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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 **v.**

No. 35,244

5 **JUSTIN ROBERT PERKINS,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

8 **Briana H. Zamora, District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

11 Charles J. Gutierrez

12 Albuquerque, NM

13 for Appellee

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15 Todd B. Hotchkiss

16 Albuquerque, NM

17 for Appellant

18 **MEMORANDUM OPINION**

19 **SUTIN, Judge.**

1 {1} Defendant has appealed from numerous convictions for unauthorized use or
2 theft of the debit cards of another, pursuant to NMSA 1978, Section 58-16-16(B)
3 (1990). We previously issued a notice of proposed summary disposition. With respect
4 to the first issue raised on appeal, by which Defendant has challenged the admission
5 of surveillance imagery, we proposed to reject the assertion of error. With respect to
6 the second issue raised, by which Defendant has challenged the sufficiency of the
7 evidence to support the convictions, we proposed to reverse. Both Defendant and the
8 State have filed responsive memoranda. After due consideration, we adhere to our
9 initial assessment of the merits.

10 {2} The pertinent background information and relevant principles of law were
11 previously set forth in the notice of proposed summary disposition. We will avoid
12 undue reiteration here and focus instead on the responsive submissions.

13 {3} Defendant continues to assert that the State failed to properly authenticate the
14 surveillance footage and imagery. [DMIO 10-15] We remain unpersuaded. The officer
15 who procured the evidence testified about both the procedure by which he obtained
16 it from the businesses in which the recordings were generated, and the manner in
17 which he confirmed the nature of its content, based on his familiarity with both of the
18 locations and Defendant's appearance on the date and times in question. [DS 10-12]
19 This was sufficient to establish by a preponderance of the evidence that the footage

1 and still images were what they purported to be: *i.e.*, visual recordings of Defendant’s
2 presence. *See* Rule 11-901(A) NMRA (governing authentication); *see, e.g., State v.*
3 *Henderson*, 1983-NMCA-094, ¶¶ 7, 12, 100 N.M. 260, 669 P.2d 736 (holding that
4 photographic evidence generated by an ATM machine was properly authenticated
5 where an officer testified that she had requested the film be developed for a specific
6 time and date); *see generally State v. Martinez*, 2007-NMSC-025, ¶ 21, 141 N.M. 713,
7 160 P.3d 894 (“[I]n considering whether a foundational requirement has been met .
8 . . . the trial court must satisfy itself by a preponderance of the evidence . . . when
9 making its decision the trial court is not bound by the rules of evidence . . . [and
10 accordingly,] the trial court may consider hearsay.”).

11 {4} Defendant continues to assert that the officer’s lack of first-hand knowledge
12 should be regarded as a fatal deficiency. [DMIO 11-12] However, as we previously
13 observed in the notice of proposed summary disposition, under the applicable “silent
14 witness” theory, such personal knowledge is not required. *See Henderson*, 1983-
15 NMCA-094, ¶ 8 (distinguishing between the pictorial-testimony theory, which entails
16 the presentation of testimony from a sponsoring witness, stating that the image is a fair
17 and accurate representation of the subject matter based on that witness’s personal
18 observation, and the silent-witness theory, by which an image speaks for itself and is
19 substantive evidence of what it portrays independent of a sponsoring witness).

1 Defendant also relies on a number of out-of-state authorities for the proposition that
2 the proponent of recorded imagery should be required to affirmatively establish the
3 reliability of the technical process by which evidence of this nature is generated and/or
4 describe the operation of the recording system. [DMIO 11] Although we acknowledge
5 that such testimony might be of utility, the district court could reasonably have
6 determined that reliability of the recording process was not sufficiently in question to
7 require it in this case. *See id.* ¶ 12 (indicating that the witness “testified about the film
8 developing procedure”); *see generally Martinez*, 2007-NMSC-025, ¶ 24 (observing
9 that once the lower court determines that the prosecution has met applicable
10 foundational requirements, the defendant may challenge reliability; however, where
11 the officer’s foundational testimony goes unchallenged, the court does not abuse its
12 discretion in admitting the evidence). We therefore remain unpersuaded by
13 Defendant’s evidentiary challenge.

14 {5} Defendant’s challenge to the sufficiency of the evidence is far more persuasive.
15 We previously observed that the State demonstrated a number of debit cards were
16 stolen and used without permission. [CN 7] However, the only evidence presented by
17 the State to establish Defendant’s involvement with the theft and unauthorized use of
18 the cards was the aforementioned surveillance imagery evincing his presence at two
19 of the four locations in which the cards were used, and Defendant’s spontaneous claim

1 of ownership over a pack of cigarettes that was also claimed by the victim as being her
2 cigarettes that were stolen. [CN 7] In the notice of proposed summary disposition, we
3 proposed to hold that this was insufficient, particularly in the absence of any
4 indication that the victim's property was recovered from Defendant or his alleged
5 accomplice. [CN 7-8]

6 {6} In its memorandum in opposition, the State confirms that it failed to present any
7 direct evidence that the victim's cards, pack of cigarettes, or other property were
8 recovered from either Defendant or his alleged accomplice. [SMIO 6, 15-16]
9 Nevertheless, it contends that the jury could reasonably have inferred that these items
10 were recovered in the course of the separate arrests, based on Officer Larranaga's
11 testimony that he discussed "certain aspects" of the case with other non-testifying
12 arresting officers at the police substation, after which a number of debit cards and a
13 pack of cigarettes were positively identified by the victim and returned to her. [SMIO
14 15-16] We disagree. While Officer Larranaga's testimony established that the police
15 had possession of the aforementioned items at the time of the identification, no
16 specific information was supplied to the jury about when, where, or how those items
17 were recovered. This is not a situation in which a single rational inference could be
18 drawn; any number of possibilities suggest themselves. If the officers had indeed
19 obtained the cards and cigarettes in the course of the arrests, as the prosecutor

1 repeatedly asserted in the course of his opening and closing arguments [SMIO 9; DS
2 6, 19-22], the State should have presented testimony to that effect. Given the State’s
3 inexplicable failure to do so, any inference would entail impermissible speculation,
4 which we decline to indulge. *See State v. Garcia*, 2015-NMCA-094, ¶ 24, 356 P.3d
5 45 (declining to indulge a speculative inference with respect to a critical matter, where
6 the evidence thereof “was not the type of evidence that was clandestine in nature [that]
7 could only be proved by circumstantial evidence” but, rather, should have been readily
8 adduced from the testimony of the prosecution’s own witness), *cert. granted*, 2015-
9 NMCERT-008, 369 P.3d 369.

10 {7} The State further contends that the remaining circumstantial evidence should
11 be regarded as sufficient to support the convictions. [SMIO 11-15] However,
12 Defendant’s mere presence at two of the four locations where unauthorized uses of the
13 cards occurred, within a six-hour window between the time of the theft and the point
14 at which the cards were presented to the victim at the police substation, [SMIO 12- 13]
15 is insufficient to establish his participation in the crimes at issue. *See generally State*
16 *v. Green*, 1993-NMSC-056, ¶ 27, 116 N.M. 273, 861 P.2d 954 (agreeing that “mere
17 presence at the location of a crime is not evidence of participation in criminal activity”
18 (alterations and internal quotation marks omitted)). Defendant’s spontaneous claim
19 to the package of cigarettes does not supply compelling evidence of guilt either.

1 [SMIO 13-15] We understand the State to contend that insofar as the package of
2 cigarettes was identifiable by the victim as one that had been stolen at the same time
3 as the debit cards, Defendant’s claim to them implies that he was involved with the
4 theft and unauthorized use of the debit cards. [SMIO 3, 6-8, 13-15, 17] However,
5 Defendant’s failure to *disclaim* the cigarettes (in order to disassociate himself from the
6 crimes) seems equally consistent with an inference of innocence. *See generally*
7 *Garcia*, 2015-NMCA-094, ¶ 17 (“Evidence equally consistent with two inferences
8 does not, without more, provide a basis for adopting either one—especially beyond
9 a reasonable doubt.” (alteration, internal quotation marks, and citation omitted)). In
10 any event, the mere assertion of ownership over the cigarettes is too attenuated to
11 establish Defendant’s theft and unauthorized use of the debit cards. *Cf. State v.*
12 *Sizemore*, 1993-NMCA-079, ¶ 8, 115 N.M. 753, 858 P.2d 420 (“Presence in the
13 proximity of stolen goods is insufficient to support a conviction for receiving stolen
14 property.”); *State v. Aragon*, 1990-NMCA-001, ¶ 17, 109 N.M. 632, 788 P.2d 932
15 (“Possession of stolen property, standing alone, is not enough to justify a conviction
16 of burglary or larceny.”). We therefore remain unpersuaded that the State sustained
17 its burden of proof beyond a reasonable doubt.

18 {8} Accordingly, for the reasons stated in this Opinion and in the notice of proposed
19 summary disposition, we reverse.

1 {9} **IT IS SO ORDERED.**

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3

JONATHAN B. SUTIN, Judge

4 **WE CONCUR:**

5

6 **M. MONICA ZAMORA, Judge**

7

8 **J. MILES HANISEE, Judge**