IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff–Appellee, v. TERENCE E. MANNING, JR., Defendant–Appellant.	Polk County Case No. SRCR365958 S. CT. NO. 23–1390

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE HEATHER LAUBER, JUDGE

APPELLANT'S REPLY BRIEF AND ARGUMENT

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The district court erred by allowing the State to enter the QuikTrip surveillance video, as captured on the responding officer's body camera video, into evidence.

NATURE OF THE CASE

COMES NOW the Defendant–Appellant Terence E. Manning, Jr., pursuant to Iowa Rule of Appellate Procedure 6.903(4), and hereby submits the following argument in reply to the State's brief filed on or about July 9, 2024. While the Defendant–Appellant's brief adequately addresses the issues presented for review, a short reply is necessary to address certain contentions raised by the State.

ARGUMENT

I. The district court erred by allowing the State to enter the QuikTrip surveillance video, as captured on the responding officer's body camera video, into evidence.

The district court improperly admitted State's Exhibit 2 over Manning's objections to the video. (D0138, Trial Day 2, at 3:10–14, 9:24–12:24, 22:18–19, 24:1–16, 30:5–34:17, 45:3–7 (06/27/2023)). The State argues the testimony of the responding officer, victim, and Manning authenticated the evidence. (State's Br. p. 10). As explained below, this assertion is incorrect.

First, the responding officer's testimony cannot authenticate the QuikTrip video because the officer himself was not a witness to the incident that compromised the charged offense. At trial, Manning did not argue the officer could not authenticate his own body camera video. (D0138, at 9:25–12; 21:18–25). Rather, the issue was that the officer could not authenticate the second video that was captured on his body camera—the video of the QuikTrip's parking lot. As counsel explained:

> This is a video within a video. I concede that an officer can lay the foundation for his video. Here's the problem with this particular case: The video that he is observing, he cannot lay the foundation for that so I am deprived of the ability to cross-examine that video itself.
>
> That is a particular problem because we can see that that video is being manipulated, not in a nefarious sense but going back and forth between different screens, zooming in, the manner in which that was done, he didn't do that so he can't describe how precisely that's happening with that video. He cannot lay the foundation for the video within a video.

(D0138, at 10:24–11:12).

Iowa Rule of Evidence 5.901 requires that "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Iowa R. Evid. 5.901(*a*) (2023). The Iowa Supreme Court has found an individual who witnessed an event is able to authenticate video of that event by testifying the "film accurately portrays" what occurred (i.e. what the witness personally observed). *See State v. Deering*, 291 N.W.2d 38, 40 (Iowa 1980) (citations omitted). For example, in *Deering*, the Court found the State laid a proper foundation for a surveillance video when the store clerk testified to "the camera's location and field of view," that he was able to confirm the camera was functioning during the crime, and that the video "very accurately" depicted what transpired and the "events as he remembered them." *Id.* at 39.

In contrast, the responding officer here cannot authenticate the QuikTrip video because, as his testimony makes clear, he did not witness the event in question—the fight in the parking lot. (D0138, at 8:17–9:5, 39:23–40:12). *See Deering*, 291 N.W.2d at 40; *see also Ex parte Fuller*, 620 So.2d

675, 678 (Ala. 1993) ("[W]hen a qualified and competent witness can testify that the sound recording or other medium accurately and reliably represents what the witness sensed at the time in question, then the foundation required is that for the 'pictorial communication' theory. Under this theory, the party offering the item must present sufficient evidence to meet the 'reliable representation' standard, that is, the witness must testify that the witness has sufficient personal knowledge of the scene or events pictured or the sounds recorded and that the item offered accurately and reliably represents the actual sounds."). The responding officer had no personal knowledge of the incident captured on the QuikTrip video, and was thereby unable to testify to the video accurately depicted the incident; accordingly, the State was not be able to offer Exhibit 2 through the responding officer. *See Ex parte Fuller*, 620 So.2d at 678. Thus, the district court erred in admitting the exhibit through his testimony. *See State v. Burgdorf*, 861 N.W.2d 273, 277 (Iowa Ct. App. 2014) (finding the district court improperly admitted evidence of the

defendant at Wal-Mart through the special agent, who had no personal knowledge of the incident).

Additionally, as explained at length in the opening brief, Makuay was also unable to lay the proper foundation and authenticate the exhibit. *See* (Def. Br. pp. 26–32). As discussed, Makuay denied he was the man in the video or that it was his car in the parking lot shown in the video. (D0138, at 63:4–16). Makuay also testified that he did not recall anything that occurred during a large portion of the incident. (D0138, at 65:13–14). Notably, Makuay never testified the video accurately portrayed the fight or what had occurred that night between him and Manning, as it required for the video's authentication. *See Deering*, 291 N.W.2d at 40. Thus, the video was not admissible through Makuay's testimony either.

The State has the burden of proving its case beyond a reasonable doubt. It cannot do so by skirting the rules of evidence. Notably, the State could have properly authenticated the QuikTrip video. First, the State could have obtained a copy of the actual video from the QuikTrip and/or QT Security. The

record shows the State initially attempted to obtain the video but through its negligence did not ultimately acquire the video evidence from QuikTrip. *See* (D0136, Trial Day 1, at 8:17–9:15 (06/26/2023); D0138, at 12:15–16; 14:9–18, 17:9–14, 24:11–25:3) (explaining the State requested the video from QuikTrip, which provided video from the wrong time period, the State did not timely review the video, and by the time it realized QuikTrip's mistake, the video of the incident was no longer available). Second, the State could have attempted to authenticate the video from the parking lot by having someone with knowledge of QuikTrip's surveillance system testify regarding its accuracy and general reliability. *See Spradley v. State*, 128 So.3d 774, 781 (Ala. Crim. App. 2011); *Washington v. State*, 961 A.2d 1110, 1116 (Md. 2008). The State failed to lay the proper foundation for the QuikTrip video despite the existence of available avenues to do so.

Part of the defense's objection was that because of the State's failure to obtain the video, the defense was unable to present the entire event. *See, e.g.,* (D0137, at 17:9–14) ("It has

been edited and they cannot possibly go back and give me the rest of the video at this point because the detective didn't follow up when he got the wrong time stamp."); (D0137, at 11:2–22, 13:6–25). In part, this objection was also lodged in the notion that the video was manipulated and edited, in a way that no State witness could explain what was occurring in the video. *See* (D0137, at 6:14–8:16, 17:9–14, 11:2–12, 13:15–20) ("It would be different if a body cam is just catching a photograph. That's easy. The photograph doesn't move. It can't be manipulated.").

Additionally, it would be inappropriate for this Court to find the video was authenticated by Manning, through his own testimony. First, the record clearly establishes Manning sought to keep the video out of evidence. (D0138, at 3:10–14, 9:24–12:24, 22:18–19, 24:1–16). Second, the district court ruled the video was admissible prior to the presentation of any evidence. (D0138, at 30:5–34:17, 45:3–7). This means that the video was already admitted when Manning testified.

It is not clear that Manning would have chosen to testify had the video came into evidence. In its own case in chief, the State presented some evidence of Manning's defense and side of the story, through its admission of the arresting officer's video from his patrol vehicle. (D0090, Ex. 1: Patrol Vehicle Video (flash drive), at 0:50–1:50, 4:00–4:30 (07/03/2023)). In that video, Manning reported to the officer that he felt like he was being set up. (D0090, at 0:50–1:50, 4:00–4:30). Specifically, Manning explained that Makuay had been the aggressor, had repeatedly tried to forcibly remove him from the car, and had tried "smacking" Manning. (D0090, Ex. 1, at 02:35–5:50). In the video, Manning is adamant he was defending himself from Makuay's attacks and that the surveillance video would corroborate his statements. (D0090, Ex. 1, at 1:30–2:00, 2:50–3:00, 5:30–5:50).

The defense could have determined that Manning's statements about what occurred at the gas station were sufficient to explain his side of what happened. It would have been a reasonable strategy to have Manning forgo testifying in

his defense if the video was not into evidence. Makuay's testimony was scattered and unconvincing; moreover, there was also evidence in the record suggesting that Makuay was belligerent and under the influence of alcohol at the time of the incident, despite Makuay's denial of such during his testimony. (D0138, at 52:9–24, 92:19–21, 93:18–20, 94:3–13, 95:2–7, 95:8–17, 104:3–14). Notably, it would have still allowed the defense's argument that the officers failed to get the video, which Manning had stated would corroborate that he acted in self-defense. *See* (D0137, Trial Day 3, at 23:10–14 (06/28/2023) ("I remember the movie Shawshank Redemption and at some point in time a key piece of evidence, the prosecutor saw it one way and the defendant said, Well, you know, it's not there and I find that pretty inconvenient. I'm sure that's how Terence feels right now because he hoped that they would go and get the rest of the video and you would be able to see on video . . . .").

The defense could have reasonably determined that Makuay's testimony, combined Manning relaying his side of

events and his belief that he was just defending himself from Makuay, in Exhibit 1, rendered any additional testimony by Manning unnecessary (or an unnecessary risk). *See* (D0137, at 23:10–14) ("Terence gave his version, his story to the police that night while in handcuffs in the back of their car. He said self-defense and the State admitted that that is consistent with what he testified to."). Because Manning's decision to testify was undoubtedly determined by assessing the need for his testimony in relation to the admitted evidence against him (including the challenged exhibit), Manning himself cannot be said to authenticate the State's exhibit.

This reasoning also shows why the State cannot "affirmatively establish" that Manning did not suffer prejudice. *See In re Detention of Stenzel*, 827 N.W.2d 690, 708 (Iowa 2013) (citations omitted) (internal quotation marks omitted); *State v. Huston*, 825 N.W.2d 531, 539 (Iowa 2013) (citation omitted). The video was the crux of the State's case. That is why the State chose to highlight it in its closing and rebuttal and play it several times for the jury at the end of the trial. *See*

(D0137, 11:15–15:14, 17:11–22, 27:23–29:19). The reason the State had to rely on the video to prove its case was because Makuay did not clearly testify what had occurred. There were also questions about Makuay's behavior at the time of the incident—Bol told officer's he'd been drinking alcohol that night, which Makuay denied on the stand, calling into question his credibility. (D0138, at 75:6–11, 92:19–21, 93:18–20). Moreover, there was testimony from witnesses that Makuay was belligerent, an important detail for the jury to consider in determining who was the aggressor in the fight; this is particularly true given the contrast in how Manning appeared and conducted himself while talking to the arresting officer. (D0138, at 52:9–24, 92:19–21, 93:18–20, 94:3–13, 95:2–7, 95:8–17, 104:3–14).

The district court improperly admitted Exhibit 2 over Manning's objections, as it was not properly authenticated. Nor does the record affirmatively establish the exhibit did not impact the jury's finding of guilt in this case. *See State v. Nims*, 357 N.W.2d 608, 609 (Iowa 1984). Because the State

failed to establish Manning did not suffer prejudice by the erroneous admission of the evidence, a new trial is required. *See id.*; *State v. Nims*, 357 N.W.2d 608, 609 (Iowa 1984); *In re Detention of Stenzel*, 827 N.W.2d at 708.

CONCLUSION

For the reasons stated above and in the original brief and argument, Defendant–Appellant Terence E. Manning, Jr. requests this Court reverse his conviction and remand to district court for further proceedings.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

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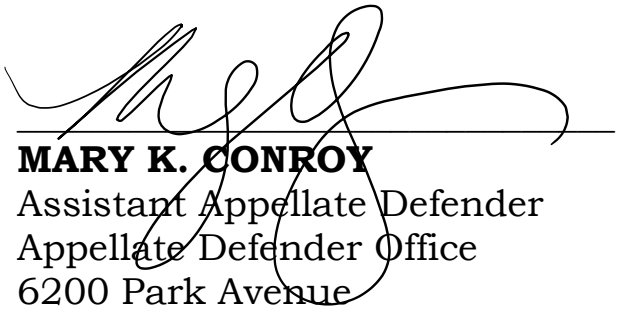

Dated: 07/30/2024

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Filed: 07/30/24