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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0688**

State of Minnesota,
Respondent,

vs.

Daniel Joseph Becker,
Appellant.

**Filed April 1, 2019
Reversed and remanded
Larkin, Judge**

Isanti County District Court
File No. 30-VB-17-2633

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Jeffrey R. Edblad, Isanti County Attorney, Annalise M. Backstrom, Assistant County Attorney, Cambridge, Minnesota (for respondent)

Daniel Joseph Becker, Onamia, Minnesota (pro se appellant)

Considered and decided by Larkin, Presiding Judge; Smith, Tracy M., Judge; and
Randall, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his petty-misdemeanor conviction for failing to stop at a red light. He argues that the district court erred by allowing the state to play a squad video of the incident at trial in a manner that prevented him from seeing the video as it was played and by basing its finding of guilt on the video, which he had never seen. We reverse and remand for a new trial.

FACTS

Respondent State of Minnesota charged appellant Daniel Joseph Becker with failing to stop at a red light. The case was tried to the district court. Becker represented himself at trial. The state called one witness, Minnesota State Patrol Trooper Scott Fredell. Trooper Fredell testified that on September 7, 2017, he was stopped at a red light at the intersection of Garfield Street and Minnesota trunk Highway 95 in Cambridge. Trooper Fredell testified that from his location in the left turn lane, he observed a vehicle in the right lane enter the intersection against the red light. Trooper Fredell stopped the vehicle and identified the driver as Becker. Trooper Fredell testified that Becker told him that the light was yellow when he entered the intersection.

The state laid foundation for a video recording of the incident from Trooper Fredell's squad car. After establishing foundation, the prosecutor informed the district court, "[A]t this time I would ask to play a portion of the squad video for the Court." The district court asked Becker if he had "[a]ny objection to that." Becker responded, "No." The state played the video for the district court. According to Becker, the video was played

on the prosecutor's laptop on top of the district court's bench, and he could not see the video as it played.

After the district court watched the video, the prosecutor said, "Your Honor, I would offer that video as State's Exhibit 1 into evidence." The district court asked Becker if he had "[a]ny objection to that." Becker responded: "My only objection would be I don't know—I haven't seen it, I don't know if it's calibrated or, you know, what would be the—I've never seen it so I don't know" The prosecutor responded:

Mr. Becker was notified that this video was available for him for a payment of \$10, which is the standard for everyone. He instead wrote a letter responding that if we were going to charge him for our evidence that he expected the State to pay him \$10 for his photographs that he claimed he had. He didn't make an effort to come in to see the video or watch it but it was made available for him.

After the prosecutor concluded her remarks, the district court stated, "All right. Exhibit 1 is received."

Becker cross-examined Trooper Fredell and then testified on his own behalf. In doing so, he proffered the following defenses: the traffic light was green when he entered the intersection and turned yellow while he was in the intersection; the light remained yellow for an unusually short period of time because it was not properly calibrated; because of the short yellow light and because there was a car between Trooper Fredell's squad car and Becker's vehicle, it was physically impossible for the officer to have seen the color of the traffic light when Becker's vehicle entered the intersection; and there was a car following Becker's vehicle very closely, which made it unsafe for him to stop before entering the intersection.

In the state's closing argument, the prosecutor disputed Becker's assertion that it was physically impossible for Trooper Fredell to have seen Becker's vehicle enter the intersection against a red light. She relied on the video, arguing,

The video is exactly as Trooper Fredell testified to, which demonstrates that he did in fact witness this with his own eyes. The video clearly shows Mr. Becker entering the intersection when the light is red. It doesn't show him entering the intersection when the light was yellow and then turn[ing] red, it shows him entering it when it was completely red. Therefore, Your Honor, given everything you've seen and heard today the State would ask [you] to find Mr. Becker guilty.

In Becker's closing argument, he noted that he had not seen the squad video. He stated,

[I] also know without seeing the videotape that the videotape does not also show when I entered the intersection because I know I entered it lawfully, so it wouldn't show that I entered when it was red, it would—it would . . . not show that because it's not possible.

Becker argued the following points: the officer did not see him enter the intersection; the traffic light was not properly calibrated; it was a busy intersection and there were vehicles in all of the lanes of traffic; and the vehicle behind him was "six inches" from his vehicle's bumper, making it unsafe for him to stop.

The district court found Becker guilty as charged, stating that it had "considered in particular Exhibit 1, the squad video." The district court explained:

The traffic control signal turned red and the vehicle driven by Mr. Becker can be quite clearly on Exhibit 1 seen crossing the threshold into the intersection on the red light. There was no car and is no car visible in between Trooper Fredell's squad

and Mr. Becker's car on the video. Further, there is no car behind Mr. Becker that can be seen on the video.

Mr. Becker's testimony is that he entered the intersection on a green light and that the light turned yellow while he was in the intersection. The video simply does not bear that out. Therefore, the Court does find that Mr. Becker violated Minnesota Statute 169.06 subdivision 5(a)(3)(i), failing to stop at a red light, and the Court does find Mr. Becker guilty of that offense.

The district court entered judgment of conviction and ordered Becker to pay a fine.

Becker appeals.

D E C I S I O N

Becker is self-represented in this appeal. His assignments of error focus on the district court's receipt of and reliance on the squad video. He complains that the district court "based [its] final decisions heavily on a video [that the district court judge] watched through the prosecuting attorney's private laptop computer," that he "was not allowed to watch the video unless he paid the prosecuting attorney a fee of \$10.00," that the video "could have been a doctored video and/or a YouTube video that the judge watched," that he "has no idea what [the judge] watched because [the video] was on the private laptop computer of the prosecuting attorney and [he] did not pay the \$10.00 to have access to the video," that "the Judge and prosecuting attorney watched [the video] together" and were aware that he was "unable to see anything atop the Judge's bench," and that "[t]he private computer, of the prosecuting attorney, should have been placed on a lower table thus allowing [him] to see the screen." In sum, Becker's complaint is that the district court based its finding of guilt on a video that he had never seen.

Becker does not contend that the squad video was inadmissible. Instead, his complaints focus on the district court's receipt of and reliance on the squad video even though it was apparent that he had never seen it. We therefore treat Becker's appellate challenge as an assertion of a violation of his right to a fair trial, as opposed to an assignment of evidentiary error. "[A] defendant has a constitutional right to due process in the form of a fair trial." *State v. Voorhees*, 596 N.W.2d 241, 249 (Minn. 1999); see U.S. Const. amends. VI, XIV; Minn. Const. art. I, §§ 6, 7. We review an alleged deprivation of the constitutional right to a fair trial de novo. *State v. Dorsey*, 701 N.W.2d 238, 249 (Minn. 2005).

The transcript does not refute Becker's assertion that he had never seen the squad video when the district court received it as an exhibit over his objection. When Becker objected to the district court's receipt of the video, the state did not dispute Becker's assertion that he had not seen the video. Moreover, the state does not now dispute Becker's assertion that he could not see the video from his position in the courtroom as it was played for the district court. Instead, the state argues:

The squad video was made available for Mr. Becker to view, but he opted not to pay the \$10 fee or call the Isanti County Attorney's Office to inquire about possible alternative options to purchasing the video, such as setting up an appointment to come in and watch it. It is untrue that Mr. Becker had no option other than to pay the \$10 in order to see the squad video.

The state further argues that "[h]ad Mr. Becker asked to view the video himself, or in some other manner, the State would have gladly moved the computer to a location where he could more easily see the screen."

Minnesota Practice § 9.4 instructs that there is a generally accepted standard procedure for the introduction of exhibits. 5 Roger S. Haydock & Peter B. Knapp, *Minnesota Practice* § 9.4 (2018-19 ed. 2018). That procedure is as follows:

1. Qualify the witness by laying the *foundation* for the witness to identify the exhibit.
2. Make certain the exhibit has been *marked* (before or during the hearing or trial).
3. Ask permission to *approach the witness* (unless close by or seated).
4. Request that the witness *examine* and *recognize* the exhibit.
5. Have the witness *identify* the exhibit.
6. *Offer* the exhibit into evidence.
7. Provide *the opponent* the opportunity to review the exhibit.
8. *Respond* to any objections.
9. Obtain a *ruling*.
10. Show the exhibit to the *fact finder*.

Id.

The prosecutor in this case did not follow that procedure. Instead, she showed the video exhibit to the fact-finder before she formally offered the exhibit into evidence, without first providing Becker an opportunity to review the exhibit in court.¹

¹ Although Becker did not object when the prosecutor initially asked to play a portion of the squad video for the district court, he did object when the prosecutor formally offered the video as evidence. That was an appropriate time to object to the district court's receipt of the video as an exhibit.

It is important to note that the *last* step in the standard procedure is showing the exhibit to the fact-finder. Before the exhibit is shown to the fact-finder, the offering party must offer the exhibit into evidence, provide her opponent an opportunity to review the exhibit, respond to any objections, and then obtain a ruling regarding admission of the exhibit. *Id.* Providing one's opponent an opportunity to review the exhibit "ensure[s] that an adequate appellate record is made and give[s] the opposing party a fair opportunity to make appropriate and timely evidentiary objections to the offered exhibit." See Thomas A. Mauet & Warren D. Wolfson, *Trial Evidence* § 10.2, at 311 (4th ed. 2009) (describing importance of showing an exhibit to opposing counsel as part of the process of introducing an exhibit).

The prosecutor's deviation from the generally accepted procedure for the introduction of an exhibit is especially concerning because Becker was a self-represented litigant. "Although some accommodations may be made for pro se litigants, this court has repeatedly emphasized that pro se litigants are generally held to the same standards as attorneys and must comply with court rules." *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. App. 2001). Given that courts impose the same standards that are expected of licensed attorneys on self-represented parties, it is reasonable to expect licensed attorneys to adhere to those standards. We note that when Becker offered photographs into evidence at trial and the district court asked the state whether it had any objection, the prosecutor understandably said, "I would like to see them first." Becker was then required to show the photographs to the prosecutor before the district court accepted them as an exhibit.

Like the prosecutor, Becker was entitled to see his opponent's visual evidence before the district court ruled on its admission and before it was shown to the fact-finder.

We appreciate that challenges may arise in district court proceedings in which one of the parties is self-represented. However, “[a district] court has a duty to ensure fairness to a pro se litigant by allowing reasonable accommodation so long as there is no prejudice to the adverse party.” *Kasson State Bank v. Haugen*, 410 N.W.2d 392, 395 (Minn. App. 1987); see *Liptak v. State ex rel. City of New Hope*, 340 N.W.2d 366, 367 (Minn. App. 1983) (stating that all courts provide some latitude and consideration to self-represented litigants). Upon hearing Becker's objection that he had never seen the squad video that the state had just played for the fact-finder as proof of the charged offense, the district court should have briefly recessed the trial to give Becker an opportunity to view the video and to formulate arguments regarding its admission and persuasive value. Under the circumstances, a brief recess would have been a reasonable accommodation to ensure fairness to a self-represented litigant.² Because the district court received and relied on evidence that Becker had never seen to find him guilty, we conclude that Becker was deprived of his constitutional right to a fair trial.³

We turn now to the appropriate remedy. Becker requests that the case be dismissed. He does not cite legal authority supporting dismissal by this court, and we are not aware of such authority. In our view, the relevant issue is whether the fair-trial deprivation was a

² The squad video is approximately nine minutes long.

³ Our holding is based on the district court's receipt of and reliance on the squad video, and not on the discovery process. Because any failure in the pretrial discovery process does not excuse the trial error, we do not address that process.

structural error requiring automatic reversal or a trial error that is subject to harmless-error analysis. See *Dorsey*, 701 N.W.2d at 252-53 (discussing difference between structural and trial errors and noting that “some errors necessarily render a trial fundamentally unfair” and “require reversal without regard to the evidence in the particular case” (quotation omitted)). For the reasons that follow, we reverse and remand without deciding that issue.

The harmless-error rule provides, “Any error that does not affect substantial rights must be disregarded.” Minn. R. Crim. P. 31.01. The state’s only argument in this case is that the district court did not err in its receipt, handling, and consideration of the squad video. The state does not argue, in the alternative, that even if there was error related to the squad video, the error was harmless and therefore not a basis for reversal. This court has held that “[i]f the state does not make a harmless-error argument with respect to an issue that is subject to the harmless-error rule, this court is not required to undertake a harmless-error analysis but may do so in certain circumstances.” *State v. Porte*, 832 N.W.2d 303, 306 (Minn. App. 2013). We stated, “[W]e may assume that in a direct appeal, the state’s failure to assert a harmless-error argument in its responsive brief is a waiver of the harmless issue, unless it is obvious that the district court’s error was harmless.” *Id.* at 313 (quotation omitted).

“When an error implicates a constitutional right, a new trial is required unless the State shows beyond a reasonable doubt that the error was harmless.” *State v. Morrow*, 834 N.W.2d 715, 729 n.7 (Minn. 2013). Although we do not analyze Becker’s complaints as an assignment of evidentiary error, the factors used to determine whether evidentiary error is harmless beyond a reasonable doubt are helpful. When determining whether the

erroneous admission of evidence was harmless beyond a reasonable doubt, a “reviewing court considers the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, and whether it was effectively countered by the defendant.” *State v. Caulfield*, 722 N.W.2d 304, 314 (Minn. 2006) (quotation omitted).

As to the manner of presentation, Becker was not able to see the video as it was played for the fact-finder. Moreover, the testimony of Trooper Fredell and Becker was conflicting regarding whether Becker entered the intersection against a red light. The district court resolved that conflicting testimony—and expressly rejected Becker’s defenses at trial—by relying on the video. That reliance shows that the video was highly persuasive. Lastly, the state emphasized the video in its closing argument, and Becker was not able to effectively counter the video evidence.⁴

On this record, it is not obvious to us that the district court’s receipt of and reliance on the squad video was harmless beyond a reasonable doubt. We therefore assume that the state’s failure to assert a harmless-error argument is a waiver of the harmless error issue. Thus, we reverse and remand for a new trial without considering whether reversal is otherwise required because the error was structural.

Reversed and remanded.

⁴ The record shows the difficulty Becker had in cross-examining Trooper Fredell about a video he had never seen. For example, after the video had been played to the district court, Becker asked Trooper Fredell, “*If it showed on the video that every lane was occupied, would you agree with that?*” and “*If the video showed that there was a vehicle behind me, would you agree with that?*” (Emphasis added.)