2021 VT 60

No. 2019-199

State of Vermont	Supreme Court
v.	On Appeal from Superior Court, Windsor Unit, Criminal Division
Peter Hiltl	February Term, 2021

Timothy B. Tomasi, J.

David Tartter, Deputy State's Attorney, Montpelier, for Plaintiff-Appellee.

Matthew Valerio, Defender General, and Dawn Seibert, Appellate Defender, Montpelier, for Defendant-Appellant.

PRESENT: Reiber, C.J., Robinson, Eaton, Carroll and Cohen, JJ.

¶ 1. **REIBER, C.J.** Defendant appeals from his conviction for lewd and lascivious conduct with a child following a jury trial. He argues that the court committed reversible error in admitting several surveillance videos. We agree and we therefore reverse and remand for a new trial.

¶ 2. Defendant was charged with the crime above based on his actions at a public pool with his then eleven-year-old daughter S.M. S.M. has been diagnosed with autism spectrum disorder. Various individuals reported defendant to the pool manager after witnessing behavior between defendant and S.M. that they considered disturbing. The manager called police and defendant was subsequently charged with the crime above.

¶ 3. At trial, the State presented testimony from various individuals who witnessed the behavior in question, including a high school teacher, who was present at the pool that day with his two children. The teacher saw what he thought was a couple in the pool. At first, he believed the girl was seventeen or eighteen years old. The man was holding up the girl, supporting her on her back with his hand under her buttocks. The teacher found the behavior "odd" and "off-putting." He took his children to a different area.

¶ 4. The teacher saw S.M. and defendant again in the kiddie-pool area. S.M. was seated on defendant's lap, facing him, and at some point, she was leaning in and kissing defendant with what appeared to be open-mouth kisses. The teacher remembered three kisses. He removed his children from the area. He made eye contact with another woman who was "visibly shaking her head to [him] and kind of putting her hands up as [if] to say, 'what's going on.' "

¶ 5. The teacher then saw defendant and S.M. in the hot tub alone. About five minutes later, he heard a "moaning, groaning sound" from the hot tub, which he described as sounding like someone was sexually aroused. The teacher had taught students with autism, and he suspected that S.M. might be on the spectrum given her physical behavior and lack of "affect."

¶ 6. A woman who was at the pool with her family and friends also testified. She noticed two people in the kiddie-pool area who looked too old to be there—they were sitting in about six inches of water and embracing and kissing each other "mouth to mouth." The girl was facing the man, and the man's arms were on her back, embracing and hugging her. When the girl turned around, the woman discerned that the girl appeared to have a mental disability. She saw defendant and S.M. move to another area of the pool, again in close proximity to one another and face-to-face. It appeared that the man had his hands in the girl's crotch area. The woman testified that she perceived the man was taking advantage of a younger girl with a disability, and so she reported it to the pool manager.

¶ 7. The woman's friend also testified. She saw a couple in the kiddie pool, with the girl sitting on the man's lap, facing him "so their . . . crotches would have been in contact." He was holding her tight. She thought the embrace appeared to have a sexual or romantic nature to it. The friend then saw the couple in the main pool area, and the woman realized that the girl was a child who appeared to have a disability. The girl was facing the man with her legs around him, again with crotch-to-crotch contact; the man appeared to be moving the girl in an up-and-down fashion against him. The woman thought the girl looked uncomfortable. The witness heard a grunting sound from the man during the up-and-down motions. The witness found the behavior disturbing and thought the girl might need help.

¶ 8. The pool manager testified that a customer approached her and was very upset and distressed, telling the manager she needed to do something. The manager approached defendant and S.M., who were in the pool completely embraced with defendant's hands under S.M.'s bottom; S.M.'s legs were wrapped around defendant's waist, and their genital areas were in contact. The manager told them to separate. Defendant asked why, saying that S.M. liked it that way. They eventually separated, and the manager went back upstairs. A short surveillance video of the manager approaching defendant and S.M. in the pool was admitted without objection. After this interaction, the same woman returned to the manager's desk, more agitated than before; she told the manager to do something. The manager called the police.

¶ 9. The State also presented expert testimony from a developmental behavioral pediatrician. She stated, among other things, that a child with autism may not have appropriate social boundaries and may touch inappropriately. She testified that parents play an important role in teaching appropriate boundaries. The expert indicated that, hypothetically, if an eleven-year-old child with autism were sitting on the lap of a parent in a public place, face-to-face, kissing and embracing, that would be cause for concern. It would not be appropriate behavior for any eleven-

year-old child, regardless of the child's diagnosis, because it is crossing a social boundary. An embrace that lasted for ten to fifteen minutes would also be cause for concern.

¶ 10. The expert stated that a parent would be expected to redirect a child's behavior under such circumstances. She testified that having a child with her legs around a parent's waist and groin-to-groin contact in bathing suits and hands in the buttocks or groin area would certainly be cause for concern and would be inappropriate for any child. The expert stated that children with developmental disabilities were significantly more vulnerable to abuse and expressed her belief that S.M. did not have the cognitive capacity to understand what constituted abuse or the language to express it. She opined that a child who did not attend school or receive therapy, like S.M., was even more vulnerable to abuse.

¶ 11. One of the police officers who responded that day also testified. She described what happened when she arrived on the scene. She saw two people in the hot tub. The man put his head underwater and his head was close to the knees of a juvenile female sitting on the interior bench of the hot tub. Video from a police body camera of this interaction was admitted. The officer also obtained surveillance video from the pool the day after the incident, some of which was shown to the jury over defendant's objection.

¶ 12. There were several surveillance videos from four different cameras. Three of the videos were very short—one depicted defendant and S.M. entering the main pool; the second depicted the police officer approaching defendant and S.M. in the hot tub; and the third showed an embrace in the main pool. There were also two views of defendant and S.M. in the kiddie pool, capturing the same general period from two different viewpoints. These videos showed defendant and S.M. apparently embracing for ten minutes with S.M. sitting on defendant's lap and the two apparently kissing. All of the videos were grainy.

¶ 13. Defendant objected to the admission of this evidence, arguing that while the officer could establish that the videos accurately depicted the pool on the day in question, she could not

testify that they accurately depicted the events. Defendant also argued that the video had not been properly authenticated; that it arguably showed uncharged misconduct; and that it was misleading and confusing.

¶ 14. The officer then provided additional testimony regarding the video evidence outside the jury's presence. She stated that, as part of her investigation, she obtained the surveillance videos on a thumb drive from the manager of the resort where the pool was located. She reviewed the videos at the police station the day after the events in question. She stated that the videos fairly and accurately depicted the scene in question. She could identify defendant and S.M. in the videos by their clothing. There were timestamps on the videos, and she did not see any indication that there was any issue or discrepancy with the timestamp. In reviewing the videos, the officer found a point where defendant and S.M. were in the kiddie pool in ways similar to what witnesses had described.

¶ 15. The court found the videos of defendant and S.M. entering the main pool and the one in which the officer approached them in the hot tub sufficiently authenticated. See V.R.E. 901(a) ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). It found that the videos had been provided at the request of law enforcement pursuant to a duly organized law enforcement investigation, they were provided by the person in charge of the facility in a timely manner, and they contained date stamps and timestamps that were consistent with the date and times that were the subject of the criminal proceeding. The court noted that it could identify defendant and S.M. in the video. The court reserved judgment on the remaining videos.

¶ 16. The court revisited the issue the following morning. Defendant again argued that the State failed to authenticate the remaining videos or establish a foundation for their admission. Defendant cited the "silent-witness" doctrine, contending that there was no eyewitness who could

link the videos to the day's events and the State could not otherwise satisfy the requirements to authenticate the videos. Defendant also argued that the evidence should be excluded under Vermont Rule of Evidence 403. He asserted that the jury might be misled into believing that the videos depicted what the eyewitnesses described.

¶ 17. The court indicated its familiarity with the "silent witness" issue raised by defendant and identified the question before it as "whether the thing was what it purported to be and was likely to be accurate." The court noted that there were witnesses who testified to some of the behavior depicted in the videos and it had also already admitted without objection several of the surveillance videos. The court was convinced that the surveillance videos were what they purported to be. It again cited the police officer's testimony about obtaining the videos from the person responsible for the security cameras as well as the date and time stamps; it also noted that the officer would be subject to cross-examination.

¶ 18. The court explained that it had been troubled the day before by the need for the video to corroborate the eyewitnesses' testimony but upon further reflection, it concluded that it was better to think of the surveillance videos as independent evidence or as a "fourth witness." The jury might be able to determine, based on circumstantial evidence, that the video depicted the same event as what the other witnesses saw but it would not be required to do so. The court did not find that the prejudicial effect of the videos outweighed their probative value. If anything, it explained, there were many positive things in the videos that defendant could use. The court also noted that it would be instructing the jury that it must unanimously agree upon the specific facts and acts that constituted lewd and lascivious conduct.

¶ 19. The videos were played for the jury during the officer's testimony and admitted as evidence. The court noted that defendant was free to cross-examine the officer regarding authentication and defendant later did so; defendant played some of the videos again as well.

¶ 20. In her direct testimony, the officer described how she was able to recognize defendant and S.M. in the surveillance videos and she described the layout of the pool area. The officer noted that one video showed defendant embracing S.M. from behind. The video of the kiddie pool showed defendant seated in the kiddie pool with S.M. straddling him on his lap, facing him. After about seven minutes of sitting this way, S.M got up from defendant's lap and walked away. The third video showed defendant and S.M. in the adult pool.

¶ 21. A video that captured a different view of the kiddie pool was also played. This latter video showed defendant approaching S.M. from behind and embracing her with his arms around her waist. Defendant then sat in the kiddie pool with S.M. straddling him on his lap. S.M. later got up and walked away. Finally, a video of defendant and S.M. in the hot tub was played, which depicted defendant going underwater. The officers then approach the pair in the hot tub, which was a different view of the same event played for the jury the day before. The State rested after the officer's testimony.

¶ 22. Defendant presented testimony from a clinical psychologist who worked with individuals with autism. He testified that people often misinterpreted the behavior of individuals with autism and the behavior of those supporting them, including misinterpreting actions as sexual when they were not. This expert also stated that some individuals with autism seek out physical contact as a calming mechanism and they may have atypical facial expressions, such as grimacing rather than smiling. He testified that it was not uncommon for children with autism to make noises.

¶ 23. Defendant also testified. He stated that S.M. was very affectionate and she enjoyed embracing and attention. He testified that he and his wife had always interacted with S.M. by kissing her on the lips. Defendant said that on the day in question, he was supporting S.M.'s body as she floated in the pool, as he and his wife had done before. He described from his point of view what was depicted on the videos of the kiddie pool. He said that S.M. was sitting facing him in the kiddie pool in a way similar to that depicted in a picture that he introduced as an exhibit.

Defendant testified that he was talking and relaxing with S.M. in the kiddie pool like they always did at the pool. Defendant said that S.M. kissed him on the lips in the kiddie pool.

¶ 24. Defense counsel played the video of the hot tub again, and defendant said it depicted him and S.M. "just bouncing" and "doing what [S.M.] liked," and that this was generally how they acted in the pool. He testified that when he was "closing in" to S.M. in the video, he was probably talking to her because he generally talked very closely to others. As to the activity in the adult pool, he said that he was holding S.M. up in the deeper water when the pool manager asked them to separate. Defendant testified that he did not know what was wrong, that S.M. could not swim on her own, that they were bouncing in the deep end, and that S.M. liked it that way. He considered his behavior appropriate.

¶ 25. On cross-examination, defendant stated that the surveillance video of the kiddie pool reflected when he and S.M. had just arrived at the pool. He said it was the first place they went when they arrived, although he later indicated that he may have misunderstood the timeline. He recognized himself and his daughter in the surveillance video as they were about to enter the hot tub.

¶ 26. After the evidence closed, the court instructed the jury that there was evidence of different alleged acts and that jurors must all agree about the same act or acts and agree that a particular act or acts satisfied the essential elements of the crime. During their deliberations, the jury asked to watch the video of the kiddie pool on a smaller screen, indicating that it was very poor quality on the larger screen. The court, with the parties' agreement, denied the request, explaining that the jury must rely on the evidence as it was presented during trial. The court did play the kiddie-pool video again in the same format as it had been played at trial. The jury found defendant guilty, and this appeal followed.

¶ 27. Defendant challenges the admission of the surveillance videos of the kiddie pool on appeal.[1] We begin with his assertion that the court abused its discretion in finding these videos sufficiently authenticated under V.R.E. 901. Defendant complains that the prosecutor did not "link the videos to the eyewitness accounts, despite promising the court that she would do so." He also asserts that there was an inadequate foundation laid for the admission of the videos under a "silent witness" theory. Defendant maintains that, at a minimum, "silent witness" authentication requires testimony from a witness with knowledge about the reliability and accuracy of the system that produced the recording. He argues that we required this type of evidence to authenticate photographs in State v. Colby, 139 Vt. 475, 431 A.2d 462 (1981). Defendant also cites cases from other jurisdictions that impose more specific requirements, and he contends that these requirements were not satisfied here. As discussed in additional detail below, defendant contends that the error was not harmless.

¶ 28. As indicated above, the court reviewed the admissibility of the surveillance videos under Rule 901(a), which requires "evidence sufficient to support a finding that the matter in question is what its proponent claims." "This is merely a preliminary determination, and as such, the test for authenticating evidence is not a demanding one." State v. Allcock, 2020 VT 60, ¶ 16, __ Vt. __, 237 A.3d 648 (quotations omitted). A proponent "need not show with absolute certainty that the evidence is what it is claimed to be," but instead "need only show the proffered evidence's authenticity with reasonable certainty." Id. (quotations omitted). "Once admitted, the definitive resolution of authenticity is left to the jury." Id. (quotation omitted). In other words, the trial court acts as a gatekeeper. It "need not be convinced that the evidence is what it purports to be, but must

[1] Defendant does not specifically challenge the admission of other videos, some of which were admitted without objection and/or authenticated by the police officer or pool manager depicted in the videos. This includes a portion of the video in which the pool manager interacted with defendant, a body camera video that showed the police officer's interaction with defendant and S.M. in the hot tub, and a portion of the surveillance video showing a different view of the officer's approach to defendant and S.M. in the hot tub.

conclude that there is evidence upon which a reasonable jury could reach that conclusion." Id. ¶ 26.

¶ 29. There are two theories pursuant to which photographs and videotapes may be admissible: (1) "the 'pictorial testimony' theory, under which the photographic evidence is admissible only when a sponsoring witness can testify that it is a fair and accurate representation of the subject matter, based on that witness's personal observation;" and (2) "the silent witness theory, under which the photographic evidence is a silent witness which speaks for itself, and is substantive evidence of what it portrays independent of a sponsoring witness." T. Farrell, Construction and Application of Silent Witness Theory, 116 A.L.R.5th 373, § 2[a] (recognizing that "most jurisdictions now allow photographs or videotapes to be introduced as substantive evidence in the absence of a sponsoring witness, given the proper foundation, which usually includes proof of the reliability of the process that produced the photograph or videotape"); 3 Wigmore on Evidence § 790, at 219-220 (Chadbourn rev. 1970) ("Given an adequate foundation assuring the accuracy of the process producing it, the photograph should then be received as a so-called silent witness or as a witness which 'speaks for itself.' ").

¶ 30. The videos in question were admitted under the "silent witness" theory, and we thus do not address defendant's assertion that the court erred by failing to satisfy requirements associated with the pictorial theory, i.e., requiring witnesses to link the kiddie-pool videos to what they saw on the day in question. See also Washington v. State, 961 A.2d 1110, 1116 (Md. 2008) (recognizing that "[g]enerally surveillance tapes are authenticated under the silent witness theory, and without an attesting witness").

¶ 31. As suggested above, the "silent witness" theory generally "allows for authentication by the presentation of evidence describing a process or system that produces an accurate result." Id. In other words, there must be "sufficient foundational evidence . . . to show the circumstances under which [a video] was taken and the reliability of the reproduction process."

Id.; see also Farrell, supra, § 2[a] ("Under the silent witness theory of admission, photographic evidence may draw its verification, not from any witness who has actually viewed the scene portrayed on film, but from other evidence which supports the reliability of the photographic product."). "Courts have admitted surveillance tapes and photographs made by surveillance equipment that operates automatically when a witness testifies to the type of equipment or camera used, its general reliability, the quality of the recorded product, the process by which it was focused, or the general reliability of the entire system." Washington, 961 A.2d at 1116 (quotation omitted) (citing cases).

¶ 32. We previously considered the admissibility of photographs made from a surveillance video under a "silent witness" theory in State v. Colby, although we did not use that precise phrase. 139 Vt. 475, 431 A.2d 462. In Colby, the defendant was charged with cashing a check made out to, and with the forged signature of, his close friend. The State presented evidence that the defendant represented himself as the legitimate holder of the check, providing identification belonging to his friend.

¶ 33. In recounting the facts, we cited evidence showing that the bank teller had followed an established process in processing the check, including stamping the date and time of the transaction on the check, and that there was a surveillance camera that "record[ed] all transactions on videotape." Id. at 477, 431 A.2d at 463. "The videotape system consist[ed] of five cameras which [were] coordinated to time and date" and, when particular transactions were reviewed, "the videotape [was] coordinated with the check bearing the same date, time[,] and teller location." Id. Because the bank erased videotapes after three months, "[t]he only remaining visual history of a transaction [was] a polaroid reproduction of the videotape." Id. "The polaroid pictures [were] without reference to the time, date[,] and place indicated on the videotape system except as copied on the back of the reproduction by the bank's security officer." Id. The defendant's friend identified him as the person in the polaroid reproductions.

¶ 34. The defendant challenged the admission of the polaroid pictures on appeal. We recognized that the admissibility of such evidence was "largely a matter of discretion for the trial court." Id. at 478, 431 A.2d at 464. We stated that "[w]hile courts may be more cautious when the evidence consists of a photograph or a tape since the possibility of alteration exists, photos are admissible if the proper foundation is adduced to indicate the circumstances under which they were taken and the reliability of the reproduction process." Id. We cited a case, United States v. Taylor, that involved admission of photographic evidence under a "silent witness" theory. See 530 F.2d 639, 642 (5th Cir. 1976) (concluding that sufficient foundation was laid for admission of photographs taken from surveillance video where witnesses, who were not present while footage was captured, testified regarding "the manner in which the film was installed in the camera, how the camera was activated, the fact that the film was removed immediately after the robbery, the chain of its possession, and the fact that it was properly developed and contact prints made from it").

¶ 35. We concluded that a proper foundation was laid in Colby. 139 Vt. at 478, 431 A.2d at 464. In support of this conclusion, we cited evidence that had been presented regarding "the coordination of the time/date stamping machine and the videotape; that the machines were functioning properly on the day in question; and that the photographs were accurate representations of the film"; and we noted that "[t]he bank security officer who took the polaroid pictures testified about the procedures employed." Id.

¶ 36. While defendant cites standards used by other states in considering the admissibility of surveillance videos, we need only rely on Colby to reach our conclusion here. See also Farrell, supra, § 2[b] (stating that "[c]ourts have generally not established specific authentication requirements under the silent witness theory because the circumstances under which the videotape was recorded or the photograph was taken, and the intended use of the evidence, will differ in every case"); People v. Taylor, 2011 IL 110067, ¶¶ 32-34, 956 N.E.2d 431, 439 (discussing "silent

witness" doctrine in detail and noting that "[m]ost jurisdictions [that have addressed this doctrine] point out that the circumstances of each case and, thus, the requirements to guarantee the genuineness of the evidence, will always differ," and therefore, "while most courts set forth various factors to consider when assessing the process that produced the recording, these factors are not deemed exclusive foundation requirements").

¶ 37. As we recognized in Colby, there must be some minimal foundation laid to support a video's authenticity. The necessary evidence was not produced here with respect to the kiddie-pool videos. The officer testified that on the day after the alleged events, she obtained the videos from the pool's four surveillance cameras as part of her investigation. The general manager of the resort provided her a copy of the videos on a thumb drive, and the videos were organized by time and by view. The officer took the thumb drive to the police station and watched it on her computer. She stated that the videos fairly and accurately depicted the pool area as she was familiar with it and she could identify defendant and S.M. in the videos by their clothing. There were timestamps on the video, and the officer saw no indication of any discrepancies with the timestamps. She saw defendant and S.M. in the kiddie pool embracing in the way witnesses had described.

¶ 38. The court found the evidence sufficient to show that this was an authentic video of the pool on the afternoon in question, that the video was provided by the resort manager, and that it had not been altered; in other words, it was what it purported to be. The court relied on the police officer's testimony about obtaining the videos from the person responsible for the security cameras as well as the date stamps and timestamps on the videos. Missing from this record, however, is evidence regarding "the reliability of the reproduction process," Colby, 139 Vt. at 478, 431 A.2d at 464, such as testimony from someone at the resort about the pool surveillance-camera system, that the surveillance cameras were working on the day in question, and/or the process by which the videos were transferred to a thumb drive for the officer. Such evidence was key in this case to establishing the authenticity of the surveillance videos. See, e.g., Commonwealth v.

Leneski, 846 N.E.2d 1195, 1199 (Mass. App. Ct. 2006) (upholding admissibility of images from surveillance camera, which store owner transferred to a CD, where store owner, who "viewed the images" and "burned the CD copy," "testified as to the procedure he used in the surveillance process, the copying process, and to the contents of the CD"; and explaining that "[a]ny concerns that the defendant had regarding the surveillance procedures, and the method of storing and reproducing the video material, were properly the subject of cross-examination and affected the weight, not the admissibility, of the CD" (quotation marks omitted)); Washington, 961 A.2d at 1117-18 (concluding that inadequate foundation was laid for admission of still photographs and videotape recording made from eight surveillance videos where video "was created by some unknown person, who through some unknown process, compiled images from the various cameras to a CD, and then to a videotape," and "[t]here was no testimony as to the process used, the manner of operation of the cameras, the reliability or authenticity of the images, or the chain of custody of the pictures"); cf. Spradley v. State, 128 So.3d 774, 782 (Ala. Crim. App. 2011) (concluding that inadequate foundation was laid for admission of surveillance videos where "[t]he only question asked of [investigating officer] was whether he used those recordings during the course of his investigation to develop a suspect," and explaining that "[t]he fact that a law-enforcement officer viewed recordings during his investigation is not sufficient to establish a proper foundation for the admittance of the recording under either the pictorial-communication theory or the silent-witness theory"). While there does not appear to be any dispute that defendant and S.M. were at the pool on the day in question, the State had the burden of submitting sufficient evidence to allow the court to find that the videos were what they purported to be. See Washington, 961 A.2d at 1117 ("Without suggesting that manipulation or distortion occurred in this case, we reiterate that it is the proponent's burden to establish that the videotape and photographs represent what they purport to portray."). We conclude that the court erred in finding Rule 901(a) satisfied here.

¶ 39. We must next consider if the error was harmless beyond a reasonable doubt. See State v. Tester, 2009 VT 3, ¶ 45, 185 Vt. 241, 968 A.2d 895 ("Our standard for harmless error is the same whether the error is constitutional or not—the error must be harmless beyond a reasonable doubt."). "Where the error is the erroneous admission of evidence, we must apply this standard by imagining a trial in which the evidence is not admitted." Id. We will only conclude that an error was harmless if, without the erroneous evidence, "there is still overwhelming evidence to support the conviction and the evidence in question did not in any way contribute to the conviction." State v. Groce, 2014 VT 122, ¶ 19, 198 Vt. 74, 111 A.3d 1273 (quotation omitted).

¶ 40. According to defendant, the error was not harmless because: the State's case was "thin" and "based entirely on the ambiguous testimony of three judgmental witnesses" (and an expert), which rendered the need for videos to corroborate their testimony "critical"; the prosecutor mentioned the videos twice in her closing argument and said that the videos corroborated the eyewitness testimony; the jury asked to rewatch one of the kiddie-pool videos during its deliberations; the nature of video evidence, in general, makes its erroneous admission "highly prejudicial"; the court failed to require the State to authenticate the evidence; and the court disregarded the prejudice from the videos' admission.

¶ 41. In evaluating this claim, "we must look to what a reasonable jury might have done without the offending evidence, not what we would have done in the fact finder's place." Tester, 2009 VT 3, ¶ 45. "In assessing harm, we use four factors: the importance of the evidence in the prosecution's case, the cumulativeness of the evidence, the extent of cross-examination, and the overall strength of the prosecution's case." Id.

¶ 42. To establish defendant's guilt of lewd and lascivious conduct with a child, the State needed to prove that defendant "willfully and lewdly commit[ted] any lewd or lascivious act upon or with the body, or any part or member thereof, of a child under the age of 16 years, with the

intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of such person or of such child." 13 V.S.A. § 2602(a).

¶ 43. In addition to the surveillance videos, the State presented testimony from four eyewitnesses (including the pool manager), a police officer who also witnessed defendant and S.M. in the pool, and an expert. The eyewitnesses presented detailed testimony about what they observed and why it caused them concern. While the State presented sufficient evidence to allow the case to go to the jury, the proof that defendant acted with the requisite intent depended entirely on the inferences that the jury drew from defendant's actions. See State v. Discola, 2018 VT 7, ¶ 24, 207 Vt. 216, 184 A.3d 1177 (explaining that in absence of direct evidence, intent is generally "inferred from a person's acts and proved by circumstantial evidence" (quotation omitted)).

¶ 44. The evidence as to defendant's intent was equivocal. The State presented evidence that supported an inference that defendant's acts were sexual, while defendant's testimony supported an inference that they were not. The videos were critical to the State's case in that they offered the jury an opportunity to draw its own inferences directly from what it observed.

¶ 45. At trial, moreover, the State argued that it would be prejudicial to exclude this evidence because witnesses had testified to the conduct in the pool and the video was consistent with this testimony. In other words, the kiddie-pool videos corroborated the descriptions of the conduct testified to by the State's witnesses and the State emphasized this point in its closing argument. To the extent that one could see conduct in the video consistent with the witnesses' testimony, it gave more weight to the witnesses' testimony about other conduct—such as hearing moaning sounds of a sexual nature—not depicted on the video. Whether defendant acted lewdly and "with the intent of arousing, appealing to, or gratifying [his] lust, passions, or sexual desires" was a key issue here. Defendant's own discussion of his conduct in the videos and his attorney's cross-examination of the officer concerning the videos did not suffice to minimize the potential harm caused by the admission of this evidence. The videos were important evidence; the jury

asked to rewatch one of them during its deliberations and deliberated for almost five hours, suggesting that the jury relied on the video in reaching its verdict. See Allcock, 2020 VT 60, ¶¶ 7, 27 (noting that jury raised questions regarding intent during deliberations and concluding that "jury's difficulty with the question of intent makes it clear that the error was not harmless"); State v. Giroux, 151 Vt. 361, 365, 561 A.2d 403, 406 (1989) (concluding that error was not harmless where jury deliberated nearly seven hours and "evidence of guilt was not overwhelming"). Given all of these factors, we are not persuaded beyond a reasonable doubt that the jury would have convicted defendant without the surveillance-video evidence.

¶ 46. Because we conclude that the court committed reversible error in finding that the videotapes satisfied the threshold requirements of V.R.E. 901(a), we need not consider if the court also failed to properly evaluate the videos' probative value and prejudicial effect under Vermont Rule of Evidence 403.

Reversed and remanded for a new trial.

FOR THE COURT:

_____

Chief Justice

¶ 47. **EATON, J., dissenting.** I agree with the majority's conclusion that video evidence of defendant and S.M. in the kiddie pool was admitted in error. I write separately because I would nonetheless affirm the jury's guilty verdict: I believe it is beyond a reasonable doubt that the error was harmless because the jury would have reached the same conclusion in the absence of that evidence. For this reason, defendant's conviction should stand.

¶ 48. The harmless-error standard arises from the "basic premise that errors must have some relation to the outcome of a criminal case, or some independent right of the defendant, before appellate intervention is warranted." State v. Carter, 164 Vt. 545, 552, 674 A.2d 1258, 1263

(1996). Accordingly, this Court may not set aside a jury verdict on the basis of "any error, defect, irregularity or variance which does not affect substantial rights." V.R.Cr.P. 52(a); State v. Tester, 2009 VT 3, ¶ 45, 185 Vt. 241, 968 A.2d 895. An error is held "harmless" where we can conclude, "beyond a reasonable doubt[,] that the jury would have returned a guilty verdict regardless." State v. Oscarson, 2004 VT 4, ¶ 30, 176 Vt. 176, 845 A.2d 337. Where, as here, the error in question was the admission of evidence, "we must apply this standard by imagining a trial in which the evidence is not admitted," taking care to consider "what a reasonable jury might have done without the offending evidence, not what we would have done in the fact finder's place." Tester, 2009 VT 3, ¶ 45.

¶ 49. To assess how heavily the jury was likely to have relied on the erroneously admitted evidence, we consider four interrelated factors: (1) the importance of that evidence to the prosecution's case; (2) the cumulativeness of the evidence; (3) the extent of related cross-examination; and (4) the strength of the prosecution's case overall. Id.; State v. Mumley, 2009 VT 48, ¶ 20, 186 Vt. 52, 978 A.2d 6. The "most important" considerations are "the strength of the State's case without the erroneously admitted evidence and the strength of the erroneously admitted evidence." Tester, 2009 VT 3, ¶ 53. After examining this harmless-error inquiry with the requisite caution, it is nevertheless clear to me that the factors favor a finding of harmless error in this case. See Carter, 164 Vt. at 556, 674 A.2d at 1266.

¶ 50. I turn first to one of the two most consequential questions: the strength of the erroneously admitted evidence. Tester, 2009 VT 3, ¶ 53. An understanding of what was actually at issue here is vital to this assessment. To obtain a conviction on its charge of lewd and lascivious conduct with a child, the State was obligated to demonstrate that defendant "willfully and lewdly commit[ted] any lewd or lascivious act upon or with the body" of a child, and did so "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of such person or of such child." 13 V.S.A. § 2602(a). Defendant did not dispute that the acts described by the

State's witnesses—and captured on the surveillance videos—took place. Indeed, during his testimony, defendant described in his own words what was depicted in the kiddie-pool surveillance videos: S.M. facing toward him and straddling his lap, while the two embraced and kissed on the mouth. He explained that this was behavior he frequently engaged in with his eleven-year-old daughter—in other words, he took the position that his behavior was appropriate, not that it did not happen. Thus, as the majority acknowledges, the "key issue" for the State was not proving that defendant committed the alleged acts, but demonstrating that he did so with the requisite state of mind. Ante, ¶ 45.

¶ 51. In this regard, the kiddie-pool videos were of vanishingly little help to the prosecution. Intent is seldom established through direct evidence, but often must be inferred from a person's acts and proved by circumstantial evidence. State v. Cole, 150 Vt. 453, 456, 554 A.2d 253, 255 (1988). The erroneously admitted videos are grainy, blurry, and without sound.[2] The viewer can make out figures and broad movements but cannot discern facial expressions or more subtle motions—in other words, the precise sort of circumstantial evidence which could shed light on defendant's mental state. And, as set forth below, the State did not rely on the videos for this purpose, but instead provided ample other evidence bearing on defendant's state of mind. See infra, ¶ 56.

¶ 52. The majority takes the position that the kiddie-pool videos were significant to the State's case because, "[t]o the extent that one could see conduct in the video[s] consistent with the witnesses' testimony," they lent credence to the witnesses' testimony about other conduct not depicted on the videos. Ante, ¶ 45. But this ignores the fact that the testimony received significant independent corroboration of precisely the same character from those surveillance videos

[2] Perhaps the best illustration of the exceedingly poor quality of the surveillance videos is the testimony of a resort employee who, when asked whether she appeared in one of the surveillance videos, responded equivocally, "I think that's me with the dark jacket on over there."

defendant did not challenge on appeal. Most importantly, however, defendant took the stand and conceded that he engaged in conduct consistent with the videos and the witnesses' testimony. Against this backdrop, video evidence depicting conduct also testified to by several other witnesses and defendant himself did little to bolster the credibility of those witnesses.[3]

¶ 53. Thus, in my view, the kiddie-pool videos were of little importance to the State's case. The prosecutor summarized their utility best in her opening statement, when she told the jury they would see portions of pool surveillance videos over the course of the trial, but candidly noted: "they're not perfect evidence. They're surveillance videos. They're a little grainy. They're a little blurry. They are what they are."

¶ 54. Turning to the second factor, whether the evidence was cumulative, I note again that the video evidence was unquestionably cumulative to the testimony of a series of eyewitnesses who testified to what they saw at the resort that afternoon, giving a much clearer and more complete picture than the video could provide. See State v. Kulzer, 2009 VT 79, ¶ 20, 186 Vt. 264, 979 A.2d 1031 (considering, with respect to cumulativeness of evidence in harmless-error inquiry, whether "[a]ny inferences the jury might have drawn" from offending evidence "would have been . . . stronger or different from those which they would have drawn from the other evidence in the case" on the same point (quotation marks omitted)). This, too, weighs in favor of a finding of harmless error. See id.

¶ 55. As to cross-examination, as the majority concedes, defendant was not prohibited from continuing to challenge the authenticity of the videos during trial. See ante, ¶ 19. To the contrary, he could and did cross-examine the officer at length regarding the videos' authenticity and other concerns, playing some of the videos for the jury again in the process. In doing so, he succeeded in establishing that the officer did not know how the resort's surveillance system

[3] The majority also overlooks that to the extent the videos did not show the detail provided by witnesses, the video evidence may have undercut the witness testimony.

worked or whether she received copies of all the relevant videos; that there were other potential eyewitnesses to the event with whom the officer did not speak; and that the officer did not confirm, with those she did interview, that the video depicted the events they described in their statements. This robust and likely effective cross-examination also weighs in favor of a finding that the error was harmless. See Tester, 2009 VT 3, ¶ 51 (finding that defendant's use of "cross-examination to show the limited significance" of the erroneously admitted evidence weighed in favor of finding error harmless).

¶ 56. Finally, then, I turn to the remaining factor: the strength of the State's case absent the kiddie-pool videos. As set forth above, the videos did little to elucidate the issue at the heart of this case—defendant's mental state. Rather, defendant's intent was much more vividly painted through the eyewitnesses, who testified to events the surveillance cameras could not and did not capture. One witness explained that when S.M. was straddling defendant in the kiddie pool, he was "holding her rather tightly," their "crotches would have been in contact," and that this behavior "appeared . . . to have either a romantic or sexual nature to it." A second witness saw defendant allowing S.M. to give him "open-mouth kisses" in the kiddie pool, and also testified that when father and daughter later went to the hot tub, he could hear "moaning, groaning" noises from the area that "sounded like somebody's sexually aroused." When defendant and his daughter were in the larger pool, a third witness observed that defendant's hands "were underneath [S.M.'s] bottom and her legs wrapped around his waist," with their "genital areas" touching. The first eyewitness also saw them in the larger pool and observed that it appeared that defendant "had his hands in [S.M.'s] crotch area," while her friend observed that in the larger pool there was "again, that crotch-to-crotch contact" and defendant "appeared to be moving [S.M.] in an up and down fashion" and that he was making "a grunting sort of sound."

¶ 57. This presents the inverse of the situation we considered in State v. Oscarson, where "[g]iven the explicit, highly detailed and graphic nature" of the erroneously admitted testimony of

an alleged abuse victim, it was impossible to say that "it was ignored by the jury in favor of" the limited circumstantial evidence or another witness's "bare-bones affirmance" that abuse occurred. 2004 VT 4, ¶¶ 43, 46, 176 Vt. 176, 845 A.2d 337 (declining to find that erroneous admission of abuse victim's graphic testimony was harmless error). When considered in the context of the disputed issue in this case, defendant's intent, the kiddie-pool videos offered far less than a "barebones affirmance" of the witnesses' comparatively explicit and graphic descriptions of what they saw at the resort on that day—the videos were only a vague shadow of the vivid eyewitness testimony. The State's case was strong, even without the disputed video.[4] See Tester, 2009 VT 3, ¶ 55 (finding harmless error in admission of evidence where other evidence "gave the State an independently convincing case"). This was far from a swearing contest punctuated by other evidence. See State v. Herring, 2010 VT 106, ¶¶ 10, 13, 189 Vt. 211, 19 A.3d 81 (holding that Court could not conclude beyond reasonable doubt that impeachment evidence erroneously excluded would have had no impact on jury's credibility assessment in what amounted to swearing contest). For all of these reasons, I believe it is clear beyond a reasonable doubt that the jury would have found defendant guilty absent the erroneously admitted video evidence.

¶ 58. Under these circumstances, there is no purpose to be served in reversing defendant's conviction due to the absence of a formulaic recitation of the reliability of the unchallenged reproduction process, such as testimony that the cameras were working on the day in question, or testimony about the video-transfer process. As the nation's highest Court has explained,

[4] The majority points to the almost-five-hour jury deliberation as evidence of the importance of the video in the jury's decision to convict. Ante, ¶ 45. I do not believe the length of deliberation here makes any statement about the importance of these additional videos to the State's otherwise substantial evidence. This case centered on defendant's intent, which the jury had to infer. See Cole, 150 Vt. at 456, 554 A.2d at 255. I do not find the length of the jury's deliberation to show anything other than its careful consideration of the evidence in a serious case tried over two days.

> the Constitution entitles a criminal defendant to a fair trial, not a perfect one. . . . The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.

Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) (citation omitted). While we must set aside a guilty verdict where there is risk that error compromised the fairness of a trial, we must also take care not to set aside the duly rendered verdict of a jury on the basis of an error which was harmless.

¶ 59. I would affirm defendant's conviction.

¶ 60. I am authorized to state that Justice Carroll joins this dissent.

_____

Associate Justice