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IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON  
DIVISION III  
No. 35233-1-III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JAMIE L. HUGDAHL,

Defendant/Appellant

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Amended Respondent's Brief

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## **RESPONSE TO ASSIGNMENTS OF ERROR**

1. The trial court did not abuse its discretion by admitting the surveillance video into evidence because the prosecution presented sufficient testimonial evidence to support a finding that the video was what it was claimed to be. ER 901.
2. The testimonies of Officer Self and Ms. Hettinger were sufficient to give some indication as to when, where and under what circumstances the video was taken and that the video accurately portrayed the Ellensburg Verizon store.
3. The testimonies of Officer Self and Ms. Hettinger were sufficient to give some indication as to when, where and under what circumstances the video was taken and that the video accurately portrayed the Ellensburg Verizon store.
4. Chain of custody is waived on appeal. Alternatively, the prosecution established chain of custody through the testimonies of Officer Self and Ms. Hettinger.
5. The trial court did not abuse its discretion by admitting the surveillance video.
6. Even if the court erred in admitting the surveillance video, the video's admission did not materially affect the outcome of trial.

## **ISSUES PRESENTED**

1. Whether the trial court abused its discretion by admitting the surveillance video into evidence when: (1) Verizon Operations Market Manager Amy Hittinger, who is familiar with the Ellensburg Verizon store, reviewed the video and testified that it was of the Ellensburg store; (2) Officer Self testified that he is familiar with the Ellensburg store and the video matched the store; (3) Self further testified that the video bore a date stamp of August 16<sup>th</sup>, which he knew to be the date that Verizon had established the iPhone went missing; and (3) Officer Self testified that the video also bore a time stamp which he knew to be within the time period Verizon had established the phone went missing.
  
2. Whether a chain of custody issue exists on appeal based on preservation when chain of custody was not objected to at trial. Alternatively, was the video's chain of custody established when: (1) Officer Self testified he reviewed the surveillance video provided to him from Verizon employee Hittinger, that he's familiar with the Ellensburg store, and that the video matches what the Ellensburg store looks like; (2) Self testified that the video's date and time stamp mirrored that of the date and time period the phone went missing; (3) Hittinger testified that a regional investigator for Verizon obtained the security

footage and forwarded it to her; and (3) Ms. Hittinger stated she then forwarded the video to Officer Clayton Self of the Ellensburg Police Department.

3. Even if the surveillance video was admitted in error, did its admission materially affect the outcome of the trial when: (1) Verizon employee Kathleen Fisher identified Ms. Hugdahl at trial; (2) Fisher stated Hugdahl was the only person at the store's counter between the period in which inventory had begun and when Fisher noticed the iPhone was missing; (3) Verizon discovered through its IMEI tracking system that the missing phone had been activated; (4) Verizon contacted Michael Aldridge to determine how he had received his iPhone; (5) Aldridge told Verizon he had received it from Jamie Hugdahl; (6) Hugdahl told Officer Self she had traded the iPhone to Aldridge, but received it from a person on Craigslist; and (7) Hugdahl admitted to being at the Verizon store during the pertinent time.

### **STATEMENT OF THE CASE**

Jamie Lynn Hugdahl was found guilty of one count Theft in the Second Degree and one count Trafficking in Stolen Property in the Second Degree. CP, 53, 54. At trial, the State sought to prove that on, August 15, 2016, Ms. Hugdahl

stole an iPhone from a Verizon retail store in Ellensburg and trafficked the phone to Michael Aldridge, RP 346-351.

At trial, the State called Verizon store employee Kathleen Fisher. RP, 185 Ms. Fisher testified that, on August 15<sup>th</sup>, the Verizon Store was receiving new inventory when an iPhone was inadvertently left out on a counter while employees were assisting customers. RP, 186-188. Fisher identified Ms. Hugdahl in the courtroom at trial. RP, 191-192. Fisher stated that Hugdahl was the only person at the counter during the three hour period between when the store began receiving inventory and when Fisher noticed the iPhone was missing. RP, 195-196.

Each phone the store receives into inventory has a specific IMEI number for tracking or other similar purposes. RP, 187. A technology advisor for the store, Dontese Deskendrick, indicated that the IMEI of the missing iPhone was searched approximately every week in Verizon's systems to determine whether the phone had been activated. RP 211; 214-215.

Michael Aldridge posted on Facebook that he wanted to trade an AT&T iPhone for a Verizon phone. RP, 233. Ms. Hugdahl responded to the posting stated that she had an iPhone. *Id.* Aldridge and Hugdahl met at a bar where they traded the phones. RP, 234. Aldridge testified that on August 30<sup>th</sup> he activated the iPhone. RP, 235. About a week later, a Verizon representative called Aldridge to ask where he had received the iPhone. *Id.* Verizon had confirmed the phone had

been activated. RP, 216. Aldridge told the Verizon representative that he obtained the phone from Jamie Hugdahl. RP, 236.

Officer Self testified that he conducted an interview with Ms. Hugdahl wherein she told him that she traded a phone to Aldridge, though she indicated that she did not know it to be stolen and that she had received it from an individual off Craigslist whose name she could not remember. RP, 264-265.

Hugdahl also stated that she had entered the Verizon store around the pertinent timeframe in which the iPhone went missing, but to return speakers. RP, 265.

The State also called Amy Hittinger. RP, 219. Ms. Hittinger was a Verizon Operations Market Manager, essentially a district manager, at the time the phone went missing. Ms. Hittinger testified that her district covered six locations including the Ellensburg Verizon store. RP, 219-220.

Verizon uses a company called Retail Next for its surveillance security. RP, 227. The surveillance is connected in the backrooms of all Verizon locations. *Id.* Ms. Hittinger testified that a regional investigator for Verizon obtained the security footage and forwarded it to her. RP, 224. Ms. Hittinger, in turn, forwarded the video to Officer Clayton Self of the Ellensburg Police Department. *Id.*; RP, 245. Although Ms. Hittinger was not at the Ellensburg store on August 16<sup>th</sup>, she frequented the Ellensburg store on a weekly basis. RP, 225-226. Moreover, Ms. Hittinger had reviewed the video and testified that it was of the Ellensburg store. RP, 229.

Officer Self testified that he received the video from Verizon employee Hittinger, reviewed the surveillance video, is familiar with the Ellensburg store, and that the video matched what the Ellensburg store looks like. RP, 248; 252. In addition, Self testified that the video bore a date stamp of August 16<sup>th</sup>, which he knew to be the date the iPhone went missing, and bore a time stamp which he knew to be within the time period the phone went missing. RP, 253. The video was admitted over the defense's objection to lack of foundation. RP 253-252. Officer Self testified that the person in the video appeared to be Jamie Hugdahl. RP, 317.

The jury asked during its deliberation whether it would be permitted "to see the last 5 minutes of the security video." CP 52

The jury returned a verdict of "guilty" to both counts. CP, 53, 54.

## **ARGUMENT**

### **Standard of Review**

A trial court's decision as to the admissibility of evidence is reviewed for abuse of discretion. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668, 230 P.3d 583 (2010); *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239, (1997); *State v. Powell*, 126 Wn. 2d 244, 258, 893 P.2d 615 (1995). Abuse of discretion exists when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *Powell*, 126 Wn.2d at 258. A trial court's

decision is manifestly unreasonable if it adopts a view “that no reasonable person would take.” *Salas*, 168 Wn.2d at 669 (quoting *In re Pers. Restraint of Duncan*, 167 Wn.2d 398, 402-03, 219 P.3d 666 (2009) (quoting *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003))). A decision is based on untenable grounds or for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts. *Id.* (citing *Mayer*, 156 Wn.2d at 684).

1. The trial court did not abuse its discretion when it admitted the surveillance video because the foundational requirements were satisfied through the testimonies of Hittinger and Officer Self.

Evidence Rule 901 authentication requirements provide that the admissibility of exhibits “is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” ER 901(a). Notably, the foundational requirements of video evidence also include “some indication as to when, where, and under what circumstances the videotape recording was taken and that it accurately portrays the subject illustrated.” *Saldivar v. Momah*, 145 Wn. App 365, 399, 186 P.3d 1117 (2008). *See also State v. Newman*, 4 Wn. App. 588, 593, 484 P.2d 473 (1971) (admission requirements for video tape are like photographs and “require some witness, not necessarily the photographer, be 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”). Admission of video evidence is then within the sound discretion of the trial court. *Id* citing *State v. Tatum*, 58 Wn.2d 73, 360 P.2d 754 (1961).

The testimonies of Hittinger and Officer Self where sufficient to give some indication as to when the video was taken, where the video was taken, and under what circumstances the recording was taken. A video authentication witness need not be present at the time of the events depicted in order to know when, where, and under what circumstances the recording was made. *State v. Sapp*, 182 Wn. App. 910, 914-915, 332 P.3d 1058 (2014). Thus, although Retail Next provided surveillance video service to the Verizon store, a representative from Retail Next was not necessary for the State to establish when, where, and under what circumstances the recording was made. *Id*.

Officer Self testified to the video’s date and time stamps thereby giving some indication of *when* the recording was made. Officer Self reviewed the video prior to trial. RP, 252. Self stated that the video was date stamped August 16, 2016. RP, 253. Self said he knew that to be the date that the iPhone went missing at the Ellensburg Verizon store. *Id*. Self stated that the video also bore a time stamp. *Id*. Self testified that the time stamp on the video was within the time period the phone went missing. *Id*.

Both Self and Hittinger testified that the recording was of surveillance video from the Ellensburg Verizon Store thereby giving some indication as to *where* the recording was made. Officer Self testified that he has familiarity with

the Ellensburg Verizon store, he reviewed the surveillance video prior to trial, and that the video is of the Ellensburg store. RP, 248; 252. , Ms. Hittinger also reviewed the video and testified that it was of the Ellensburg store. RP, 219-220, 229.

Hittinger testified that Verizon uses a surveillance video system thereby giving some indication of under what circumstances the recording was made. Hittinger indicated that Verizon uses a company called Retail Next for its surveillance security. RP, 227. This surveillance system is connected in the backrooms of all Verizon locations. *Id.* Ms. Hittinger testified that a regional investigator obtained the security footage and forwarded it to her. RP, 224. Ms. Hittinger, in turn, forwarded the video to Officer Clayton Self of the Ellensburg Police Department. *Id.*; RP, 245.

Both Self and Hittinger testified that the video accurately the Ellensburg Verizon store. The prosecution asked Self whether the video matched what the Ellensburg store looked like to which he stated “certainly looked like it to me.” RP, 252. Ms. Hittinger, the store’s district manager, who frequented to the store on a weekly basis, testified that she had reviewed the surveillance video and that it was of the Ellensburg Verizon store. RP, 229; 225-226.

Thus, the trial court's decision to admit the surveillance video was not manifestly unreasonable because the testimonies of Hittinger and Self gave some indication as to when, where, and under what circumstances the recording was

taken and that the recording accurately portrayed the Ellensburg Verizon store.

*Salas*, 168 Wn.2d at 669; *Saldivar*, 145 Wn. App at 399.

2. Chain of custody of the video is waived on appeal because a chain of custody objection was not made at trial. Alternatively, chain of custody was established by the testimonies of Officer Self and Hittinger.

Defense counsel did not make a chain of custody objection at trial.

Defense counsel objected to lack of foundation, but a lack of foundation objection is insufficient to preserve a chain of custody issue on appeal. *City of Seattle v. Carnell*, 79 Wn. App. 400, 403, 902 P.2d 186 (1995) (chain of custody challenge waived on appeal when counsel's objection was to lack of foundation). An objection which does not specify the particular ground on which it is based is insufficient to preserve the question for appellate review. *State v. Boast*, 87 Wn.2d 447, 553 P.2d 1322 (1976) (citing *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985); RAP 2.5. See also *In re Det. of Audett*, 158 Wn.2d 712, 726, 147 P.3d 982 (2006) ("opposing parties should have an opportunity at trial to respond to possible claims of error"); *State v. Avendano-Lopez*, 79 Wn. App. 706, 710, 904 P.2d 324 (1995). This issue should be waived on appeal because a specific chain of custody objection was not made to preserve it. *Carnell*, 79 Wn. App at 403; RAP 2.5.

Alternatively, Officer Self and Hittinger's testimonies established the chain of custody of the video. While the video must have been "satisfactorily identified and shown to be in substantially the same condition as when the crime was committed," it was not required to "be identified with absolute certainty." *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984). "[M]inor discrepancies or uncertainty on the part of the witness will affect only the weight of evidence, not its admissibility." *Id.*

Officer Self's testimony established that the video was substantially in the same condition as when the crime was committed because Self testified that the video bore a date stamp of August 16<sup>th</sup>, which he knew to be the date that the iPhone went missing, and that the video bore a time stamp which he also knew to be within the time period the phone went missing. *Id.*; RP, 253. Moreover, officer Self stated that after he received the video from Verizon employee Hittinger, he reviewed the surveillance video, and being familiar with the Ellensburg Verizon store, he was able to confirm the video did match what the Ellensburg store looks like. RP, 248; 252.

Hittinger also testified that Verizon uses a company called Retail Next for its surveillance security. RP, 227. The surveillance is connected in the backrooms of all Verizon locations. *Id.* Ms. Hittinger testified that a regional investigator obtained the security footage and forwarded it to her. RP, 224. Ms. Hittinger, in

turn, forwarded the video to Officer Clayton Self of the Ellensburg Police Department. *Id.*; RP, 245.

Because Officer Self identified with some degree of certainty that the video was in the same condition as when the crime was committed, based upon his observations of the video's date and time stamp mirroring that of the date and time period the phone went missing, the State established the chain of custody of the video. Any minor discrepancies properly went to weight, not admissibility. *Campbell*, 103 Wn.2d at 21.

3. Even if the surveillance video was admitted in error, its admission did not materially affect the outcome of the trial based on other evidence.

Reversal requires that any error in admitting evidence must have also resulted in prejudice to the defendant. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Error is not prejudicial unless, "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004) (quoting *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)). "The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." *Bourgeois*, 133 Wn.2d at 403.

The outcome of the trial would not have been materially affected by the video admission due to the testimonies of Fisher, Self, Deskendrick, and Aldridge. Verizon employee Kathleen Fisher identified Ms. Hugdahl at trial and stated Hugdahl was the only person at the store's counter between the period in which inventory began and the phone was noticed to be missing. RP, 191-192; 195-196. During an interview with Officer Self, Hugdahl admitted to being at the Verizon store during the pertinent time and trading an iPhone to Michael Aldridge. RP, 264-265. Aldridge activated the phone on August 30<sup>th</sup>. About a week later, presumably after Verizon discovered through its IMEI tracking that its missing phone had been activated, Verizon contacted Aldridge. RP, 216; 235. Aldridge told the Verizon representative that he obtained the phone from Jamie Hugdahl. RP, 236.

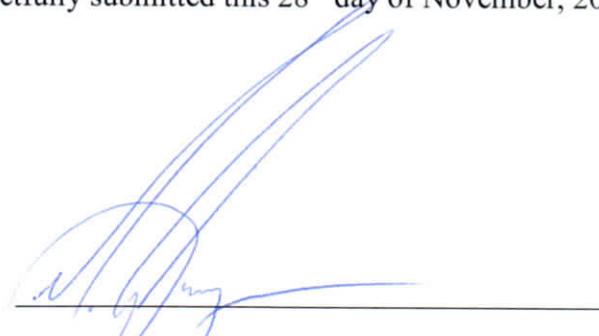
Thus, within reasonable probabilities, admitting the video did not prejudice Ms. Hugdahl or materially affect the outcome of trial.

### **CONCLUSION**

Based on the foregoing, the Court should affirm the trial court decision because (1) the trial court did not abuse its discretion when it admitted the surveillance video as the foundational requirements were satisfied; (2) chain of custody is either waived on appeal or was established by the prosecution; and (3)

even if the trial court erred in admitting the video, any such error was harmless based on other evidence presented at trial.

Respectfully submitted this 28<sup>th</sup> day of November, 2017.



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PROOF OF SERVICE

I, Dustin Davison, do hereby certify under penalty of perjury that on November 30<sup>th</sup>, 2017, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the Amended Respondent's Brief:

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