

No. 35233-1-III

(Kittitas County Superior Court No. 16-1-00238-1)

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON

Respondent,

v.

JAMIE L. HUGDAHL,

Appellant.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This action arises out of the trial court's erroneous admission of a surveillance video without the proper foundation. The prosecution did not provide sufficient evidence to support a finding that the surveillance video is what the prosecution claims it to be, and the trial court abused its discretion by admitting the video into evidence. Therefore, this matter should be remanded to the trial court for a new trial.

II. ASSIGNMENTS OF ERROR

1. The Trial Court erred by admitting the surveillance video into evidence without proper foundation as required by ER 901(a).
2. Ms. Hettinger's testimony is insufficient to give some indication as to when, where and under what circumstances the video was taken and that the video accurately portrays the subject illustrated.
3. Officer Self's testimony is insufficient to give some indication as to when, where and under what circumstances the video was taken and that the video accurately portrays the subject illustrated.
4. The Prosecution Failed to Establish the Chain of Custody of the Surveillance Video.

5. The Trial Court abused its discretion by admitting the surveillance video.
6. The Trial Court failed to adhere to ER 901(a).
7. The Trial Court's erroneous admission of the surveillance video materially affected the outcome of the trial.

III. STATEMENT OF THE CASE

An iPhone went missing from a TCC Verizon retail store in Ellensburg, Washington on August 16, 2016. VRP, p. 186, ll. 5-25; p. 191, ll. 1-13. A relatively new store employee left one or more iPhones on the counter while assisting customers. VRP, p. 188, ll. 2-3. Store employees realized an iPhone was missing when they reviewed inventory on the following day. VRP, pp. 212, ll. 24-25; p. 213, ll. 1-7. Store employees searched for the missing phone for several days but could not find it. VRP, p. 213, ll. 1-5.

The employee who left the iPhone on the counter testified that Appellant Jamie L. Hugdahl was in the Verizon store on the day the phone went missing. VRP, p. 191, ll. 2-8. The employee did not realize that an iPhone was missing until the following day. VRP, p. 213, ll. 10-12. There were at least fifty other customers in the store that day. VRP, p. 199, ll. 7-9.

The prosecution did not present any testimony from witnesses who were in the TCC Verizon store alleging that they saw Ms. Hugdahl take the missing phone. *See* VRP. Instead, the prosecution presented surveillance video allegedly from the store into evidence. VRP, p. 252, ll. 12-25; p. 254, ll 1-2. TCC Verizon employee Amy Hittinger testified that she obtained the surveillance video from TCC Verizon's "regional investigator" Jessie Gaw. VRP, p. 226, ll. 20-21. Mr. Gaw did not testify at trial. VRP, pp. 207-08. Ms. Hittinger testified that the video was obtained from a third party: "[o]ur company uses Retail Next for security footage, and that was the site that it was located on." VRP, p. 227. There was no testimony from a Retail Next representative. VRP, pp. 207-08.

Ms. Hittinger was not in the Ellensburg TCC Verizon store on the day the phone went missing. VRP, p. 225, ll. 11-15. Ms. Hittinger reviewed the surveillance video and testified that it was the Ellensburg store. VRP 229, ll. 8-14. Ms. Hittinger forwarded the surveillance video to the investigating police officer, Officer Self. VRP, p. 224.

Counsel for Appellant Ms. Hugdahl objected to the admission of the surveillance video, arguing that the prosecution had not established foundation for the video. VRP, p. 249, ll. 22-25; p. 250, ll. 1-9. The trial court overruled the objection and admitted the video into evidence. VRP, p. 253, ll. 21-25; p. 254, ll. 1-2. The trial court judge stated that Ms.

Hittinger “would know what the Ellensburg store looked like, since she was the manager for that store and five others in the area.” VRP, p. 250, ll. 10-12. The surveillance video was played for the jury. VRP, p. 256.

Officer Self testified that he could not see the face of the person he identified as Ms. Hugdahl in the video, “but the baggie (sic) basketball shorts and the tank top and the general physical stature of that person was ... consistent with clothing that I’ve seen Ms. Hugdahl wear in the past.” VRP, p. 262, ll. 2-5. The surveillance video was “not a great camera angle.” VRP, p. 317, ll. 1-2. Officer Self testified that “[o]nce I realized that it’s not great footage, I was really only using it to determine if somebody who was in the store at that time could feasibly be Jamie Hugdahl, based on general physical description.” VRP, p. 317, ll. 4-7. The Prosecution admitted that the video was “crappy,” the view is blocked, it’s not good footage, it’s “grainy,” and “not clear.” VRP, p. 368, ll. 13-19.

During deliberations, the jury asked the Court if they could “see the last 5 minutes of the security video.” CP 52. The jury found Ms. Hugdahl guilty of Theft in the Second Degree and Trafficking in Stolen Property in the First Degree. CP 53 and 54.

IV. LAW AND ARGUMENT

A. **Standard of Review.**

Courts treat videotape recordings and motion pictures like photographs for purposes of authentication. *State v. Newman*, 4 Wn. App. 588, 593, 484 P.2d 473, *review denied*, 79 Wn.2d 1004 (1971). “There is a well-established precedent for the proposition that the admission or rejection of photographs as evidence lies within the sound discretion of the trial court.” *State v. Tatum*, 58 Wn. 2d 73, 75, 360 P.2d 754, 755–56 (1961). Washington courts have also held that the trial court's discretion extends to the sufficiency of identification. *Id.* “Discretion is abused when it is exercised on untenable grounds or for untenable reasons.” *State v. Sapp*, 182 Wn. App. 910, 914, 332 P.3d 1058 (2014), *citing State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). “Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion.” *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007), *citing State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

B. The Trial Court Erred by Admitting the Surveillance Video Without Proper Foundation.

Washington Rule of Evidence 901(a) requires a party to provide sufficient evidence to support a finding that video and digital recordings are what the proponent claims them to be. Sapp, 182 Wn. App. at 914. “To authenticate such evidence, the proponent must put forward a witness ‘able to give some indication as to when, where and under what circumstances the photograph was taken, and that the photograph accurately portrays the subject illustrated.’” Id., quoting State v. Newman, 4 Wn. App. 588, 593, 484 P.2d 473 (1971).

1. Ms. Hettinger’s testimony is insufficient to give some indication as to when, where and under what circumstances the video was taken and that the video accurately portrays the subject illustrated.

The surveillance video in this action was allegedly recorded by a third party, Retail Next. VRP, p. 227, ll. 1-7. According to Ms. Hettinger, Retail Next records surveillance videos at multiple Verizon retail stores:

Our company uses Retail Next for security footage, and that was the site that it was located on. And that’s connected in all of our back rooms in all of our locations.

VRP, p. 227, ll. 4-7.

There was no testimony from a Retail Next representative explaining Ms. Hettinger’s vague testimony quoted above or for any other purposes. VRP, pp. 207-08. There was no testimony from Jessie Gaw,

the TCC Verizon employee who obtained the video from Retail Next. VRP, p. 226, ll. 20-23.; pp. 207-08. Ms. Hettinger's vague testimony regarding Retail Next's activities does not provide sufficient evidence to meet ER 901(a)'s authentication requirements. See Saldivar v. Momah, 145 Wn. App. 365, 399, 186 P.3d 1117 (2008), as amended (July 15, 2008), review denied, 165 Wn.2d 1049, 208 P.3d 555 (2009) (video properly excluded because witnesses could not testify as to when, where, and under what circumstances the recording was made and, thus, could not properly authenticate the recording).

Ms. Hettinger testified that she reviewed the video and that it was from the Ellensburg Verizon store. VRP, p. 229, ll. 8-14. However, Ms. Hettinger did not provide testimony regarding the basis for her belief. She was not in the Ellensburg TCC Verizon store on the day the phone went missing. VRP, p. 225, ll. 11-15. The Prosecution admitted that the video was "crappy," the view is blocked, it's not good footage, it's "grainy" and "not clear." VRP, p. 368, ll. 13-19. Ms. Hettinger does not identify any specific features that distinguish the Ellensburg store from any other TCC Verizon store. Thus Ms. Hettinger's testimony does not provide sufficient evidence to support a finding that video and digital recordings are what the prosecution claims them to be. See ER 901(a). See also Sapp, 182 Wn.App. at 914.

2. Officer Self's testimony is insufficient to give some indication as to when, where and under what circumstances the video was taken and that the video accurately portrays the subject illustrated.

Officer Self testified that the surveillance video "looked like" the Ellensburg TCC Verizon store to him. VRP, p. 252, ll. 16-25. Officer Self also testified that the video had a time and date stamp showing that it was recorded on August 16, 2016. VRP, p. 253, ll. 2-7. Officer Self testified that he could not see the face of the person he identified as Ms. Hugdahl, "but the baggie (sic) basketball shorts and the tank top and the general physical stature of that person was ... consistent with clothing that I've seen Ms. Hugdahl wear in the past." VRP, p. 262, ll. 2-5. The surveillance video was "not a great camera angle." VRP, p. 317, ll. 1-2. Officer Self testified that "[o]nce I realized that it's not great footage, I was really only using it to determine if somebody who was in the store at that time could feasibly be Jamie Hugdahl, based on general physical description." VRP, p. 317, ll. 4-7.

Officer Self's testimony that the surveillance footage "looked like" the Ellensburg store is insufficient to give some indication as to when, where and under what circumstances the video was taken and that the video accurately portrays the subject illustrated. There is no dispute that the surveillance video was of poor quality. There is no evidence that

Officer Self visited other TCC Verizon stores to determine whether they all have similar layouts and features. There is no testimony regarding any specific features in the video that would distinguish the store depicted in the video from any other TCC Verizon store. Officer Self could not positively identify Ms. Hugdahl in the video. VRP, p. 317, ll. 4-7. Officer Self was not in the store on the day in question. VRP, p. 246, ll. 12-24. Thus, Officer Self's testimony does not provide sufficient evidence to support a finding that video and digital recordings are what the prosecution claims them to be. See ER 901(a). See also Sapp, 182 Wn. App. at 914.

3. The Prosecution Failed to Establish the Chain of Custody of the Surveillance Video.

Before an exhibit connected with the commission of a crime may properly be admitted into evidence, it must be satisfactorily identified and shown to be in substantially the same condition as when the crime was committed. State v. Campbell, 103 Wn.2d 1, 21, 691 P.2d 929 (1984). Factors to be considered include the nature of the item, the circumstances surrounding the preservation and custody, and the likelihood of tampering or alteration. Id.

In this action, the prosecution presented surveillance video allegedly from the Ellensburg TCC Verizon store into evidence. VRP, p.

252, ll. 12-25; p. 254, ll 1-2. Amy Hittinger testified that she obtained the surveillance video from TCC Verizon’s “regional investigator” Jessie Gaw. VRP, p. 226, ll. 20-21. Mr. Gaw did not testify at trial. VRP, pp. 207-08. Ms. Hittinger testified that Mr. Grew obtained from a third party: “[o]ur company uses Retail Next for security footage, and that was the site that it was located on.” VRP, p. 227. There was no testimony from a Retail Next representative. VRP, pp. 207-08. Ms. Hittinger was not in the Ellensburg TCC Verizon store on the day the phone went missing. VRP, p. 225, ll. 11-15. There was no testimony that the surveillance video viewed by the jury was “substantially the same” as when the alleged crime was committed, and thus the prosecution failed to establish chain of custody properly. See Campbell, 103 Wn.2d at 21.

C. The Trial Court Abused Its Discretion by Admitting the Surveillance Video into Evidence.

“There is a well-established precedent for the proposition that the admission or rejection of photographs as evidence lies within the sound discretion of the trial court.” State v. Tatum, 58 Wn. 2d 73, 75, 360 P.2d 754, 755–56 (1961). “Discretion is abused when it is exercised on untenable grounds or for untenable reasons.” State v. Sapp, 182 Wn.App. 910, 914, 332 P.3d 1058 (2014), *citing* State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). “Failure to adhere to the

requirements of an evidentiary rule can be considered an abuse of discretion.” State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007), *citing* State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

1. The Trial Court failed to adhere to ER 901(a).

In this action, the trial court abused its discretion by failing to adhere to ER 901(a)’s requirement that a party provide sufficient evidence to support a finding that video recordings are what the proponent claims them to be. Appellant objected to admission of the surveillance video based on lack of foundation. VRP, p. 249, ll. 22-24. Appellant’s counsel argued that Ms. Hittinger could not verify that the video was in fact from the Ellensburg TCC Verizon store. VRP, p. 250, ll. 1-9. The trial court judge stated that Ms. Hittinger “would know what the Ellensburg store looked like, since she was the manager for that store and five others in the area.” VRP, p. 250, ll. 10-12.

There was no testimony from Ms. Hittinger that she in fact recognized the store in the video. Ms. Hittinger testified that she reviewed the video and that it was from the Ellensburg Verizon store. VRP, p. 229, ll. 8-14. Ms. Hittinger does not say how much of the video she reviewed. Ms. Hittinger does not provide testimony regarding the basis for her belief that the video depicted the Ellensburg store and to what extent her conversations with Retail Next and/or Mr. Gaw formed the

basis of her belief. Therefore, the trial court's assumption that Ms. Hininger "would know what the Ellensburg store looked like" is not supported by testimony. The admission of the surveillance video was an abuse of discretion, and Appellant is entitled to a new trial.

2. The admission of the surveillance video materially affected the outcome of the trial.

A trial court's evidentiary error that does not result in prejudice to the defendant is not grounds for reversal. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). "[E]rror is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

Appellant Ms. Hugdahl was severely prejudiced by the admission of the surveillance video since there was no eyewitness testimony that she stole the missing iPhone and the video played a key role in the prosecution's case against her. Officer Self testified at length about the video. VRP p. 255, ll. 17-25; p. 263, ll. 1-8. Officer Self identified Ms. Hugdahl from the video. VRP p. 262, ll. 2-16. During deliberations, the jury asked the Court if they could "see the last 5 minutes of the security video." CP 52. The admission of the surveillance video, within reasonable probabilities, materially affected the outcome of the trial and

was prejudicial. See State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

V. CONCLUSION

The prosecution did not provide sufficient evidence to support a finding that the surveillance video is what the prosecution claims it to be, and the trial court abused its discretion by admitting the video into evidence. Therefore, this matter should be remanded to the trial court for a new trial.

RESPECTFULLY SUBMITTED this 29th day of September, 2017.

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CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington that on the 29th day of September, 2017, a true and correct copy of the foregoing document was served by the method indicated below and addressed to the following:

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