IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0389

STATE OF MONTANA,

Plaintiff and Appellee,

v.

GREGORY SCOTT GREEN,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Montana Code Annotated

Montana Rules of Evidence

Other Authorities

INTRODUCTION

The State ignores the fundamental principle of the common law rule, which is that courts must not place undue emphasis on one piece of evidence to the exclusion of everything else. The State argues that because the video at issue here did not contain an audio track, this Court cannot even analyze whether undue emphasis occurred.

Although the video was not *purely* testimonial, the way the State presented it to the jury gave it testimonial characteristics. The blurry clip of Greg carrying a red object to his truck was objectively inconclusive and prone to misinterpretation. The State's witnesses interpreted it for the jury by indicating they believed this footage was smoking gun evidence of Greg carrying Laura's body. And the State gave the jury the tools, instructions, and encouragement to rewatch and zoom in on that particular footage until the jury saw in that clip what the State wanted it to see.

The totality of these circumstances shows this piece of evidence was unduly emphasized relative to its probative value and compared to everything else the jury heard during the seven-day trial.

ARGUMENT

I. The District Court improperly sent the video into the jury room for unsupervised review and experimentation.

A. The State explicitly dodges the heart of the issue: whether the District Court's decision placed undue emphasis on the video.

The common law rule against sending testimonial materials into the jury room exists for one purpose: "to prevent an undue emphasis of the submitted materials over all other evidence in the case." *State v. Harris*, 247 Mont. 405, 416, 808 P.2d 453, 459 (1991). This rule does not bar testimonial materials for the sake of barring testimonial materials. It bars them to avoid undue emphasis. *State v. Evans*, 261 Mont. 508, 512, 862 P.2d 417, 419 (1993) (stating courts must "weigh the probative value" of sending an item back "against the danger of undue emphasis"); *State v. Johnson*, 1998 MT 107, ¶ 52, 288 Mont. 513, 958 P.2d 1182 (stating that in deciding whether to send back a piece of evidence, courts must "guard against the evidence being given undue weight or emphasis"); *State v. Halligan*, 818 N.W.2d 650, 656 (Neb. 2012) ("The common-law rule is designed to curtail the principal danger involved in allowing the jury to rehear only part of the evidence; that is,

the jury may give undue emphasis to the part of the evidence which is reheard.").

The State makes only passing references to "undue emphasis" in its brief. And it does so in the context of urging this Court *not* to even analyze whether undue emphasis occurred. (Appellee's Br. at 39.)

Citing *State v. Ward*, 2020 MT 36, ¶ 25, 399 Mont. 16, 457 P.3d 955, the State says, "*Only* '[i]f it can be determined that the District Court allowed testimonial materials to go back to the jury' will this Court 'look to the totality of the circumstances to determine whether undue emphasis was placed on the evidence and if so, whether the defendant was prejudiced.'" (Appellee's Br. at 39 (emphasis added).)

The actual *Ward* quote says, "*If* it can be determined that the District Court allowed testimonial materials to go back to the jury," this Court assesses whether undue emphasis and prejudice occurred. *Ward*, ¶ 25 (emphasis added). *Ward* does not say "*only* if." The State commits a logical fallacy by arguing that if purely testimonial materials in the jury room create undue emphasis, anything other than purely testimonial materials in the jury room must not. The fact that testimonial materials

automatically create undue emphasis does not mean non-testimonial materials never can.

A district court's responsibility goes beyond rigidly categorizing exhibits as either testimonial or non-testimonial and always giving the jury access to the latter. Under Mont. Code Ann. § 46-16-504, a court's job is to carefully discern "which exhibits admitted into evidence are necessary and proper to go into the jury room during deliberations." *State v. Hoover*, 2021 MT 276, ¶ 16, fn. 3, 406 Mont. 132, 497 P.3d 598.

If § 46-16-504 categorically allowed all non-testimonial exhibits in the jury room while categorically barring all testimonial exhibits, it would say so. But it does not. In fact, the statute's plain language "does not distinguish between" testimonial and non-testimonial exhibits; it does not use the word "testimonial" at all. *State v. Bales*, 1999 MT 334, ¶ 17, 297 Mont. 402, 994 P.2d 17; *see* § 46-16-504. This is because the standard for sending evidence into the jury room is not whether the exhibit meets a strict definition of testimonial or non-testimonial evidence, but whether the "probative value" of giving the jury access to it outweighs "the danger of undue emphasis." *Evans*, 261 Mont. at 512, 862 P.2d at 419. In other words, a district court must ask not only is the

exhibit testimonial, but also, "Why do the jurors need unrestricted access to this, and will giving it to them unduly emphasize this evidence to the exclusion of other evidence?"

In several cases interpreting M. R. Evid. 403, this Court has said district courts must carefully weigh the necessity and propriety of sending even non-testimonial exhibits into the jury room. In *State v. Langford*, 267 Mont. 95, 106, 882 P.2d 490, 496 (1994), this Court affirmed the district court using its "sound discretion" to keep admissible autopsy photographs out of the jury room during deliberations. The Court approved of the lower court's rationale in letting the jury see the unpleasant photographs during trial but not during deliberations, because sending the photographs into the jury room "would have been unduly prejudicial." *Langford*, 267 Mont. at 106, 882 P.2d at 496.

Likewise, in the related case of *State v. Cox*, 266 Mont. 110, 122, 879 P.2d 662, 669 (1994), this Court held that admitting and publishing the autopsy photographs to the jury was not overly prejudicial. "Most importantly," the Court reasoned, "the photographs were not allowed into the jury room." *Cox*, 266 Mont. at 122, 879 P.2d at 669.

And in *State v. Dunfee*, 2005 MT 147, ¶ 29, 327 Mont. 335, 114 P.3d 217, this Court affirmed admission of photographs of an assault victim's bruised face. In reasoning that the photographs were "not so inflammatory" as to be unduly prejudicial, the Court emphasized that "the photographs were not permitted in the jury room during deliberations." *Dunfee*, ¶ 29. These cases make clear that even non-testimonial evidence in the jury room can have an unfair, persuasive impact on the jurors that district courts must guard against.

The District Court did not have carte blanche to send any non-testimonial exhibit into the jury room. It was bound under § 46-16-504 to assess whether giving the jury access to the video during deliberations was necessary and proper, or whether it would unduly emphasize this piece of evidence.

B. The video's testimonial characteristics exacerbated the undue emphasis on it.

A jury's unfettered access to "exhibits of a testimonial *character*" creates a presumption of undue emphasis. *Bales*, ¶ 23 (emphasis added). The State essentially argues that because the video did not contain a voiceover in which the prosecutor and State witnesses

narrated what they believed the video showed, the video was akin to any other non-testimonial evidence. (Appellee's Br. at 32, 38.)

Even though the video did not contain an audio track, the State's witnesses effectively told the jury what they were seeing, giving it testimonial characteristics. The State made clear for the jury that its witnesses Wade Larson, Detective Morrison, Detective Tucker, and Detective Wooley collectively believed the clip of Greg moving a blurry red object to his truck was conclusive proof that (a) Laura was dead, and (b) Greg was responsible for her death.

Larson said that at Detective Tucker's request, he enhanced the video and created a magnified pop-out box with the explicit purpose to "capture the motion" and draw the jury's "eye" to the blurry footage of Greg holding the indiscernible red object. (1/30/2020 Tr. at 111; 2/28 Tr. at 1077–82; State's Ex. 4-B at 02:44.) This enhancement "add[ed] a human element of subjectivity"—namely, Larson's and law enforcement's perspective that the red object in Greg's arms was critical evidence and proof of his guilt. *See* 2 McCormick on Evidence § 216 (8th ed. Jan. 2020).

Detectives Morrison, Tucker, and Wooley testified that immediately after viewing this clip of Greg loading the blurry red object into his truck, they believed (a) they had a "homicide investigation" on their hands, and (b) the very next thing Greg did was drive somewhere to bury 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.) The subtext was not subtle: the detectives obviously believed the video showed Greg moving Laura's dead body into his truck, at which point he drove to a rural area to dispose of it. The prosecutor made explicit in closing argument that this is exactly what the detectives believed. (3/4 Tr. at 331.)

The State asserts that when the District Court ordered pre-trial that the witnesses not explicitly tell the jury the video showed Greg moving Laura's dead body, this "eliminated the danger of suggestibility." (Appellee's Br. at 37.) To the contrary, Larson's and the detectives' testimony was incredibly suggestive. Their unmistakable message—hammered home by the prosecutor in closing argument—was that they believed the video depicted Laura's dead body and thus proved Greg's guilt. The State and its witnesses grafted testimonial

characteristics onto the video, heightening the danger of undue emphasis.

The State cites *State v. Christenson*, 250 Mont. 351, 820 P.2d 1303 (1991), for the proposition that silent videos are akin to a series of photographs[1] and can never be testimonial. (Appellee's Br. at 36.) The video at issue in *Christenson*—a drug possession case—objectively and clearly depicted the crime scene and the drugs and paraphernalia police officers seized there. *Christenson*, 250 Mont. at 359–61, 820 P.2d at 1308–10. There was no question that the video showed drugs and paraphernalia; the video's contents were plain to the viewer.

By contrast, the video here did not depict the alleged crime (a murder) or the alleged crime scene (the back bedroom). Nor did it objectively depict any evidence of criminality at all; it merely showed a blurry, far-off scene of Greg loading a red object into his truck in broad

[1] To clarify a point of fact, the State cites the District Court's statement that defense counsel "conceded that if the video in question were reduced to still shots[,] he would not be contending the photos should be excluded from the jury room." (Appellee's Br. at 28 (citing Doc. 68 at 3–4).) This was a factually erroneous statement by the court. When the judge asked defense counsel how the undue emphasis analysis would change if the debate centered on a still shot from the video, counsel answered he would be "challenging that photograph too." (12/20 Tr. at 107.) Counsel ultimately did not challenge sending the still shots into the jury room, knowing such argument would be futile after the District Court's adverse ruling on the video.

daylight. Standing alone, this video was unremarkable. Whereas the video in *Christenson* was clear and objective in what it depicted, the video here was indiscernible, blurry, and needed State witness testimony to tell the jurors what they were seeing. The video in *Christenson* did not have testimony grafted onto it the way the video here did.

Nor did the video in *Christenson* carry the same risk of undue emphasis. That video was sent into the jury room with only a VCR player—in 1990. *Christenson*, 250 Mont. at 354, 820 P.2d at 1305. The jury had no special tools with which it could manipulate the video.

The prosecutor here gave the jury the tools, instructions, and encouragement to manipulate and experiment with the video at will. The jury had the Lorex DVR system and a monitor at its disposal in the jury room. (State's Ex. 5; 3/4 Tr. at 299–300, 308, 391–92.) The Lorex system had high-tech zoom and replay capabilities. (12/20 Tr. at 95.) The State gave the jury the Lorex instruction manual to review. (State's Ex. 6.) It had Detective Tucker walk the jury through step-by-step instructions on how to zoom in on and replay the specific moment Greg allegedly moved Laura's body to his truck. (3/3 Tr. at 59–69.) And the

prosecutor explicitly encouraged the jury to use these tools to rewatch the video and "enlarge that moment." (3/4 Tr. at 331–32, 378–79.) All of this heightened the likelihood the jury would place undue weight on the video relative to its probative value and to the exclusion of other evidence.

II. The State has not explained how the jury's unfettered review of the video did not cause prejudice.

The State argues the jury's unrestricted access to the suggestive video during deliberations could not have been prejudicial because the video was duplicative of other evidence proving the same facts. (Appellee's Br. at 40–42.) But when it comes to evidence improperly given to the jury for unsupervised review during deliberations, it is not the qualitative *content*, but rather the "qualitative effect of the jury's *review*" of the video that matters. *State v. Nordholm*, 2019 MT 165, ¶ 13, 396 Mont. 384, 445 P.3d 799 (emphasis added).

There was no other evidence that had the same persuasive effect on the jury as its unrestricted review of the video and all the State's testimonial interpretations that came with it. Video evidence "dominates" other evidence "simply because of the nature of its presentation." *Bolstridge v. Cent. Maine Power Co.*, 621 F. Supp. 1202,

1204 (D. Me. 1985). And "repeatedly watching a video may simply give viewers more chances to find ammunition to argue for their favored interpretation"—or in this case, Larson's, the detectives', and the prosecutor's favored interpretation.[2] Nothing else had the same impact as the jurors replaying a narrow portion of the blurry, zoomed-in video and convincing themselves to see in that pixilated image what the State told them to see.

If the jury's unrestricted review of and experimentation with the video was merely duplicative of other evidence, the State would not have gone so far out of its way to equip the jury with the Lorex DVR system and monitor, the DVR manual, and instructions from Detective Tucker on how to experiment with the zoom function. (State's Exs. 5, 6; 3/3 Tr. at 59–69.) The State insisted the jury be able to rewatch and manipulate the video because it knew this would be an incredibly compelling exercise for the jurors.

This video received undue emphasis "to the exclusion of the other evidence presented at trial." *State v. Hayes*, 2019 MT 231, ¶ 19, 397

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

Mont. 304, 449 P.3d 826. Over the course of the seven-day trial, the jury heard testimony about the imprecision of the State's location data for Laura's cell phone that purported to show Greg disposing of it near his workplace. (2/27 Tr. at 773–74.) It heard about the presumptions of Laura's family members that Greg was responsible for her disappearance and the pressure they put on law enforcement to resolve the case. (2/25 Tr. at 318, 336–45, 361; 2/26 Tr. at 547.) It heard about Laura's propensity for drug use and relapse. (2/25 Tr. at 326; 2/27 Tr. at 961–62; 3/3 Tr. at 206–07.) It heard she had lost touch with her family several days *before* her disappearance. (3/3 Tr. at 109–10, 113; State's Ex. 120-B.) It heard the State found no trace of blood in the house or garage where the murder and cleanup allegedly occurred. (3/3 Tr. at 30, 87, 93–95.) And it heard police never discovered Laura's body, a murder weapon, or other proof she was dead.

The jury did not get to rehear any of this evidence during deliberations. All of this "was limited to what the jury remembered." *Nordholm*, ¶ 13.

But the jury was allowed to re-watch the video at will, without supervision, and with the tools, instructions, and explicit

encouragement from the State to focus in on what the State and its witnesses insisted was the smoking gun moment of Greg carrying Laura's deceased body. This unduly emphasized this one piece of evidence to the exclusion of the other evidence presented at trial.

CONCLUSION

The State made sure that if the jury saw enough zoomed-in clips of this footage, and if it heard from enough witnesses that they believed this footage to be proof of Greg carrying Laura's body, the jury would start to see in that indecipherable clip what the State wanted it to see. The District Court placed undue emphasis on this suggestive video with testimonial characteristics when it gave the jury unlimited opportunity to rewatch and experiment with it.

The jury's unfettered review and manipulation of this video was not harmless. The proper remedy is reversal and remand for a new trial.

Respectfully submitted this 7th day of June, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply 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 2,880, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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CERTIFICATE OF SERVICE

I, Michael Marchesini, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 06-07-2022:

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