

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0420**

State of Minnesota,
Respondent,

vs.

Hassan Abdullah Ali,
Appellant.

**Filed February 10, 2020
Affirmed in part, reversed in part, and remanded
Bryan, Judge**

Hennepin County District Court
File No. 27-CR-17-19298

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

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Abigail H. Rankin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Hooten, Judge; and Bryan, Judge.

UNPUBLISHED OPINION

BRYAN, Judge

On appeal from his convictions of check forgery and possessing stolen checks, appellant argues that (1) the district court abused its discretion by admitting photographs from the bank's ATM, and (2) he should have received one sentence, instead of four, because all four counts were part of the same behavioral incident. We affirm in part, reverse in part, and remand to vacate the probationary consequences¹ corresponding to count four.

FACTS

E.S., the owner of a restaurant in Minneapolis, discovered that the checkbook for his business checking account was missing. Surveillance footage at the restaurant revealed that a man, whom E.S. believed to be the brother of appellant Hassan Abdullah Ali, took the checkbook from the cash register of the restaurant. E.S. subsequently learned that eight checks had been written to appellant and deposited in appellant's Bank of America checking account between May 9, 2017 and May 17, 2017. A total of \$25,000 was deposited into appellant's account at two separate Bank of America ATMs, located in St. Louis Park and Bloomington.

¹ In their briefs, the parties refer to the decision of the district court to stay imposition of sentence as a "sentence." In this opinion, we distinguish between the portion of the disposition below regarding guilt (the conviction) and the portion of the disposition below regarding punishment (stay of imposition of sentence on conditions of probation and 120 days of jail). We refer to the portion of the disposition regarding punishment as the "probationary consequences."

The bank's ATM cameras captured video recordings of the person using the ATM and captured images of the checks deposited. Law enforcement obtained still images from the ATM video recordings during the time period of the above transactions. The ATM images showed that appellant's brother, alone, deposited checks on May 9, 10, and 17. They also show that appellant and his brother were together when they deposited checks on May 11 and May 12, and appellant, alone, deposited a check on May 15.

The state charged appellant with three counts of aiding and abetting check forgery for depositing checks on May 11, 12, and 15, 2017. The state also charged appellant with one count of possession of a stolen check between the dates of May 9 and May 17, 2017. The district court admitted the ATM images as exhibits at trial. The district court also admitted the testimony of Chad Anderson, who explained that, in his experience working for the bank, he accesses the bank's records on a daily basis. He also explained how the images were made, testifying that the ATM cameras automatically and continuously record what is occurring in front of them, that the recordings are dated and timestamped, that the recordings are sent to a bank server, and that bank personnel can access the video within 120 days. Anderson further testified that, based on his familiarity with the process, the ATM photographs are reliable and accurate. He stated that the bank has a department to maintain the accuracy of the ATM recording devices and that there were no complaints about the operation of the ATM machine during the timeframe in which appellant's transactions occurred. He explained that, in this case, the bank received a warrant and request from law enforcement to provide ATM information related to appellant's account for a period in May 2017. Anderson explained that the bank-records custodian compiled

the images and sent them to law enforcement pursuant to the warrant. In addition, the district court received an exhibit and testimony further establishing chain of custody. A police officer also testified and explained that he requested and subsequently received the images from the bank.

After deliberation, the jury convicted appellant of all four counts. The district court stayed the imposition of sentences, placed appellant on probation for five years on all four counts, and ordered appellant to serve 120 days in jail. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by admitting the ATM photographs.

Appellant first argues that the district court admitted ATM photographs without authentication. In response, the state argues that its witness properly authenticated the ATM photographs. Appellant argues that this court should reject respondent's position regarding authentication because the district court did not make explicit findings applying the "silent-witness theory" of authentication.

Appellant next argues that the district court erred when it admitted the photographs under the business-records exception to the hearsay rule. In response, the state argues that the court correctly admitted the photographs. The state does not dispute the business-records exception analysis, but instead argues that the district court correctly admitted the photographs for a different reason: the photographs do not fall within the definition of a hearsay "statement" in the first place because they do not constitute or contain any statements. Appellant argues that this court should reject respondent's position because

the district court referred to the business-records exception to the hearsay rule and did not make explicit findings regarding the definition of hearsay statement.

As a threshold matter, we observe that it is this court's responsibility to decide cases in accordance with the law, *State v. Vasko*, 889 N.W.2d 551, 556 (Minn. 2017), and that we "will not reverse a correct decision simply because it is based on incorrect reasons," *Kahn v. State*, 289 N.W.2d 737, 745 (Minn. 1980). In other words, we need not address the reasoning provided by the district court. Instead, we consider whether or not the district court correctly admitted the images in question and whether or not the record supports that decision. We need not consider whether or not the district court referred to the silent-witness theory of authentication or explicitly analyzed whether or not the images contain hearsay statements. We first address the authentication argument and then turn our attention to the hearsay objection.

a. Authentication

Authentication is merely a more specialized application of the principles of relevancy and foundation. See Minn. R. Evid. 901, 1977 comm. cmt. Authentication of a photographic image is satisfied by evidence sufficient to support a finding that the image in question is what its proponent claims. *Id.* Under rule 901(b)(9) of the Minnesota Rules of Evidence, "[e]vidence describing a process or system used to produce a result and showing that the process or system produces an accurate result" suffices to provide authentication. Rulings on foundation are committed to the sound discretion of the district court and will only be reversed upon a clear abuse of discretion. *In re Welfare of S.A.M.*, 570 NW.2d 162, 164 (Minn. App. 1997). District courts possess "considerable discretion

under Minn. R. Evid. 901(a) in deciding whether evidence has been adequately authenticated or identified.” *State v. Dulak*, 348 N.W.2d 342, 344 (Minn. 1984).

The evidence at issue here consists of images from ATMs equipped with cameras. Video recordings and still images from video recordings may be authenticated in two ways, using the pictorial-witness theory or the silent-witness theory. *S.A.M.*, 570 N.W.2d at 164-65. Under the first authentication method, a witness describes what she saw; the video is a pictorial representation of the witness’s personal observations. *Id.* at 164. Under the second method, the video depicts events that no person directly observed, but witness testimony describes the process or system of recording and verifies that this process produces an accurate video. *Id.* at 165. In *S.A.M.*, this court held that a video was properly authenticated when its proponent offered testimony that showed (1) how the video was made, (2) that it produces an accurate result, and (3) some evidence on the chain of custody. *Id.* at 166.

In this case, Chad Anderson testified on behalf of the bank regarding the ATM photographs. While the district court admitted the photographs under the business-records exception, it also made explicit findings satisfying the silent-witness theory of authentication. The district court found that there was “no real question about the authenticity of the [photographs],” that Anderson testified reliably about how the videos were made, and that the process produced an accurate result. It also found evidence of the chain of custody in the form of an affidavit signed by another records custodian from the bank.

The record supports the district court's findings that relate to the requirements of the silent-witness theory of authentication. First, Anderson explained how the images were made based on his knowledge and experience as a records custodian who accesses the bank's records on a daily basis. Anderson testified that the ATM cameras automatically record what is occurring in front of them, that the recordings are dated and timestamped, that the recordings are sent to a bank server, and that bank personnel can access the video within 120 days.

Second, Anderson further testified that, based on his familiarity with the process, the ATM photographs are reliable and accurate. He stated that the bank has a department to maintain the accuracy of the ATM recording devices and that there were no complaints about the operation of the ATM machine during the timeframe in which appellant's transactions occurred.

Third, Anderson's testimony provided evidence regarding the chain of custody. Anderson testified that the ATM records video surveillance continuously and the footage is then stored on a bank server. He explained that, in this case, the bank received a warrant and request from law enforcement to provide ATM information related to appellant's account for a period in May 2017. Anderson explained that the bank records custodian compiled the images and sent them to law enforcement pursuant to the search warrant. In addition, the district court received an exhibit and testimony further establishing chain of custody. In an affidavit from a records custodian at the bank, the custodian stated that she produced original copies of the ATM photographs that were requested by law enforcement.

A police officer also testified and explained that he requested and subsequently received the ATM photographs from the bank.

This evidence satisfies each of the necessary components of the silent-witness theory of authentication.

b. Hearsay

Although appellant concedes that “the district court misconstrued the photographs as hearsay,” appellant argues that because the district court admitted the ATM photographs while referring to the business-records exception, this court must analyze admissibility under this rule. As noted above, we consider whether or not the district court correctly admitted the images in question and whether or not the record supports that decision. Here, we agree with the argument of respondent: the district court correctly admitted the ATM photographs because they do not contain any verbal or nonverbal hearsay statements.² We need not address the business-records exception.³

² We note that the ATM machines automatically recorded, generated, and stored the images, without intervention of human persons. We have previously adopted the reasoning of the Eleventh Circuit, which held that under the Sixth Amendment and pursuant to the definition of “statement” in rule 801(a) of the Federal Rules of Evidence, evidence that is wholly and automatically generated by a computer or a machine is not a “statement.” *State v. Ziegler*, 855 N.W.2d 551, 556 (Minn. App. 2014) (“The circuit court also reasoned that under the definition of ‘statement’ in the federal hearsay rule, ‘the statements in question are the statements of machines, not statements of persons.’”) (quoting *United States v. Lemmons*, 532 F.3d 1251, 1263 (11th Cir. 2008), *cert denied*, 555 F.3d 1009 (2008)). Because the parties focused their arguments on whether the evidence contained verbal or nonverbal statements, we do not end our analysis with an application of the rule in *Ziegler*, but also address the remainder of the parties’ arguments.

³ Appellant argues that the ATM photographs do not meet the business-records exception because they were not maintained in the regular course of business but were prepared specifically for litigation. See Minn. R. Evid. 803(6).

We review district court decisions regarding hearsay rulings for an abuse of discretion. *Holt v. State*, 772 N.W.2d 470, 483 (Minn. 2009). Hearsay is an out-of-court statement offered for the truth of the matter asserted. Minn. R. Evid. 801(c). The issue here is whether or not the images contain or constitute “statements.” The Rules of Evidence define a “statement” as “(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.” Minn. R. Evid. 801(a). To be admitted, a person must make a clear nonverbal assertion, as opposed to something vague or ambiguous. For example, nodding or pointing without speaking in answer to a question constitutes a “statement” under rule 801(a). 2 Kenneth S. Broun et al., *McCormick On Evidence* § 250, at 205 n.1 (Robert P. Mosteller ed., 8th ed. 2020) (citing the following three cases: *United States v. Katsougrakis*, 715 F.2d 769, 774-75 (2d Cir. 1983) (heavily bandaged victim nodding in the affirmative when asked whether he was paid to commit arson deemed hearsay); *United States v. Caro*, 569 F.2d 411, 416 n.9 (5th Cir. 1978) (defendant pointing at the house of his source in response to question constituted hearsay); *People v. Covarrubias*, 378 P.3d 615, 653-54 (Cal. 2016) (witness pointing to two trailers in response to investigator’s question constituted hearsay)).

The Minnesota Supreme Court has also analyzed nonverbal assertions as adoptive admissions under Minnesota Rule of Evidence 801(d)(2)(B), indicating that the nonverbal assertions satisfied the definition of a “statement” in rule 801(a). See *State v. Roan*, 532 N.W.2d 563, 573 (Minn. 1995) (affirming trial court’s admission of witness testimony that the witness observed defendant making a gesture “like a gun to the head” after being asked to confirm that he had shot someone); *State v. Shoop*, 441 N.W.2d 475, 482 (Minn.1989)

(affirming trial court’s admission of witness testimony that the witness observed defendant nodding his head when an accomplice said “I didn’t do it, [the defendant] did.”).

In this case, the images contain no clear, nonverbal gesturing or pointing that can satisfy the definition of “statement” in rule 801(a). The district court properly admitted the images because they do not contain or constitute hearsay statements.

II. We affirm the district court’s order of separate probationary consequences for counts one, two, and three but reverse and remand for the district court to vacate the probationary consequence as to count four.

Appellant argues that the district court erroneously sentenced him separately on all four counts. He contends that all four counts stemmed from a single behavioral incident because they occurred within eight days in Hennepin County, stemmed from a single theft, and were committed to fulfill the same criminal objective: to obtain money.

In Minnesota, “if a person’s conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses.” Minn. Stat. § 609.035, subd. 1 (2018). This statute “protects criminal defendants from both multiple prosecutions and multiple sentences for offenses resulting from the same behavioral incident.” *State v. Schmidt*, 612 N.W.2d 871, 876 (Minn. 2000). When, as here, the facts are not in dispute, we review the question of whether the offenses were part of a single behavioral incident de novo. *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016).

In determining whether a course of conduct consists of a single behavioral incident, we consider two factors: (1) whether the conduct has a unity in time and place; and (2) whether the commission of the offenses was motivated by a single criminal objective. *Schmidt*, 612 N.W.2d at 876. The test is not rigid, but in each case, the district court must

examine the facts and exercise reasonable discretion. *State v. O'Brien*, 429 N.W.2d 293, 297 (Minn. App. 1988), *review denied* (Minn. Nov. 16, 1988).

a. Counts one, two, and three—check forgery (May 12), check forgery (May 15), check forgery (May 11)

The offenses charged in counts one through three did not share a unity of time and place, were not motivated by a single criminal objective, and so were not committed as part of a single behavioral incident under Minnesota Statutes, section 609.035 (2018). Accordingly, the district court did not err in imposing separate punishments for these convictions.

To determine whether separate counts share a unity of time and place, courts look to the number and identity of victims, the locations of the offenses, and the times that offenses occurred. *See, e.g., State v. O'Hagan*, 474 N.W.2d 613, 622 (Minn. App. 1991) (concluding no unity of time and place where theft through multiple diversions of funds occurred seven weeks apart and two-and-a-half months apart), *review denied* (Minn. Sept. 25, 1991); *O'Brien*, 429 N.W.2d at 296-97 (concluding no unity of time and place where the state charged defendant with four counts of theft by swindle for cashing checks stolen from different victims on four separate occasions in a period of just over a month); *State v. Chidester*, 380 N.W.2d 595, 597 (Minn. App. 1986) (concluding no unity of time and place where theft and forgery spanned eight-month period), *review denied* (Minn. Mar. 21, 1986); *State v. Eaton*, 292 N.W.2d 260, 267 (Minn. 1980) (concluding no unity of time and place where the state charged defendant with theft of two different checks at two different

times three days apart). Here, the offenses took place on three separate dates, at two different locations, involved separate checks, and occurred over a period of five days.

To determine whether the commission of the offenses was motivated by a single criminal objective, courts compare the degree of specificity required by section 609.035 with the objective identified in that case. “[T]he mere fact that [a defendant] committed multiple crimes over time for the *same* criminal objective does not mean he committed those crimes to attain a *single* criminal objective.” *Bakken*, 883 N.W.2d at 271 (emphasis in original). Obtaining the maximum benefit from an ongoing fraud or theft by swindle is too broad to constitute a single criminal objective. *See, e.g., O’Hagan*, 474 N.W.2d at 622 (using client funds for own benefit deemed too broad to constitute a single criminal objective); *O’Brien*, 429 N.W.2d at 297 (using same statements to obtain funds did not transform separate acts into a single behavioral incident); *Chidester*, 380 N.W.2d at 598 (obtaining money to cover expenses deemed too broad to constitute a single criminal objective); *Eaton*, 292 N.W.2d at 267 (trying to swindle as much as possible deemed too broad to constitute a single criminal objective). In this case, appellant describes the conduct as motivated by “the same goal,” “to get money from those stolen checks.” As noted above, the general intent to steal as much money as possible is too broad of a purpose to constitute a single criminal objective under section 609.035.

We, therefore, affirm the district court’s probationary consequences for counts one through three.

b. Count four—possessing stolen checks (May 9 through May 17)

As to count four, the district court instructed the jury that it could find appellant guilty of possessing stolen checks for any conduct occurring from May 9 through May 17, 2017. It is unclear, however, what specific conduct and timeframe the jury relied on in finding appellant guilty of count four. For this reason, appellant argues that the state cannot meet its burden of demonstrating that this offense was committed as part of a separate behavioral incident from counts one through three, and so he may not be punished separately for this conviction.

The state agrees that appellant's probationary consequence for count four should be vacated because the basis for the conviction is unclear, and the jury could have convicted appellant based on conduct underlying counts one through three. Although the parties agree, it is an appellate court's responsibility to decide cases based on the law and not an agreement between parties. *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990). A defendant should only be punished "for the most serious of the offenses arising out of a single behavioral incident." *State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006) (quotation omitted).

Here, because the district court instructed the jury that it could find appellant guilty of count four based on his conduct ranging from May 9, 2017, to May 17, 2017, appellant's conduct underlying counts one through three could have supported the guilty verdict for count four. If the jury convicted appellant of count four based on the conduct underlying his convictions for any one of counts one through three, the convictions would share a unity of time and place and share a single criminal objective. *See Schmidt*, 612 N.W.2d at 876.

Because it is impossible to discern from the record whether count four was committed as part of a separate behavioral incident from counts one through three, we reverse and remand for the district court to vacate appellant's probationary consequence as to count four.

Affirmed in part, reversed in part, and remanded.