 291 (1930) (“it is not absolutely essential that all these particular conditions be met[;] *** they are not exclusive”))), and that gaps in the chain of custody go to the weight of the evidence, rather than its admissibility. *Id.* However, from a policy perspective, the “silent witness” theory was established and has been applied in situations where audio and video recordings would be otherwise inadmissible unless someone watched the video or listened to audio of a camera at the time the camera captured the alleged crime. As such, we cannot find that the circuit court abused its discretion when the only evidence elicited before the court was Detective Pingolt’s stipulated testimony that he was a knowledgeable detective who had extensive experience installing recording devices on confidential sources. Without a stronger foundation set forth by the State, we cannot find that the circuit court abused its discretion when the court determined that there was insufficient proof of reliability of the video recording where the chain of custody had been severed, the competency of the operator was unknown and proper operation of the device was undetermined.

¶ 23

III. Conclusion

¶ 24 The order of the circuit court of Jackson County is hereby affirmed.

¶ 25 Affirmed.

¶ 26 JUSTICE CATES, specially concurring:

¶ 27 I agree with the majority that the standard of review is abuse of discretion. I also agree that under the unique circumstances presented in this case, the trial court did not abuse its discretion in granting the defendant's motion *in limine* as to the audio-video recordings for two controlled purchases of narcotics. I write separately to clarify that under the "silent witness" theory, strict proof of a "chain of custody" for an audio or video recording is not necessary if there are other factors demonstrating the authenticity and reliability of the recording. *People v. Taylor*, 2011 IL 110067, ¶ 41, 956 N.E.2d 431. Thus, while the unavailability of a confidential informant may create a gap in the chain of custody, a recording may nevertheless be admissible if there are other factors demonstrating the authenticity and reliability of the recording. See *Taylor*, 2011 IL 110067, ¶ 41; *People v. Vaden*, 336 Ill. App. 3d 893, 899, 784 N.E.2d 410, 415 (2003). In this regard, I must disagree that some sort of "break in the chain of custody occurred," thereby frustrating the admissibility of these videotapes. In my view, the State simply failed to meet its burden to show the presence of sufficient factors that would demonstrate the authenticity and reliability of the recordings.

¶ 28 During the hearing held on the defendant's motion *in limine*, the State indicated that the confidential informant, who was involved in the two controlled drug buys that were the subject of defendant's motion, was unavailable to testify. Therefore, the State had no witness who could personally authenticate the images depicted on the audio-video recordings that allegedly involved the defendant. The State did not call any of the officers involved in the controlled buys to testify during the motion *in limine* hearing. In lieu of

live testimony, the State made an oral representation of what one of the officers involved in the controlled buys would testify to, if called by the State as a witness. Specifically, the State represented what Detective Tyler Pingolt would testify to as the basis for its attempt to establish the reliability of the process that produced the recordings. Counsel for the defendant stipulated to these facts. The State acknowledged that Detective Pingolt could not testify as to what occurred while the confidential source was out of sight in the apartment where the transactions allegedly occurred. The record is also silent with regard to whether there was any active audio or video being transferred to any of the officers present regarding what was transpiring inside the apartment during the two transactions. Further, the State offered no foundational facts regarding how the audio-visual recording device was placed on the confidential informant, how the device was operated, when the recording was activated, whether there was a date and time clock on the video, how long the confidential informant was in the apartment, or any other information to show the manner in which the recording was obtained and preserved. Moreover, the State did not attempt to make an offer of proof of the audio-visual recordings themselves.

¶ 29 The trial court is granted discretion, based upon the factors set forth in *Taylor*, to determine whether the State has met its burden of proof, to make it more likely that the tape offered into evidence is authentic and reliable. Strict proof of a “chain of custody” is not required. *Taylor*, 2011 IL 110067, ¶ 41. Rather, there must be sufficient facts to allow the trial court to conclude that the information depicted and heard on the videotapes at issue was reliable. In this case, in the absence of the confidential informant, the oral stipulation presented by the State did not contain sufficient evidence of those factors

which would demonstrate the accuracy and the reliability of the process that produced the audio-visual recordings. For these reasons, I agree that trial court did not abuse its discretion in granting the defendant's motion *in limine*.