
STATE OF MONTANA,

Plaintiff and Appellee,

v.

GREGORY SCOTT GREEN,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, the Honorable Jessica T. Fehr, Presiding

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STATEMENT OF THE ISSUE

Whether the District Court unduly emphasized the State's key video evidence by sending it into the jury room during deliberations.

STATEMENT OF THE CASE

Laura Johnson went missing after September 13, 2018, and has not been seen or heard from since. (3/3/2020 Trial Transcript (3/3 Tr.) at 70–71¹.) On April 15, 2019, seven months after her disappearance, the State charged her partner, Greg Green, with deliberate homicide under Mont. Code Ann. § 45-5-102(1)(a). (District Court Document (Doc.) 3.) The State never located Laura's body, a murder weapon, or other conclusive proof she was dead.

The key evidence the State relied on at trial was a private surveillance video from a neighbor's home across the street and one house down from Greg and Laura's house. (*See* State's Exhibits (Exs.) 3, 3-A, 4, 4-A, 4-B, 8, 9, 10, 12, 12-A, 12-B, 13, 13-A, 13-B, 14, 14-A, 14-B,

¹ The record contains transcripts from the seven-day jury trial from February 24, 2020, to March 4, 2020, with a separate volume for each day. The transcripts from the first five days of trial—February 24 through 28—are sequentially paginated from pages 1 (at the start of February 24) to 1,238 (at the end of February 28). The pagination then restarts on the sixth day of trial, March 3. As such, the March 3 and March 4 transcripts are marked with page numbers from 1 to 368.

15, 18, 23.) The far upper left-hand portion of the video recorded Greg's driveway and the front of his house and captured some of his and Laura's movements in the weeks surrounding her disappearance. (See State's Ex. 2 (surveillance log cataloguing movements on the video from August 8 to October 5, 2018).) Of note, the State believed footage from September 14 at 5:48 p.m.—in which Greg is seen in his driveway in broad daylight loading a relatively large, indiscernible red object into his truck—actually depicted Greg moving Laura's dead body. (See State's Ex. 4-B at 02:44.) The State believed this fuzzy clip was direct proof Laura was dead and Greg had killed her. (3/4/2020 Trial Transcript (3/4 Tr.) at 277, 322.)

The defense moved pre-trial to keep this video out of the jury room during deliberations. (Docs. 27, 40; 12/20/2019 Hearing Transcript (12/20 Tr.) at 103–06 (attached as Appendix B).) The defense argued both that it was testimonial and that letting the jury rewatch it while deliberating would unduly emphasize this highly suggestive, inconclusive piece of evidence. (Doc. 40 at 2; 12/20 Tr. at 103–06.)

The District Court denied the motion. (Doc. 68 at 2–4 (attached as Appendix C).) The jury had unrestricted access to the video during

deliberations, along with the technology, instructions, and explicit encouragement from the State to manipulate and zoom in on the supposedly inculpatory portions of the video. (*See* 3/3 Tr. at 63–70; 3/4 Tr. at 299–300, 332, 391–92.)

After a grueling seven-day trial, the jury found Greg guilty on March 4, 2020. (3/4 Tr. at 394; Doc. 120.005.) The District Court sentenced Greg to 100 years to the Montana State Prison. (Doc. 132 (Judgment, attached as Appendix A).) Greg filed a timely notice of appeal. (Doc. 133.)

STATEMENT OF THE FACTS

Greg and Laura started dating in 2013, and the two lived together outside Las Vegas, Nevada. (2/25/2020 Trial Transcript (2/25 Tr.) at 327–28.) They broke up several times but then got back together. (2/25 Tr. at 328.)

In the summer of 2018, Greg moved to Billings, rented a trailer, and took a job as a manager at Architectural Doors and Hardware (ADH). (*See* State’s Ex. 17; 2/28/2020 Trial Transcript (2/28 Tr.) at 1229.) Laura followed shortly thereafter, moving in with Greg in August. (2/25 Tr. at 266, 330.) She took a job as a pizza delivery driver

for Papa John's on September 3 or 4, and she borrowed Greg's white Buick to use at work. (2/27/2020 Trial Transcript (2/27 Tr.) at 880.)

Laura struggled with depression, anxiety, and a heroin addiction for at least the past 15 years. (2/25 Tr. at 326; 2/27 Tr. at 961–62.) She began attending a methadone clinic in Billings daily in mid-August. (2/27 Tr. at 932.) In her intake paperwork, she responded to a question about the safety of her current living environment with, "I feel safe." (2/27 Tr. at 964.)

On September 4, Laura texted her father saying she and Greg had broken up again, and she was renting a room in his house and using his car. (2/25 Tr. at 395–96; State's Exs. 127, 128.) After September 4, Laura's phone and text communications with her family began to taper off, and she stopped having contact with them after September 7. (3/3 Tr. at 109–10, 113; State's Ex. 120-B.) Defense expert Lisa Hjelmstad testified that when a drug addicted person goes into relapse, their behaviors commonly include secrecy, hiding their drug use, and disconnecting from important relationships. (3/3 Tr. at 206–07.)

The last anyone heard from or saw Laura was September 13. She worked at Papa John's that day and got off work at around 6:45 p.m.

(2/27 Tr. at 881.) She was scheduled to work the next day but never came in, and she never picked up her next paycheck. (2/27 Tr. at 882, 886.) She stopped attending the methadone clinic after September 13 and did not show up for a new job she was supposed to start on September 19. (2/27 Tr. at 805, 866, 932–33.) Laura’s cell phone records show she made no outgoing texts or calls from that phone after September 13. (2/26/2020 Trial Transcript (2/26 Tr.) at 663–64; State’s Exs. 121, 121-B.)

For several weeks, Billings police treated Laura as a missing person. (2/27 Tr. at 807–09.) They suspected she had traveled to the Vancouver, Washington area, near where she was from. (2/27 Tr. at 808–09.) One of the detectives on the case, Detective Morrison, acknowledged the police began receiving “tremendous pressure” from Laura’s family to produce an answer to what happened to her. (2/26 Tr. at 547.) Adding to this pressure, Laura’s children created social media posts and missing person fliers asking for help locating Laura, and these circulated widely. (2/25 Tr. at 318, 345, 361.)

On September 29, two police officers went to Greg’s home to ask about Laura’s disappearance. (2/25 Tr. at 295–96.) Greg “openly

invited” the officers inside and was “very cooperative” with them. (2/25 Tr. at 296–97, 303.) According to the officers, Greg told them when he came home from work on September 13, Laura and her two red suitcases were gone. (2/25 Tr. at 296–97.)

Laura’s son Stephan traveled from Washington to Billings on October 1 to look for his mother. (2/25 Tr. at 334.) Under mounting pressure from Laura’s family, police officers returned to Greg’s house on October 3 and asked if they could look around. Greg invited them in and consented to the search. (2/25 Tr. at 470; 2/26 Tr. at 551.) The officers found nothing of note during their search, other than Greg showing Detective Morrison two text messages he sent to Laura after she disappeared—which Morrison found unusual (2/25 Tr. at 473–76; State’s Ex. 116)—and that Greg’s house seemed “very clean.” (2/25 Tr. at 470.)

After his arrival in Billings, Stephan went door to door in Greg and Laura’s neighborhood asking if anyone had seen anything suspicious. On the night of October 4, Stephan made contact with James Driscoll, a neighbor across the street and one house down from Greg and Laura’s house. (2/25 Tr. at 350–52; *see* 2/28 Tr. at 1118–19;

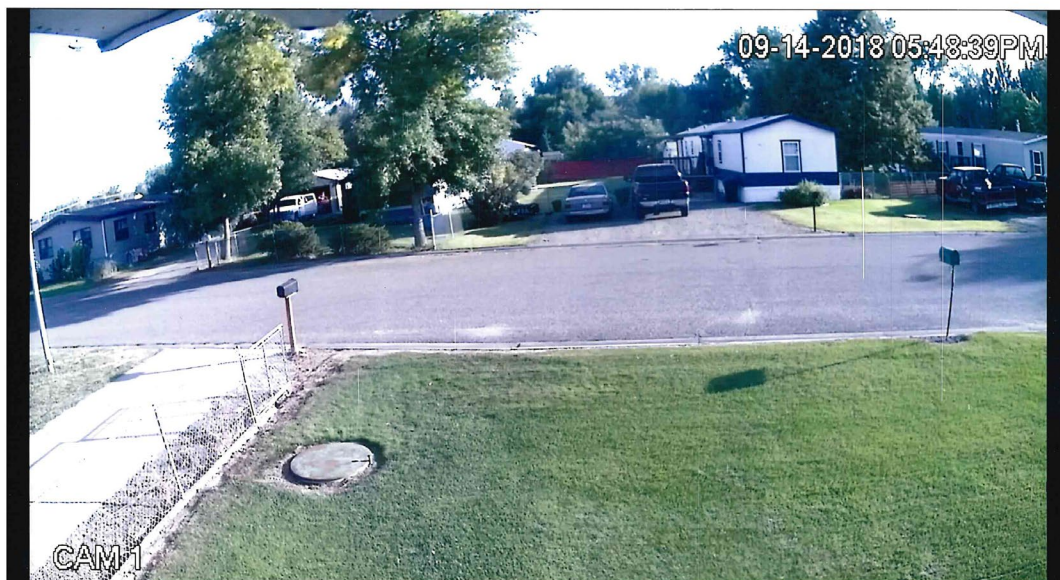
State's Ex. 30 (showing the view from Driscoll's front yard.) Driscoll told Stephan his security camera mounted on the front of his house had captured footage from Greg's driveway around the time of Laura's disappearance, and he invited Stephan inside to watch. (2/25 Tr. at 351–52.)

Stephan saw on the film his mother entering the home on the night of September 13, but in watching footage through September 17, he did not see her come out again—at least not through the front door during the daytime, which is all the camera could capture. (2/25 Tr. at 353.) He then saw things on September 14 that were of “concern” to him, mainly footage showing Greg loading various objects into his truck between 5:48 and 7:00 p.m. that day. (2/25 Tr. at 353–54, 489–90.) After viewing this footage, Stephan testified, “I was under the mindset that we had enough to get law enforcement interested finally.” (2/25 Tr. at 354.)

Stephan called the police, and three detectives came to Driscoll's house around 11:00 p.m. (2/25 Tr. at 354–55, 479–80, 495.) Detective Morrison testified Stephan pointed out “specific areas” of the video Stephan thought was “important for [him] to see.” (2/25 Tr. at 479–80.)

Detective Morrison testified Stephan showed him footage of Laura entering the home the night of September 13 (State's Ex. 3), Greg moving the white Buick Laura used from the driveway into the garage the morning of September 14 (State's Ex. 12-A), and then Greg loading various objects into his truck starting at 5:46 p.m. on September 14 (State's Ex. 4-A). (2/25 Tr. at 480–94.)

Detective Morrison testified that while Stephan showed him these clips, he was “very upset,” “very animated, a lot of profane language, agitated, really amped up.” (2/25 Tr. at 480.) And he was “the most” animated while playing the clip from 5:48 p.m. on September 14 in which Greg is depicted in the distance loading an indiscernible red object into the rear driver's side door of his truck. (2/25 Tr. at 489–90; *see* State's Ex. 4-A at 02:44.) This is a screenshot of this clip, depicting Greg and his truck in the upper left-hand corner:



(State's Ex. 8.)

The surveillance video also showed that, after Greg loaded the vague red object, a shovel, and what appeared to be two red suitcases into his truck on September 14, he left his house at 7:00 p.m. and returned around 10:23 p.m. (2/26 Tr. at 502–04; 2/28 Tr. at 1121.)

After Stephan showed officers the “highlights” of the video that concerned him, detectives seized the hard drive—a Lorex DVR system—and took it into evidence. (2/25 Tr. at 355–56, 367, 483.)

Detective Tucker stated pre-trial he believed the clip of Greg in the

distance putting something into his truck was actually footage of him moving Laura's deceased body. (12/20 Tr. at 97.) But he acknowledged the video did not on its face clearly show this; rather, this was Tucker's inference based on his synthesis of all the other evidence in the investigation. (12/20 Tr. at 96–97.)

The day after viewing the surveillance video, police officers contacted Greg again and asked if he would be willing to make a formal statement about Laura's disappearance. (2/26 Tr. at 515.) Greg volunteered to come to the police station during his lunch hour. (2/26 Tr. at 515, 552.) He waived his *Miranda* rights and gave a video-recorded interview. (2/26 Tr. at 515; State's Ex. 29-B.)

During the interview, Greg said the last time he saw Laura was before he left for work one morning around September 13. (2/26 Tr. at 516.) After asking Greg detailed questions about his movements the days surrounding September 13, the officers notified Greg toward the end of the interview they had surveillance footage that contradicted much of what he had just told them. (State's Ex. 29-B at 1:12:40–1:15:35.) The officers asked Greg to show them where Laura's body was. (State's Ex. 29-B at 1:12:40–1:15:35.) Shortly thereafter, Greg told the

officers he did not wish to answer any more questions. (State's Ex. 29-B at 1:12:40–1:15:35.)

At the conclusion of the interview, the officers told Greg he would not be allowed to access his truck or return home, because they were going to search those things. (2/26 Tr. at 521.) They escorted Greg to a hotel for the night. (2/26 Tr. at 521.)

Officers searched Greg's home and took his truck into evidence. (2/26 Tr. at 522.) They recovered Greg's cell phone that was in his truck. (2/27 Tr. at 896.) Officer Brett Lapham conducted an extraction and observed that there were over 800 text messages that had been deleted from Greg's phone—565 of which were between him and Laura—that were sent between July 5 and September 13; there were no deleted messages from September 13 through October 5. (2/27 Tr. at 910–13.)

In searching Greg's home, officers photographed the back, south bedroom where Laura had apparently been staying but where Greg now appeared to be living. (2/28 Tr. at 1182–88; State's Exs. 98–105.)

Detective Tucker testified the house smelled like new carpet, and the back bedroom carpet appeared to have been replaced without "tack strips." (2/28 Tr. at 1186–88.) Detectives later ascertained that Greg

bought new carpet and padding on September 18 and 20 and did not request reimbursement from his landlady for this as he often did with materials he purchased for upgrades to the house. (2/28 Tr. at 1220–26; State’s Exs. 24, 24-A, 26, 26-A.) Detective Tucker also later looked at photographs from the interior of the house and realized the back bedroom carpet used to be orange in early September, it was grey on October 5, and the covered porch had orange carpet in it on October 5 that was not there in early September. (2/27 Tr. at 905–06; 2/28 Tr. at 1203–13; 3/3 Tr. at 30–33; *see* State’s Exs. 88–90, 163–64, 176, 177, 177-A.) The orange carpet appeared to Tucker to be missing a 30” by 150” piece—the same length as the back bedroom wall. (3/3 Tr. at 33.)

Tucker applied a Bluestar “chemiluminescence” spray throughout the back bedroom to look for possible blood stains. He got a reaction on one of the walls in the bedroom, where a swath of the wall lit up blue from the spray. (2/28 Tr. at 1191–93; Exs. 108–10.) Tucker testified Bluestar can illuminate both blood and bleach. (3/3 Tr. at 94.) He took a swab from the wall, but it came back negative for blood. (3/3 Tr. at 30, 95.) Tucker also later sprayed the orange carpet in the covered porch with Bluestar to test for blood, but there was no reaction. (3/3 Tr. at 87.)

The officers searching the home on October 5 inspected the drains throughout the house for blood but found none. (3/3 Tr. at 93–94.) Tucker agreed that if Greg had blood on himself at any point while in the house, he probably would have washed it off at home. (3/3 Tr. at 93–94.)

During the search, officers affixed a GPS tracker to Greg’s white Buick. (2/25 Tr. at 427–28; 2/26 Tr. at 523.) After the search was complete, Tucker and Morrison went to Greg’s hotel at about 12:30 a.m. on October 6. (2/28 Tr. at 1201.) Morrison asked Greg if he was ready to show them where Laura was, and, according to Morrison, Greg answered, “No, not yet.” (2/28 Tr. at 1202.) Morrison testified Greg had a smirk on his face when he said this. (2/26 Tr. at 525.) The officers gave Greg back the keys to his Buick. (2/28 Tr. at 1202.) Greg left Billings the next day—with the full knowledge of the detectives, who were tracking his movements in the Buick—and he was arrested six months later in his hometown of Henderson, Nevada. (2/26 Tr. at 529–31; 2/27 Tr. at 821.)

The officers continued their investigation. Detective Tucker watched 58 days-worth of surveillance footage, covering the time period

from August 8 to October 5. He created a spreadsheet or “surveillance log” cataloguing Greg’s and Laura’s movements during that time, which the State later used heavily at trial. (State’s Ex. 2; 2/28 Tr. at 1126–38; see 3/4 Tr. at 322–25, 331, 335, 338, 343 (State’s use of the log during closing argument).)

Detective Tucker also searched the interior of Greg’s truck. While applying the Bluestar spray, he observed four tiny droplets of blood on the inside edge of the rear driver’s side door. (3/3 Tr. at 26–28; State’s Exs. 49–53.) The droplets were each roughly 1 millimeter in size. (3/3 Tr. at 28.) He testified the only way the blood could have gotten there was when the door was open. (3/3 Tr. at 30.) Tucker swabbed the droplets and submitted them for testing, and the test results indicated the DNA most likely came from Laura. (3/3 Tr. at 30, 163–73; State’s Ex. 179.) Of the four blood droplets present, defense blood spatter expert Tom Griffin testified he could not determine how one of them got there, but the other three each struck the door after being airborne, not through contact transfer. (3/4 Tr. at 287–90.)

The State analyzed location data from Laura’s cell phone and determined her phone left her and Greg’s house on September 14 at

7:05 a.m. (2/26 Tr. at 708–09.) Her phone moved through Billings until it approached an area near Greg’s place of work. (2/26 Tr. at 709.) At that point, around 7:16 a.m., Laura’s phone stopped sending data, meaning it was either destroyed, turned off, or the battery died. (2/26 Tr. at 694, 714; 2/27 Tr. at 771–73.) The location data showing the phone leaving the house at 7:05 a.m. correlated roughly with surveillance video showing Greg—but not Laura—leaving the house in his truck. (2/26 Tr. at 713–14; 3/3 Tr. at 9–10.) The data came with a disclaimer from the cell phone provider saying that, with regard to using it for investigative purposes, the provider could not “guarantee the accuracy” of the data. (2/27 Tr. at 773–74.)

Detective Morrison tried to piece together where Greg went after loading objects into his truck on the evening of September 14 and then leaving his house for over three hours. (2/26 Tr. at 503–04.) Using surveillance camera footage from various businesses, Morrison saw Greg’s work truck driving out of Billings west on I-90, getting off at Laurel, and then driving south across the Yellowstone River, where the truck was last seen before returning to Billings a couple hours later. (2/26 Tr. at 504–13, 542; State’s Exs. 31, 32.)

The next morning, the surveillance footage showed Greg putting more objects in his truck, including a shovel, and leaving the house from 9:00 a.m. to 3:00 p.m. on September 15. (3/3 Tr. at 39.) Greg's cell phone location data showed he was in the area of Pompey's Pillar and Huntley at around 11:00 a.m. that day. (2/26 Tr. at 712; 2/27 Tr. at 817–18; 3/3 Tr. at 39.) Officers testified they searched for Laura's body or any evidence of Greg's presence there but did not find anything. (2/27 Tr. at 819; 3/3 Tr. at 39–42.)

Use of the surveillance video at trial

Before trial, the defense made several objections to the State's intended use of the surveillance video. First, the defense argued the State's witnesses should not be allowed to comment on or "characterize" what they believed the video showed. (Docs. 26, 42.) The defense expressed concern about the State using its witnesses "to help the jury see what it thinks they should see" in the largely indecipherable driveway footage. (Doc. 26 at 3.) The defense argued that if the jurors "are told to find something, they are more than likely to go looking and find it." (Doc. 42 at 1.)

Second, the defense objected to the State showing the jury “enhanced” clips and still photographs of the surveillance video that zoomed in on what the State believed was important for them to see. (Doc. 78 at 4–5; Doc. 105.) The defense argued this was an inadmissible alteration of the evidence. (Doc. 78 at 4–5; Doc. 105 at 2–3.) The defense asserted enhancing the video to zoom in on supposedly significant moments creates “a false/created version of the evidence” different from the evidence in its original form. (Doc. 105 at 2.)

A pre-trial hearing was held in which the State’s witness who performed the enhancements, Wade Larson, testified to his process. (1/30/2020 Hearing Transcript (1/30 Tr.) at 105–23.) Larson said he took the surveillance video and produced several clips and photographic stills for the police in which he enlarged and “brighten[ed]” the portions the police asked him to. (1/30 Tr. at 107, 119; 2/28 Tr. at 1077–82.) The enhanced video clips were in “picture and picture” format, meaning the original video played in the background while a pop-out box simultaneously and prominently displayed a zoomed-in version of the same clip, focusing on the portion of the camera’s field of vision on which the State felt was important for the jury to focus. (1/30 Tr. at

108.) For instance, Larson’s enhancement of the clip purportedly showing Greg moving Laura’s body into his truck looked like this:



(State’s Ex. 4-B at 02:44.) Defense counsel objected that Larson’s enhancement process “takes out the original evidence and puts a slant on it that it doesn’t have.” (1/30 Tr. at 127.)

Lastly, the defense objected to the District Court sending any portion of the surveillance video into the jury room during deliberations. (Docs. 27, 40; 12/20 Tr. at 103–06.) The initial motion argued the video was testimonial in nature. (Doc. 27.) The State argued the video was

not testimonial and thus should automatically accompany the jurors into the jury room. (Doc. 32.) The defense responded in reply:

[B]y allowing the video back into the jury room, the Court would place undue emphasis on it. This must be avoided, in part because it would render all other testimony and evidence insignificant in comparison. The Supreme Court in all of the opinion cited by the State stated repeatedly it is the undue emphasis that must be avoided.

(Doc. 40 at 2.) Counsel reiterated at a pre-trial hearing on the matter, “The Supreme Court’s position of not allowing undue emphasis is really important in this case.” (12/20 Tr. at 104.) Counsel explained that “to allow the jury to give that more weight than anything else that it hears at trial, whether it’s Detective Tucker’s testimony, or whether it’s a cell phone expert or a blood splatter expert, [or] that same genre, isn’t appropriate.” (12/20 Tr. at 104.)

In arguing against sending the video back to the jury room, counsel referenced the related motion to bar the State’s witnesses from characterizing the contents of the video. (12/20 Tr. at 88–89.) Counsel argued,

I don’t think, Your Honor, you can unlock both motions. I think they speak to really the same issue. When you allow characterization of the video by Detective Tucker, or whoever the State chooses to call, and then you allow that

characterization to go into the jury room, it's the same problem. What's testimony, what isn't?

(12/20 Tr. at 89.) Counsel insisted that when the State's witnesses focus "on particular events of that video, you're saying these are significant and there's something there for you to see." (12/20 Tr. at 89.) Sending that video into the jury room during deliberations compounds the problem, counsel argued, because both the video and the State's proffered interpretation of it will be "overemphasized to the jury." (12/20 Tr. at 89.)

The District Court granted the defense motion to bar the State's witnesses from explicitly testifying they believed the surveillance video depicted Greg moving Laura's body. (Doc. 68 at 4–5; 1/13/2020 Hearing Transcript (1/13 Tr.) at 2–3.) But the court denied the defense motion to exclude Larson's enhanced, selected portions of the video. (Doc. 117.) And it denied the defense request to keep the surveillance video out of the jury room. (Doc. 68 at 2–4; 1/13 Tr. at 2.)

The State published Larson's enhanced images and video clips to the jury at various points in the trial over defense objection. (2/28 Tr. at 1149 (Ex. 4-B), 1157 (Ex. 3-A), 1159 (Ex. 18); 3/3 Tr. at 7 (Ex. 12-B), 47 (Ex. 13-A), 51 (Ex. 14-A), 56 (Ex. 15).) And the full Lorex DVR system

containing the surveillance video went back with the jury for deliberations, along with a television monitor to view it and instructions on how to operate it and use its zoom function. (3/4 Tr. at 299–301, 308, 391–92; State’s Ex. 6.)

Defense counsel did not rehash the jury room objection at the close of trial when the parties determined which exhibits would accompany the jury during deliberations. (3/4 Tr. at 300–06.) But the court stated at that time, “just so the record is clear, going through what goes back to the jury, you are not waiving any of the evidentiary objections that you . . . made during the course of trial.” (3/4 Tr. at 304.) Defense counsel responded, “Very good. Thank you.” (3/4 Tr. at 304.)

In opening statements, the State argued the surveillance video was conclusive proof Laura was dead and Greg was responsible. The State repeatedly personified the video, comparing it four times to a “silent witness” who “tells a story” about how Greg murdered Laura. (2/25 Tr. at 269, 271, 273, 275.)

The State’s witnesses at trial—while technically abiding by the letter of the District Court’s order not to *explicitly* say they saw Laura’s body on the video—made crystal clear that is exactly what they

believed the video showed. Detectives Morrison and Tucker both testified that the moment Stephan played them the concerning video clips—and particularly the footage of Greg loading objects into his truck around 5:48 p.m. on September 14 that upset Stephan the most—they believed they had a homicide investigation on their hands. (2/25 Tr. at 489–96; 2/28 Tr. at 1123, 1151.) Detectives Morrison, Tucker, and Wooley also testified it was important to them to find out where Greg went immediately after loading up his truck the evening of September 14, because they hoped to discover the “burial site” or “dump site” for “Laura’s body.” (2/26 Tr. at 543–46; 2/27 Tr. at 819; 3/3 Tr. at 38.)

The State showed the jury video clips and still frames of the moment at 5:48 p.m. on September 14 when Greg allegedly loaded Laura’s body into his truck. (2/25 Tr. at 494 (Ex. 4-A); 2/28 Tr. at 1142 (Ex. 8), 1149–50 (Ex. 4-B).) This included Larson’s enhanced, “picture and picture” video clip zooming in on Greg carrying the blurry red object from his garage to his truck. (2/28 Tr. at 1149–50 (Ex. 4-B).)

In closing arguments, the State repeatedly cited the video as smoking gun proof Laura was dead and Greg had murdered her. (3/4 Tr.

at 321–47, 375–88.) The prosecutor stated, “you’re going to see her on the video precisely at 5:48 p.m. and 38 seconds, when the defendant carries her lifeless body out of the garage and puts her in the rear cab of his work truck. That’s Laura’s body, carried to the truck by the defendant.” (3/4 Tr. at 322.) The prosecutor told the jury where exactly to locate this pivotal moment on the video and Tucker’s surveillance log, reiterating multiple times that was where “you see the defendant carry out her body.” (3/4 Tr. at 330–31, 377.) The prosecutor even went so far as to assert the red blur in Greg’s arms was “shaped like a body.” (3/4 Tr. at 377.)

The State also made explicit what its detective witnesses had tried to keep implicit: that they were convinced the video clearly showed Greg carrying Laura’s body. The prosecutor said:

[Detective Tucker] was very objective so as to not invade your purview as members of this jury. But make no mistake about it . . . Both Detective Morrison and Detective Tucker told you the moment that they viewed that clip, that’s when this case went from a missing person case to a homicide investigation like that.

(3/4 Tr. at 331.) The prosecutor continued, “So, while Detective Tucker was very objective in his surveillance log, you can conclude that that is

Laura's body coming out in that moment on the surveillance log. That's it right there." (3/4 Tr. at 331.)

The State urged the jury to rewatch and zoom in on the supposed smoking gun clip showing Laura's body, and it gave the jury the tools to do so. The State introduced the Lorex DVR system and its instruction manual into evidence. (2/28 Tr. at 1128 (State's Ex. 5 admitted); 3/3 Tr. at 57–59 (State's Ex. 6 admitted).) The Lorex DVR, when plugged into a television monitor, allows the viewer to click and zoom in on any selected portion of the video frame. (12/20 Tr. at 95.)

At the prosecutor's behest, Detective Tucker gave the jury step-by-step instructions on how to operate the system and, importantly, how to use the zoom function. (3/3 Tr. at 59–69.) The prosecutor and Tucker even used the footage from September 14 at 5:48 p.m. as an example, showing the jury how they should zoom in on that particular clip. (3/3 Tr. at 66.) Defense counsel objected to this exchange. (3/3 Tr. at 66.)

The State arranged for the jury to have the necessary technology at its fingertips, ensuring the Lorex system and an attached television monitor were present in the jury room at the start of deliberations. (3/4 Tr. at 299–300, 308, 391–92.) The prosecutor pressed the jury in closing

argument to use these tools in the jury room. The prosecutor said of the clip from September 14 at 5:48 p.m.:

I believe this actual moment in the video is enough to conclude that that is Laura's body and that's the defendant carrying her out . . . Simply look at that video. You will have it with you. We have enlarged it for you. You can take the Lorex and you can enlarge that moment and you can decide for yourself.

(3/4 Tr. at 331–32.) The prosecutor repeated, “And again, watch that video,” and “go back and watch that video as her [body] and . . . then all of her belongings start coming out that you can identify.” (3/4 Tr. at 378–79.)

STANDARD OF REVIEW

This Court “review[s] a district court’s decision on the evidence that may be taken into the jury room during deliberations for an abuse of discretion.” *State v. Nordholm*, 2019 MT 165, ¶ 8, 396 Mont. 384, 445 P.3d 799.

SUMMARY OF THE ARGUMENT

The State’s case against Greg was entirely circumstantial. The State never produced any direct evidence Laura was dead, how she died, or that Greg killed her. To prove these central facts, the State repeatedly showed the jury a clip of surveillance footage depicting Greg

in the distance loading a somewhat large, blurry red object into his truck at 5:48 p.m. on September 14. The State insisted this was Greg carrying Laura's body to his truck—the smoking gun proof it needed that she was dead and he had killed her.

At trial, the State showed the jury enhanced clips of the moment it believed Greg carried away Laura's body. It elicited testimony from its detective witnesses clearly implying they believed the video depicted Greg carrying Laura's body. The enhancements and detectives' testimony primed the pump for the jury to see a body when it watched the video clip of a blurry red mass in Greg's arms.

The jury went into deliberations not only with the surveillance video, but also with the technology, detailed instructions, and explicit encouragement from the State to manipulate the video and zoom in on the supposed smoking gun clip. The jury's unfettered review of and experimentation with this video placed undue emphasis on it relative to its probative value and to the exclusion of all other evidence from the seven-day trial. The District Court abused its discretion by allowing this video into the jury room.

This error was not harmless. The video was, by the State's own admission, its key evidence. It was the closest thing the State had to direct proof Laura was even dead, let alone that Greg killed her. The State used the power of suggestion to prime the jury to see what it wanted them to see in the video, and then sent that video into the jury room with explicit encouragement to rewatch it and zoom in on the supposedly incriminating parts. This created a high likelihood the jury would set aside its own judgment and defer to the State's interpretation of what the indecipherable video showed. The State cannot prove there was no reasonable possibility the jury's unrestricted review and manipulation of this video contributed to the guilty verdict.

ARGUMENT

I. The District Court abused its discretion by allowing the jury unrestricted review of the surveillance video during deliberations.

A. The District Court was obligated to avoid placing undue emphasis on the video.

Greg had the right to a trial by a fair and impartial jury under the Montana and United States constitutions. Mont. Const. art. II, sec. 24; U.S. Const. amend. VI. This right governs "not only the information that may be conveyed to a jury, but also the manner in which the

information may be delivered.” *State v. Koontz*, 41 P.3d 475, 477 (Wash. 2002).

A district court abuses its discretion when it takes an action that unduly emphasizes evidence relative to its probative value. *See State v. Hayes*, 2019 MT 231, ¶¶ 16, 18, 397 Mont. 304, 449 P.3d 826. An evidentiary exhibit “might be misleading if the jury will not be able to estimate its probative worth accurately, typically because it may overestimate the item’s value due to the immediacy of the apparent reality it portrays.” 2 McCormick on Evidence § 212 (8th ed. Jan. 2020).

This principle undergirds the common law rule against sending testimonial materials into the jury room.² *State v. Harris*, 247 Mont. 405, 416–17, 808 P.2d 453, 459–60 (1991) (citing *Chambers v. State*, 726 P.2d 1269, 1275–76 (Wyo. 1986)). The whole purpose of the common law rule is to avoid “giving undue weight” to or “placing undue emphasis” on one piece of evidence “to the exclusion of other evidence.” *Nordholm*,

² This principle is also similar to the balancing district courts must perform under M. R. Evid. 403. Under that rule, district courts cannot admit otherwise relevant evidence if the downsides of admitting the evidence—including its prejudicial impact or potential to confuse, mislead, or distract the jury—substantially outweigh its probative value. *State v. Buckles*, 2018 MT 150, ¶ 14, 391 Mont. 511, 420 P.3d 511.

¶¶ 10, 13, 14; *accord Harris*, 247 Mont. at 416, 808 P.2d at 459 (“This rule was designed to prevent an undue emphasis of the submitted materials over all other evidence in the case.”); *State v. Evans*, 261 Mont. 508, 512, 862 P.2d 417, 419 (1993); *State v. Johnson*, 1998 MT 107, ¶ 52, 288 Mont. 513, 958 P.2d 1182. This rule is supposed to mitigate “the danger in allowing juries to hear evidence critical to the State’s case during their deliberations,” lest they be unduly swayed by the immediacy of the evidence in front of them while they deliberate. *State v. Bales*, 1999 MT 334, ¶ 20, 297 Mont. 402, 994 P.2d 17.

There are two statutes that govern sending exhibits into the jury room: Mont. Code Ann. §§ 46-16-503(2) and -504. Section 46-16-503(2) governs jury requests to review testimony during deliberations. It provides, “The information requested may be given, in the discretion of the court, after consultation with the parties.” § 46-16-503(2). This Court has held, “The touchstone for a district court in exercising its discretion under § 46-16-503(2), MCA, is whether complying with the jury’s request would unduly emphasize the testimony of certain witnesses, relative to the probative value of that testimony.” *Hayes*, ¶ 16. Only if the requested “testimony’s probative value outweigh[s] the

danger of undue emphasis” is it proper to send it into the jury room.

Hayes, ¶ 18.

The other statute, § 46-16-504, is the pertinent one here, because the jury never requested to review the surveillance video during deliberations. *See Bales*, ¶ 23. That statute provides, “Upon retiring for deliberation, the jurors may take with them...all exhibits that have been received as evidence in the cause that *in the opinion of the court will be necessary*.” § 46-16-504 (emphasis added).

District courts have limited discretion under this statute in determining what exhibits should go into the jury room. Interpreting this statute, this Court has held, “This statutory rule expressly contemplates that *not all exhibits admitted into evidence should automatically go into the jury room* for deliberations.” *State v. Hoover*, 2021 MT 276, ¶ 16, fn. 3, 406 Mont. 132, 497 P.3d 598 (emphasis added). Instead, the statute “manifestly contemplates an affirmative determination by the court, upon consultation with counsel, as to which exhibits admitted into evidence are *necessary and proper* to go into the jury room for deliberations.” *Hoover*, ¶ 16, fn. 3 (emphasis added).

Section 46-16-504 is not a *carte blanche* for a district court to send back any exhibits it wishes into the jury room. Rather, it is an invitation for the district court to carefully determine the necessity and propriety of sending back a particular piece of evidence. *Hoover*, ¶ 16, fn. 3.

A district court must take care to avoid placing undue emphasis on *any* exhibit when deciding what the jurors should have access to during deliberations. *United States v. Salerno*, 108 F.3d 730, 745 (7th Cir. 1997) (“[I]n some cases it may be better practice to exclude *demonstrative* evidence from the jury room in order to reduce the potential for unfair prejudice . . .”) (emphasis added); *State v. Milliken*, 204 N.W.2d 594, 596 (Iowa 1973) (“The court should not emphasize or give undue prominence to evidentiary facts, the existence or nonexistence of which must be settled by the jury.”); *Settle v. People*, 504 P.2d 680, 680–81 (Colo. 1972) (stating courts must “observe caution that evidence is not so selected, *nor used in such a manner*, that there is a likelihood of it being given undue weight or emphasis by the jury. This would be prejudicial abuse of discretion and constitute grounds for reversal”) (emphasis added).

The District Court was obligated to not give the jury unsupervised access to sophisticated video equipment with which they could rewatch and manipulate the State’s key evidence at will unless it was necessary and proper to do so.

B. The District Court placed undue emphasis on the video by allowing it in the jury room during deliberations.

Sending the surveillance video into the jury room during deliberations placed undue emphasis on this piece of evidence relative to its probative value and to the exclusion of all other evidence. This is because the video had testimonial characteristics, it was prone to misinterpretation, and the jury was repeatedly prompted to place undue weight on it and experiment with it at will during deliberations.

1. The video had testimonial characteristics, creating a heightened danger of undue emphasis.

Although this Court has typically identified testimonial evidence as a person’s written or verbal statements, *see Hoover*, ¶ 18, even a video depicting nonverbal actions can have a testimonial character. *See, e.g., State v. Gilmore*, 844 S.E.2d 877, 879 (Ga. 2020) (holding a video recording with indecipherable audio that depicted a confidential informant’s movements during a controlled buy “constituted nonverbal

testimonial” evidence). Several legal scholars have argued that even purportedly neutral video evidence, including surveillance video, can be inherently “substantive and assertive in nature,” akin to statements by any other testimonial witness.³

This is particularly true when, as here, the prosecution adds a testimonial flavor to the video through edits, enhancements, and explicit comparisons of the video to a human eyewitness. McCormick, § 216 (noting that “[e]nhancing and editing add a human element of subjectivity” to an otherwise neutral automated camera recording).

The State had Wade Larson “brighten” the surveillance video and zoom in on the narrow segments of the camera’s field of vision the State believed to be significant. (1/30 Tr. at 107, 119; 2/28 Tr. at 1077–82.) Larson’s enhanced video clips and still frames—particularly the video clip with a pop-out box magnifying the moment Greg supposedly moved

³ Jessica M. Silbey, *Judges As Film Critics: New Approaches to Filmic Evidence*, 37 U. Mich. J.L. Reform 493, 499 (2004); see also Aaron M. Williams, *The Noisy “Silent Witness”: The Misperception and Misuse of Criminal Video Evidence*, 94 Ind. L.J. 1651, 1680–81 (2019); Andrea Roth, *Machine Testimony*, 126 Yale L.J. 1972, 1975–2053 (2017); Naomi Mezey, *The Image Cannot Speak for Itself: Film, Summary Judgment, and Visual Literacy*, 48 Val. U. L. Rev. 1, 16–17 (2013); Jessica M. Silbey, *Cross-Examining Film*, 8 U. Md. L.J. Race, Religion, Gender & Class 17, 17–34 (2008); Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 Yale J.L. & Human. 1, 55–56 (1998).

Laura’s dead body—were themselves assertive and testimonial. (See State’s Ex. 4-B at 02:44.) These enhanced images were “not unbiased; rather, they represent[ed] one point of view”—the State’s point of view that there was something worth seeing in the red blurry object in Greg’s arms.⁴ The State prompted the jury to experiment with recreating these enhancements on its own by playing back the video again and again while zooming in on select portions just like Larson did. (3/3 Tr. at 59–69; 3/4 Tr. at 332, 379.)

The State also grafted a testimonial character onto the video by eliciting implicit testimony from trained homicide detectives that when *they* watched the clip of Greg moving a blurry red object into his truck, they concluded he was carrying Laura’s dead body. (2/25 Tr. at 489–96; 2/26 Tr. at 543–46; 2/27 Tr. at 819; 2/28 Tr. at 1123, 1151; 3/3 Tr. at 38.) If the detectives’ implicit testimony was not clear, the State made explicit in closing argument that the detectives were simply being coy in their testimony and were deeply convinced that the video depicted Laura’s body. (3/4 Tr. at 331.) The State ensured that when the jurors rewatched the video during deliberations, they would have at the

⁴ See Silbey, 8 U. Md. L.J. Race, Religion, Gender & Class at 25.

forefront of their minds the video editor's and detectives' testimonial conclusions about the significance of the clip from September 14 at 5:48 p.m.

Lastly, the State imbued the video with testimonial characteristics by repeatedly and explicitly comparing it to a human eyewitness. The State framed the video not as a neutral, objective portrayal of reality, but as a "silent witness" who was "telling" the jury a story about Laura's death and Greg's guilt. (2/25 Tr. at 269, 271, 273, 275; *see also* 3/4 Tr. at 277 (prosecutor telling the court, "The direct evidence is the video shown at 5:48 p.m. on September 14th, similar to a silent witness. It would be like an eyewitness testifying from that perspective saying this is what I saw . . .").) The State purposely gave the video an animate character.

Videotapes in trials are sometimes considered self-authenticating "silent witnesses," essentially functioning as "unimpeachable eyewitnesses 'testifying' to the true version of what happened." McCormick, § 216. A video operating as a silent witness "speaks for

itself” as standalone, substantive evidence, rather than as a demonstrative aid to a human witness’s testimony.⁵

Unlike most videos and photographs at trial, the surveillance video here was not a demonstrative exhibit. It did not clarify or explain the testimony of another witness to Greg’s movements around the time of Laura’s disappearance; it *was* the State’s witness to those movements. Rather than “dovetail[ing] on a percipient witness’ authentication,” the video “assert[ed] in its own right.”⁶ Particularly when paired with Larson’s enhancements and the detectives’ testimony, the video, like a live testimonial witness, “assert[ed] the existence or nonexistence of certain facts”—namely, that Greg was seen in his driveway on September 14 at 5:48 p.m. moving Laura’s dead body.⁷

All the State’s efforts to give the video a testimonial character significantly increased the risk of undue emphasis when this video went back to the jury room. *See, e.g., Nordholm*, ¶ 14 (noting there is a presumption of undue emphasis when a testimonial exhibit goes into the jury room for unsupervised review).

⁵ Silbey, 37 U. Mich. J.L. Reform at 541.

⁶ Silbey, 37 U. Mich. J.L. Reform at 541.

⁷ Silbey, 8 U. Md. L.J. Race, Religion, Gender & Class at 23.

2. The video was ripe for misinterpretation.

The State believed the surveillance video was “direct evidence” of Laura’s death and Greg’s culpability (3/4 Tr. at 277), and that the indiscernible, blurry red object in Greg’s arms was “shaped like a body” (3/4 Tr. at 377). It was neither of those things. The object in Greg’s arms was completely indiscernible, aside from the facts it was red and somewhat large. (*See* State’s Ex. 4-B at 02:44.)

As Detective Tucker conceded in a pre-trial hearing, the State’s case against Greg was based purely on “circumstantial,” not direct evidence. (12/20 Tr. at 97.) And Tucker acknowledged the video lacked clarity and an average viewer could not make out a body in it. (12/20 Tr. at 96–97.)

The video evidence here captured events from a distance across the street and down a house. The bulk of the surveillance camera’s field of view captured the rest of the block; only a small portion of the video’s frame captured the front of Greg’s house and driveway. (*See, e.g.*, State’s Ex. 8.) When the State—and presumably the jurors—zoomed in on Greg’s driveway, the camera’s significant distance and poor lighting

contributed to a blurry, low-quality magnified image. (*See* State’s Ex. 4-B at 02:44.)

Problems of video clarity frequently “translate into problems of interpretation,” where the video appears to make assertions “that no one can verify.”⁸ No one could verify whether the nondescript object in Greg’s arms was Laura’s body, making the State’s conclusory assertions both speculative and difficult to refute.

The surveillance footage as a whole was admittedly probative to establish Greg’s and Laura’s movements around the time of Laura’s disappearance. But in its original and unadulterated form, the video does not clearly depict Greg carrying Laura’s deceased body. (*See* State’s Ex. 4-A at 02:44.) Stephan had to convince detectives the video depicted Laura’s body, and the prosecutor and detectives had to convince the jurors of the same.

Even when paired with the evidence of the droplets of Laura’s blood inside the rear driver’s side truck door, the video did not prove Greg was moving Laura’s body. The blood droplets landed on the door after being airborne and were not smeared there or transferred through

⁸ Silbey, 8 U. Md. L.J. Race, Religion, Gender & Class at 34, 44.

physical contact, as one might expect given the State's theory that Greg loaded Laura's body into that open truck door. (3/4 Tr. at 287–90.) The State did not establish how old those droplets were. It was conceivable the nearly microscopic droplets appeared there on some other occasion and not through a wrapped-up body flinging blood through the air on its way into the truck.

The prosecutor insisted the video clip of Greg carrying a blurry red object to his truck, *standing alone*, was sufficient to prove Laura was dead and Greg disposed of her body. (3/4 Tr. at 331 (“I believe this actual moment in the video is enough to conclude that that is Laura's body and that's the defendant carrying her out.”).) It was not. Standing alone, the video proved Greg loaded objects into his truck the evening of September 14 and then drove off. The video's fuzzy, unclear depictions were fertile ground for the State and its witnesses to prime the pump for the jurors to see what the State wanted them to see.

3. Given the video's testimonial attributes and objectively inconclusive footage, the extremely heavy emphasis on it was undue.

The State published to the jury the original and enhanced clips of the supposed smoking gun moment of Greg carrying Laura's dead body

to his truck. (2/25 Tr. at 494; 2/28 Tr. at 1142, 1149–50.) Larson’s pop-out emphasized the narrow slice of the surveillance video’s wide field of vision the State wanted to emphasize. (State’s Ex. 4-B.) And several of the State’s detective witnesses implicitly—but unmistakably—testified they confidently believed the blurry red object in Greg’s arms was Laura’s body. (2/25 Tr. at 489–96; 2/26 Tr. at 543–46; 2/27 Tr. at 819; 2/28 Tr. at 1123, 1151; 3/3 Tr. at 38.) Taken together, the State’s witnesses screamed to the jury, “you should conclude this indecipherable red blur in Greg’s arms is Laura’s body.”

The State then ensured the jurors would not only keep Larson’s enhancements and the detectives’ suggestive testimony in mind when reviewing the surveillance video during deliberations, but also conduct their own unsupervised experiments on the video. The State gave the jury an instruction manual for the Lorex DVR and had Detective Tucker walk the jury step by step through how to zoom in on Laura’s alleged body. (3/3 Tr. at 59–69; State’s Ex. 6.) The State arranged for the jury to have all the technological equipment it needed in the jury room to watch and manipulate the video. (3/4 Tr. at 299–300, 308, 391–92.) And it explicitly urged the jury to rewatch and zoom in on the clip

of Greg carrying a vague red object to his truck as Larson had done for them during trial. (3/4 Tr. at 331–32, 378–79.)

The State gave the jurors a sophisticated tool to use during their private review of the video. (State’s Ex. 5; 3/3 Tr. at 59–69.) This prodded the jurors to adopt the State’s version of what the video showed—but which the unadulterated video could not show on its own. Typically, juries in Montana are not proactively given detailed instructions and special equipment to conduct their own experiments on the evidence. *See* MCJI 1-105 (2009) (Model criminal jury instruction concerning the function of the bailiff, stating, “the bailiff cannot . . . provide you with any information, books, or materials, as I have strictly forbidden the bailiff to do so”).

Psychological research shows that “repeatedly watching a video may simply give viewers more chances to find ammunition to argue for their favored interpretation . . . [P]eople tend to seek out evidence that would confirm their initial hypothesis and largely neglect to search for evidence that could disconfirm their hypothesis.”⁹

⁹ Roseanna Sommers, *Will Putting Cameras on Police Reduce Polarization?*, 125 Yale L.J. 1304, 1348 (2016).

The jury was prompted to watch the unclear, suggestive video on repeat and zoom in on the portions the State and its witnesses told them were important. This created a concerning likelihood the jurors would convince themselves to see what the State wanted them to see—but which was not clearly and objectively portrayed on the film. The jury was thus likely to “overestimate the [video’s] value due to the immediacy of the *apparent* reality it portray[ed].” *See* McCormick, § 212 (emphasis added).

Had an eyewitness testified they saw Greg move a red object into his truck that they believed was Laura’s dead body, sending a transcript or recording of that testimony into the jury room clearly would have been improper. *See, e.g., Nordholm*, ¶¶ 10–12. Similarly, sending this video—with all the suggestive, testimonial interpretations the State grafted onto it—into the jury room for repeated and unsupervised viewing and manipulation created an unacceptable risk of undue emphasis on this evidence relative to its probative value. The decision to allow this video into the jury room was an abuse of discretion.

C. The error was not harmless.

A district court's erroneous decision to send materials into the jury room is trial error subject to harmless error analysis. *Nordholm*, ¶ 12. The burden is on the State to show the error was harmless by demonstrating there is "no reasonable possibility" the jury's unrestricted review of the materials might have contributed to the conviction. *Nordholm*, ¶ 12.

The State believed its best evidence of Greg's guilt was the surveillance video purportedly showing him loading up Laura's body into the truck. (3/4 Tr. at 277, 331–32.) The jury's unlimited review of the video evidence—compounded by the fact the State urged and equipped it to rewatch and zoom in this particular clip—gave the video an outsized, suggestive power.

Video evidence "dominates evidence more conventionally adduced simply because of the nature of its presentation." *Bolstridge v. Cent. Maine Power Co.*, 621 F. Supp. 1202, 1204 (D. Me. 1985). "Surveillance film is considered so authoritative, despite the frequent absence of a

corroborating witness, that analyses of this type of filmic evidence are frequently the most conclusory.”¹⁰

In *Nordholm*, the Court expressed concern that, “Unsupervised, the jury could repeatedly view the statements made” by several witnesses on video, while all the other testimony at trial, “including statements made during cross-examination, was limited to what the jury remembered.” *Nordholm*, ¶ 13. This troubled the Court not because of the “qualitative effect” of the videos, but because the true issue was “the unsupervised review of the videos.” *Nordholm*, ¶ 13. The Court explained:

It may well be true that other evidence presented at trial proved at least some of the same facts as those in the videos, but the qualitative effect of *the jury’s review* of the videos is both unknown and unknowable because they were given unsupervised access to view the videos as many times as they wished.

Nordholm, ¶ 13 (emphasis added).

The same is true here. Although there was other evidence tending to prove some of the same things the video showed, the qualitative effect of the jury’s unsupervised *review* of the surveillance video “is both

¹⁰ Silbey, 37 U. Mich. J.L. Reform at 516.

unknown and unknowable because they were given unsupervised access to view the video[] as many times as they wished”—along with instructions on how to zoom in on the supposedly damning scenes. *See Nordholm*, ¶ 13. Given the high-tech tools and detailed instructions the jury had at its disposal, there is no way to know the extent to which the jurors experimented with the video. Nor is it possible to know whether their experimentation went beyond the scope of the evidence presented at trial or what influence it had on the jurors’ view of the case.

The jury was not prompted to give equal weight and consideration to all the evidence. It was specifically prompted to give undue emphasis to the video clip “to the exclusion of the other evidence presented at trial.” *See Hayes*, ¶ 19. The State cannot prove there is no reasonable possibility the jury’s unsupervised review of and experimentation with the video at the center of the State’s case contributed to Greg’s conviction.

CONCLUSION

The District Court should have granted Greg's pre-trial motion to keep the suggestive, unclear video out of the jury room during deliberations. Allowing the jury unsupervised review of and experimentation with this evidence unduly emphasized it relative to its probative value and to the exclusion of everything else the jury heard during the seven-day trial.

The District Court's decision to allow the video into the jury room was an abuse of discretion, it was prejudicial, and it warrants reversal and remand for a new trial.

Respectfully submitted this 22nd day of December, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,311, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Michael Marchesini
MICHAEL MARCHESNIN

APPENDIX

Judgment.....App. A

Defense requests to keep video out of the jury room.....App. B

District Court order denying defense motionApp. C

CERTIFICATE OF SERVICE

I, Michael Marchesini, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 12-22-2021:

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