Law of the Visual Trial

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MCR 7.215 (C) Precedent of Opinions

(1) An unpublished opinion is not precedentially binding under the rule of stare decisis. Unpublished opinions should not be cited for propositions of law for which there is published authority. If a party cites an unpublished opinion, the party shall explain the reason for citing it and how it is relevant to the issues presented. A party who cites an unpublished opinion must provide a copy of the opinion to the court and to opposing parties with the brief or other paper in which the citation appears.
(2) A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis. The filing of an application for leave to appeal to the Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals.

DISCOVERY

***People v Campbell,* unpublished per curiam opinion of the Court of Appeals, issued October 18, 2016, (Docket No. 327059), p 8.**

> No Discovery or Due Process Violation Where No Evidence That Scout Car Video Existed, Was Exculpatory or Was Withheld by the Prosecutor.
>
> "In this case, there is no evidence that any scout car video showing the police chase and arrests of defendants even exist or that it ever existed. Although several police officers involved in this incident testified that their police cars contained recording equipment, they had no control over the recording system and did not know whether a recording existed. Even if scout car video existed, Sanders and Wilburn have failed to demonstrate that it was potentially exculpatory
>
> Because Sanders and Wilburn have failed to demonstrate that any video existed, that it was potentially exculpatory, or that the police or the prosecutor acted in bad faith, Sanders and Wilburn have not established a due process violation (*Citations Omitted*). For the same reason, the trial court did not err in declining to provide an instruction that the juries may infer that any scout car video would have been favorable to Sanders and Wilburn (*Citations Omitted*).

***People v Gant,* unpublished per curiam opinion of the Court of Appeals, issued March 14, 2013, (Docket No. 307338), p 2.**

> No Discovery Violation Where Defendant Failed to Present Evidence That The Missing Scout Car Tape Was Exculpatory Or Destroyed In Bad Faith
>
> "In the present case, defendant failed to present any evidence that the missing videotape was exculpatory or that the videotape was destroyed in bad faith. Officer Ahmed Morsy testified that the video camera recorded straight in front of the vehicle, not what transpired behind the vehicle. Defendant's firefighter friend, Bruce Irving, testified that the police vehicle stopped "almost past my vehicle." Therefore, the videotape would not have

contained exculpatory evidence because it would not have recorded what occurred behind the police vehicle. Moreover, there was no evidence that the videotape was destroyed in bad faith.

Despite the production of the audiotape and motion hearings to address discovery, there is no indication that the defense noted the outstanding discovery of any videotape from the scout car. Thus, the videotape was destroyed in ninety days in accordance with standard police procedure. Although the force investigation unit viewed the videotape and found that it did not substantiate the defendant's assertions, it did not preserve a copy of the videotape. There is no evidence that the failure to preserve the videotape occurred in bad faith. Accordingly, reversal is not required. "

***People v Ingraham,* unpublished per curiam opinion of the Court of Appeals, issued January 12, 2016 (Docket No. 324226), p 3.**

Discovery Violation Was Properly Remedied Though the Issuing of a Limiting Instruction and by Allowing Defense to Review Withheld Video Prior to Taking Testimony.

"The record shows that the prosecution did not offer the video to defense counsel until two days before trial, despite defense counsel's valid request. As a remedy, the trial court allowed defendant and defense counsel to view the video privately before taking any testimony at trial... [T]he trial court's remedy of allowing defendant and defense counsel to view the video before taking testimony and issuing limiting instructions, once right before the video was shown and once right before the jury began to deliberate, was within the range of reasonable and principled outcomes."

***People v Jackson,* unpublished per curiam opinion of the Court of Appeals, issued January 29, 2009 (Docket No. 282141), p 4.**

Failure of Prosecutor to Timely Secure Squad Car Video Recording in Response to Discovery Order was less than Good Faith; Trial Court Was Not in Error for Dismissing Case as Sanction.

"Given the evidence that patrol car videos were customarily made, the explanation that possible equipment failure accounted for the lack of one in this instance was speculative, because there was no evidence of any equipment failure beyond the lack of videos for a certain period. Because we are not left with a definite and firm conviction that the court erred in this regard, we affirm the trial court's determination that the video sought did exist at one time but that the prosecution failed to produce it.

Plaintiff argues that there was no evidence of bad faith. We disagree... Assuming, without deciding, that this was mere inadvertence and not a deliberate attempt to withhold evidence, we nonetheless agree with the trial court that such egregious dalliance bespeaks something less than a good-faith attempt to comply with the discovery order."

***People v Jackson,* unpublished per curiam opinion of the Court of Appeals, issued August 16, 2016 (Docket No. 326805), p 3.**

Trial Court Did Not Err in Refusing to Infer Bad Faith from DPD's Sloppiness in Failing to Secure Relevant Squad Car Video

"Further, defendant did not demonstrate bad faith about the failure to preserve any videotape recording (*Citation Omitted*). There is no evidence showing that the DPD's routine destruction of the video footage occurred despite knowledge of any potential exculpatory value to defendant. Such automatic procedures to clear police department storage space alone do not constitute bad faith. (*Citation Omitted*)

Moreover, it does not appear that Detective Van Raaphorst had any motive not to produce the videotape. He was not involved in defendant's arrest. Nor is there any evidence that the Technical Services Bureau had reason not to search for or produce the correct video. While the trial court noted that there was "a lot of sloppiness" with regard to the videotape, the court viewed the evidence and specifically refused to infer bad faith in that regard. (*See MCR 2.613(C)*. Therefore, the trial court properly denied defendant's motion to dismiss premised on the claim that he was denied due process by the failure to preserve the videotape. "(*Citation Omitted*)

***People v White,* unpublished per curiam opinion of the Court of Appeals, issued June, 16, 2011 (Docket No. 297716), p 3.**

No Discovery Violation for Failure to Preserve Video Where Original Case in Which Discovery Order had been Entered Was Dismissed and No Order of Discovery Was Subsequently Requested When a New Case Was Brought Against the Defendant 10 Months Later

"Shortly after the discovery order was entered, however, the charges against defendant were dismissed, without prejudice. The case was reissued against defendant approximately ten months later. It is undisputed that no order was entered in the new case requiring preservation of any video. If the prosecution or Detroit police violated a discovery order by failing to preserve videotape evidence concerning the case, it would thus necessarily have to have been the discovery order entered by the district court in the prior case against defendant that was dismissed[...]

While defendant has alleged here that the prosecution and police department did not preserve the videotape, he has not alleged that they did so deliberately or in bad faith, or that any other discovery provision or order was violated. Nor has he provided any indication whatsoever that the videotape was exculpatory, such that its lack of preservation prejudiced him. Given the above, the trial court did not abuse its discretion in denying defendant's motion to dismiss based upon the alleged violation of a discovery order."

***People v Ball,* unpublished per curiam opinion of the Court of Appeals, issued January 23, 2018 (Docket No. 332561), p 5.**

Trial Court did not Err in Denying Defendants Motion to Dismiss for Prosecutions Failure to Preserve Squad Car Video Where Defendant Failed to Show Recording Existed or if in Existence was Erased in Bad Faith

"We conclude that the trial court did not err in denying defendant's motion to dismiss based on the prosecution's failure to produce an audio or video recording of the event.

The state trooper testified that he thought the recording system was operating properly on the day of the incident because the system gave him no reason to believe otherwise. The trooper noted that his vehicle's overhead lights were not activated when he pulled into the parking lot behind defendant's car; therefore, the video would not have been activated. He stated that an audio recording would have been made during the incident, but when he checked the hard drive onto which the recording would have been loaded, he found that it was empty. Audio and video from all sources recorded during the time the incident occurred were erased. The trooper surmised that the erasure might have been caused by a switch to a new recording system. Defendant's assumption to the contrary, these facts do not establish that any audio or video recording ever existed, or if they did exist, that they were deliberately erased in bad faith. (*Citation Omitted*). Accordingly, the trial court did not err by denying defendant's motion to dismiss."

***People v Wilcher,* unpublished per curiam opinion of the Court of Appeals, issued May 8, 2012 (Docket No. 301487), p 4.**

Failure to Provide Dashcam Video Was a Discovery but Not a Due Process Violation – No Evidence Showing Video Was Exculpatory or That Officers Acted In Bad Faith.

"The prosecution clearly violated the trial court's discovery order. The court ordered the prosecution to produce the video footage recorded by the dashboard cameras on the two squad cars involved in this situation. The prosecution failed to produce any video from car 063619. This case would be simple if we knew the video's content would match defendant's version of events. "'[T]he suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution.' (*Citing Arizona v Youngblood,* 488 US 51, 55 (1988); *Brady v Maryland,* 373 US 83, 87 (1963)).

As no one has seen the subject video footage, defendant can only theorize that its contents would exculpate him. The failure to preserve evidence that is only potentially exculpatory does not automatically constitute a due process violation (*Citation Omitted*). To warrant relief, the defendant must show that the officers acted in bad faith."

COMMENT*: Court Drew Distinction Between Brady Violation (Failure to Provide Exculpatory Evidence – Good Faith/Bad Faith Irrelevant) vs. Discovery Violation (Failure to Provide Only Potentially Exculpatory Information- Defendant Required to Show Bad Faith by Pros./Officers).*

***People v White,* unpublished per curiam opinion of the Court of Appeals, issued October 20, 2015 (Docket No. 312648), p 5.**

No Brady Violation Where Nothing in Record Indicated that Police had any Video Recordings Other Than Those Provided to Defendant

"The police obtained the video recording with respect to the relevant time period, and it was provided to defendant... Defendant then requested additional footage covering a

longer time period, but by the time the request was made, the bowling alley had erased the recordings from the day of the incident. Because there is nothing in the record to indicate that the police or prosecutor had any video recordings other than what was provided to defendant, much less recordings having exculpatory or impeachment value, defendant has not established a Brady violation. While it is possible that any additional video recordings from the bowling alley, had they captured the incident, may have been potentially useful, the trial court found that the police did not act in bad faith and defendant has not provided any basis for concluding otherwise. Therefore, defendant has not established a due process violation with respect to the failure to preserve any video recordings."

***State v Draper-Roberts*, 378 P3d 12611267; 2016 UT App 151 (2016)**

Abuse of Discretion for Failing to Declare a Mistrial When Body Camera Video Was Provided to Defense Counsel After Opening Statements

The question, then, is whether the trial court abused its discretion when it denied Defendant's request for a mistrial and opted instead to provide her with a brief continuance to review the body cam video and prepare to cross-examine the officer. In other words, was this course of action "beyond the limits of reasonability"? (Citations Omitted)

We conclude that it was. Defense counsel was deprived of the ability to prepare for trial with the body cam video in mind. The video was revealed after opening statements—after counsel had presented the case to the jury and had made no mention of the video. Defense counsel had no reason or opportunity to seek out and interview the store employees and other police officers who appear in the video. The late disclosure of the body cam video impaired Defendant's ability to thoroughly review the contents of the video and research applicable law in order to effectively move to exclude portions of the video; instead, the video was admitted to the jury in its entirety. Aside from including potentially inadmissible hearsay statements, the video shows the Defendant being arrested, being read her rights in accordance with Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and invoking her rights to silence and counsel.

***State v Rich*, unpublished per curiam opinion of the Court of Appeals of Ohio, issued March 11, 2013 (Docket No. CA2012-03-44), p 7-10.**

The state called an expert witness and presented a PowerPoint during his direct testimony that had not been provided in Discovery. The Court of Appeals held:

In support of his assertion that the state violated Crim.R. 16(K) by failing to provide him with "a complete expert report [,]" Rich calls to our attention that Detective Henson's PowerPoint presentation contained new information that had not been contained in the evidence submission form, namely, that there were three fingerprints uncovered from the toolbox, and not just two, with 17-plus total characteristics, and not just 12, that matched Rich's known fingerprints. However, Rich is ignoring the trial court's instruction to the defense to bring to its attention any new information contained in Detective Henson's testimony at trial regarding his PowerPoint presentation that had not been contained in the material provided to the defense before trial, including the evidence submission form. Rich is also ignoring the trial court's offer to strike any such new information from Detective Henson's testimony if the defense brought it to the trial court's attention.

However, the only objection the defense raised to Detective Henson's testimony was that Detective Henson had testified "[m]ore completely [,]" in that he testified as to his analysis and how he arrived at it.

Therefore, the only issue properly before us is Rich's argument that Detective Henson's expert report regarding the fingerprints found on the toolbox should have been "more complete." What Rich means by this is, while the state provided him with a summary of Detective Henson's *conclusions,* the state failed to provide him with a summary of Detective Henson's *analysis,* and therefore the trial court was obligated under Crim.R. 16(K) to exclude Detective Henson's testimony for this reason. We find this argument unpersuasive.

OPENING STATEMENTS

***People vs. Eriksen, 288 Mich. App. 192**, 793 N.W.2d 120 (2010).*

Defendant also argues that the prosecutor interjected his personal beliefs into the case when he stated during his opening statement that defendant's companions went to see Ritthaler in order to talk to him but defendant had a different intent. Rather than offering his personal beliefs about defendant's guilt, the prosecutor was simply summarizing the anticipated testimony of defendant's companions, as well as providing a fair view of what the evidence would show. **Opening statement is the appropriate time to state the facts that will be proved at trial.** *People v. Moss,* 70 Mich.App. 18, 32, 245 N.W.2d 389 (1976). Defendant has not shown error.

***United States v Burns,* 298 F.3d 523 (CA 6, 2002).**

Defendants asserted the district court abused its discretion in allowing the prosecution to use PowerPoint during its opening statement. The presentation included "various drawings, photographs, icons, and text...some of the images depicted items that were not intended to become evidence in the case." Before trial, the prosecutor provided copies of the presentation to the court and defense counsel; the district court ruled "as long as there would be evidence about each image that appeared...the presentation was permissible." The jury was then instructed, before opening statements and after closing, that the attorney's statements were not evidence. The appellate court ruled that even though photos used in the PowerPoint were not entered into evidence, the instruction was sufficient to cure "any harm that might have been caused." The Court also recognized the fact the prosecution presented nine days of admissible evidence which showed the defendants' guilt; such evidence, the court reasoned, was enough to overcome any error in the PowerPoint.

***State v Sucharew,* 205 Ariz 16; 66 P.3d 59 (App, 2003).**

Before trial, the prosecutor informed the trial court and defense counsel about the use of a PowerPoint presentation; the presentation included information disclosed to defendant during discovery. The trial court allowed it saying the presentation was not "prejudicial or inflammatory and...did not include anything ...not likely to be admitted at trial." All the photographs used in the slide-show presentation were admitted into evidence at trial, "words and labels [on the photos] simply tracked the subject matter of the prosecutor's opening statement." Court held for the prosecutor based on local case law which allowed a trial court the discretion to permit the use of "motion picture and photos," later admitted, during opening statement.

***Dolphy v State,* 288 Ga 705; 707 SE2d 56 (2011).**

During the trial's opening statement, the prosecutor showed a PowerPoint slide that read "Defendant's Story Is a Lie." Defendant Dolphy objected. The court ruled it *argumentative* and instructed the prosecutor to remove it. A second slide read "People Lie When They Are Guilty." Defendant objected again, and the court ordered the slide taken down. Though no curative instruction was given, the court instructed the jury that the statements were not evidence. The PowerPoint did, however, contain evidence which was eventually admitted. Following conviction, Defendant argued the slides deprived him of a fair trial and expressed the prosecutor's personal belief in Dolphy's guilt. The appellate court did not find the presentation prejudicial within the meaning of local statute. Furthermore, the court found that any potential error in allowing the presentation was outweighed by the evidence of guilt presented.
Comment: *In Michigan, I would recommend against using the slides quoted in paragraph a.*

Campbell vs. Menze Construction Company, 15 Mich. App. 407, 166 N.W.2.d 624 (1968).

The Court approved the use of a chart exhibit in the Opening Statement over objection by the defense, holding:

The use of blackboards, charts and other visual aids at a trial is common practice. Counsel for both sides should be encouraged to present their case in a way that will be most clearly understood by the jury. The extent to which visual aids can be used, when and whether they are to be marked for the record and the comment to be made by preliminary or final instructions that such drawings, charts, or calculations are not evidence rests within the sound discretion of the trial court

***State v Lankford,* unpublished per curiam opinion of the Intermediate Court of Appeals of Hawaii, issued May, 13, 2011 (Docket No. 29287), p 12.**

Defendant argued on appeal that prosecutorial misconduct occurred at trial because the prosecutor utilized a PowerPoint slide that labeled the location where Defendant first encountered the victim as the "abduction site" during the State's opening statement. Defendant did not object to the prosecution's use of the slide at trial. The Court held the Defendant was not prejudiced by the use of the label "abduction site." Applying the *Valdivia* factors: (1) there was enough evidence on which to base Defendant's conviction; (2) the jury was instructed that statements or remarks made by counsel are not evidence; and (3) there was no indication in the record that the jury did not adhere to these instructions. In addition, it was reasonable for the prosecutor to argue that the victim had been abducted since there was evidence that:

(1) The victim looked distressed when she was talking with Defendant; and (2) The victim was shy and uncomfortable with strangers, and would not be likely to get into a stranger's truck.

***People v Dwayne Ivey,* unpublished per curiam opinion of the Court of Appeal Fourth Dist Cal, issued February, 14, 2013 (Docket No. D059874), p 1-4.**

A jury convicted defendant Dwayne Ivey of numerous sexual crimes against a minor child, including five counts of committing a lewd act on a child under the age of 14 (Pen.Code, § 288, subd. (a),1 counts 1–3, 5 & 6), two counts of sexual intercourse with a child 10 years of age or younger (§ 288.7, subd. (a), counts 7 & 8), two counts of sodomy with a child 10 years of age or younger (§ 288.7, subd. (a), counts 9 & 10), one count of digital penetration on a child 10 years of age or younger (§ 288.7, subd. (b), count 11), and one count of oral copulation with a child 10 years of age or younger (§ 288.7, subd. (b), count 12). The jury also found true the special allegation, alleged in connection with counts 1 through 3, 5 and 6, that Ivey had engaged in substantial sexual conduct within the meaning of section 1203.066, subdivision (a)(8). Ivey was sentenced to an aggregate prison term of 146 years to life. On appeal, Ivey argues that three acts of alleged prosecutorial misconduct, coupled with the improper admission of inflammatory evidence, denied him a fair trial. The judgment is affirmed.

The PowerPoint Was Not Misconduct. Ivey's first claim of misconduct—the prosecutor's PowerPoint presentation that used the epithet "deviant"—is without merit. Information presented in an opening statement cannot be charged as misconduct unless the evidence referred to by the prosecutor was so patently inadmissible that the prosecutor is charged with knowledge it could never be admitted[1], and a prosecutor has broad discretion to state his or her views as to what the evidence shows and what inferences may be drawn therefrom, including vigorously arguing the case using appropriate epithets where warranted by the evidence.[2] As long as the remarks are fair comment on the evidence, the prosecutor is not limited to Chesterfieldian politeness and may use appropriate epithets.[3]

Here, the prosecutor had grounds to expect admissible evidence would show at a minimum that, over a several-year period, Ivey forced a young child to have vaginal and anal intercourse, forced her orally to copulate him, penetrated her with a dildo, committed other sexual acts on her, and showed her adult videos. We conclude that, because the epithet "deviant" was not an unwarranted characterization of Ivey's actions, there was no misconduct in the PowerPoint presentation and therefore it does not enter the calculus of whether Ivey was denied a fair trial.

***Watters v State,* 129 Nev 886, 890-892; 313 P3d 243 (2013).**

PowerPoint, as an advocate's tool, is not inherently good or bad. Its propriety depends on content and application. A prosecutor may use PowerPoint slides to support his or her opening statement so long as the slides' content is consistent with the scope and purpose of opening statements and does not put inadmissible evidence or improper argument before the jury. But a PowerPoint may not be used to make an argument visually that would be improper if made

[1] Citing People v Dykes (2009) 46 Cal.4th 731, 762

[2] Citing People v Welch (1999) 20 Cal.4th 701, 752–753.

[3] Citing People v Harrison (2005) 35 Cal.4th 208, 244–246 [no misconduct where prosecutor referred to defendant as a " 'prowler,' " an " 'executioner,' " a " 'head hunter,' " and " 'the complete and total essence of evil' "]

orally. Here, the prosecutor orally declared that she would be asking the jurors to find Watters guilty. But the PowerPoint that accompanied her declaration displayed Watters's booking photograph with a pop-up that directly labeled him "GUILTY." These are not just two different ways of saying the same thing. Since the prosecution could not *orally* declare the defendant guilty in the opening statement, she could not do so in her PowerPoint.

State v Rivera,* 437 NJ Super 434, 865; 99 A3d 847 (App Div, 2014*).

The prosecutor used a PowerPoint during opening statements with the PowerPoint's twenty-first and final screen containing a photograph showing the defendant's face and neck, which is displayed with a bright red border. It also includes text, printed in the same color and density, "Defendant *GUILTY OF* ATTEMPTED MURDER." The words "Defendant" and "*GUILTY OF*:" appear on separate lines to the right of defendant's photograph, and "ATTEMPTED MURDER" appears below the photograph in much larger typeface. The Court, faced with a pre-presentation challenge to use of a PowerPoint in an opening, applied the law governing opening statements.

The Court said, "In some respects, use of PowerPoint has potential to advance the interests of fairness in opening because the court may direct removal of prejudicial material before a prosecutor displays a slide to the jury. That opportunity should not be lost."

The trial judge gave no specific instruction to the jurors on how they might consider the slide in issue, or for that matter any of the other twenty slides. **The Court held the cumulative impact of the prosecutor's misconduct deprived the defendant of a fair trial.**

AUTHENTICATION[4]

***People v. Haywood,* unpublished per curiam opinion of the Court of Appeals, issued December 3rd, 2019 (Docket 342729) pages 7, 8, and 9.**

Compressed video provided in Discovery

B. ANALYSIS

Defendant moved pretrial to have the original video of his partially recorded statement examined by Ed Primeau, an audio and video forensic expert, because Primeau's assessment of the video copy provided to defendant was that it was compressed, of poor quality, and had "frozen video frames." Primeau's affidavit was not presented to this court nor is there record of an affidavit being presented to the trial court. According to the motion presented to the trial court, defendant believed that the video had been altered. The trial court granted defendant's motion and defendant learned that the original video had been erased from the hard drive after copies of it were made. At trial, defense counsel moved the court to suppress defendant's partially recorded interview with police. The trial court denied the motion. It held that there was no indication that the recording was intentionally partially recorded and that it would caution the jury by way of an instruction to consider that the exhibit was a partial recording.

[4] Also see the digital evidence section at the end of this outline and the attached articles regarding the authentication of electronically stored information (ESI).

Later on the same page:

While we disagree with the trial court's finding that the original videotape was not intentionally destroyed, we agree that no bad faith was proven. The prosecution admitted that the Kalamazoo Public Safety Department routinely recorded over its hard drive recordings after making copies of those recordings. Thus they acted intentionally. However, while this practice may be unwise, the defendant did not demonstrate that the department acted with knowledge that exculpatory material was on those tapes or that the department destroyed the tapes after the court's order for the production of the original. Defendant argued at trial that the destruction of the original video also destroyed metadata that was necessary for his expert's complete analysis. Again, we note that the expert's affidavit is not in the record. There is no evidence to suggest that the police *department was aware that it was destroying* ***metadata when it deleted the original video or the impact that the destruction of metadata would have on a forensic analysis of the video.***

Defendant additionally argues that a duplicate of the recording was inadmissible under the rules of evidence. MRE 1002 provides that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." "An 'original' of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it." MRE 1001(3). However, "[t]he original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if[,]" among other reasons, "[a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith...." MRE 1004(1). This argument was first made on appeal. Defendant rather asserts, "the original recording was important to show that certain statements were omitted from the copy of the recording that still existed and was used by the prosecution." At trial, the prosecutor stated it had the same copy as the defendant. The court found this to be credible and the defense offers nothing in support of this assertion of prosecutorial misconduct other than his argument. The statements that defendant sought from the original video were "threats" that Officer Leonard made to defendant that "his brother and mother would go to prison or would end up dead like his nephew's mother." Leonard admitted that he left out of his report that he threatened to send defendant's mother to prison, and testified that he did not consider it a threat because defendant's mother would be guilty of a felony if the firearm that was used in this instance were located in her apartment. Thus, even if such statements were made in the unrecorded portion of the interview the jury was made aware of those statements.

People v Hence, **110 Mich App 154, 162; 312 NW2d 191 (1981)**

A sufficient foundation exists if there is evidence of (1) the exhibit's identity, and (2) its connection to the crime. It was the people's theory that this was the weapon Edmonds and Robinson (witnesses) testified Defendant had shown them at a meeting and was also the weapon that defendant took to the victim's house the morning defendant shot and killed the victim, using the victim's gun rather than the .38-caliber revolver. Edmonds testified during trial that at the meeting defendant had carried a suitcase which contained a .38-caliber revolver. Robinson testified that it looked similar to the gun Defendant had in his briefcase at the meeting and was similar to the weapon Defendant took with him the morning of the shooting. The testimonies coupled together, established that the weapon was similar to the one in Defendant's possession.

United States v Pageau, **526 F Supp 1221, 1224 (NDNY, 1981)**

A sufficient foundation is constructed by testimony as to the proper installation, activation, and operation of the camera and by the chain of possession of the tape. Prison surveillance captured corrections officers willfully assaulting an inmate. Defendants argued there was not sufficient foundation to admit the video recording because no one was able to authenticate its contents from personal knowledge. The Court found a sufficient foundation through the testimony of the video technician who operated the cameras at that time in question.

***People v Berkey,* 437 Mich 40, 48; 467 NW2d 6 (1991)**

A witness can view the DVD of the surveillance video and testify if he recognizes the scene or persons within the video and whether it fairly and accurately represents the incident that occurred based on his knowledge. Audio recording authenticated by testimony as to voice identification. The prosecution claimed that the tapes were recordings of conversations between the victim and the defendant. The prosecution, having shown these tapes to be what it claims them to be, has provided authentication.

***People v White,* 208 Mich App 126, 132-33; 527 NW2d 34 (1994)**

When the foundational requirement of MRE 901(a) has been satisfied, any failure to show complete authentication affects the weight of the evidence, but not its admissibility. Defendant objected to the admission of cocaine into evidence because there was a vital link missing in the chain of custody—there was no testimony concerning the transfer of the cocaine from the evidence room safe. The Court found the chain to be substantially complete based on reasonable inference from Officer Winn's testimony that Sergeant Yek removed the evidence envelope. Further testimony established that reasonable precautions were taken to preserve the original condition of the evidence and prevent its misidentification.

***People v Hack,* 219 Mich App 299, 309-10; 556 NW2d 187 (1996)**

A Video Recording Is Properly Authenticated When A Witness Views Some Or All Of The Video Itself.

The court upheld the admission of a videotape depicting the Defendant engaging in child sexually abusive activity, based on its proper authentication by the mother of the female victim testifying that she knew the defendant was videotaping that day in question, that she watched the video twice on that day and at least once after it was repaired by the police, that she observed the tape is broken, and that she brought the tape to the authorities. She testified that she recognized various events on the tape that she observed during the day in question.

***People v Dababneh,* unpublished per curiam opinion of the Court of Appeals, issued October 23, 2008 (Docket No. 278537), p 4.**

Video Compilation Properly Authenticated by Employee

Prima facie showing that the item is genuine can be satisfied in several ways, including the testimony of a witness with knowledge, or evidence showing that a process or system produces accurate results. The Court upheld the admission of a portion of Meijer surveillance video that was edited for time and not the entire video. The Meijer employee who compiled the DVD testified that it was an accurate representation of the footage from the security

cameras. There was no evidence introduced that suggested that the DVD images did not represent what was recorded from the cameras at Meijer.

***United States v Cejas,* 761 F3d 717, 723-24 (CA 7, 2014)**

Video May Be Authenticated Where There Witness Testimony Establishes The "*Fairness and Accuracy*" Of the Video.

The government established proper foundation to authenticate video where agent testified that pole camera used to make recording produced accurate results.

***United States v Smith,* 591 F3d 974 (CA 8, 2010)**

Where Witness Testifies to the Accuracy of a Video's Depiction of an Event, Such Testimony is Sufficient for Authentication of Video

In Smith, the Defendant appealed the conviction on two counts of aggravated sexual abuse of a child, arguing in part that the district court erred by admitting a 40-minute DVD recording of a forensic interview of the child victim. Rejecting the Defendants arguments, the Court of Appeals noted:

> ***Rule 901(a) allows parties to authenticate evidence in any way that presents evidence sufficient to support a finding that the matter in question is what it is claimed to be... Rule 901(b) provides that a party may authenticate evidence through "testimony of a witness with knowledge" ...***

Determining that the forensic interviewer identified the DVD as a recording of her forensic interview with the victim and indicated that it was an accurate recording of her interview, the Court found that this was sufficient to authenticate the DVD under FRE 901(b).

***United States v Damrah,* 412 F3d 618 (CA 6, 2005)**

No Requirement Under FRE 901 That Evidence Be Presented on The Making Or Handling Of Video For Its Authentication

In Damarah, Defendant argued trial court abused its discretion by permitting the government to admit videotapes and DVD translations depicting the Defendant at several fundraising events held by a terrorist organization. Stating that no evidence had been offered that the videos fairly or accurately depicted these events, the Defendant argued that these videos had not been authenticated and were, therefore, should not have been admitted into evidence. Rejecting this argument, the Court of Appeals referred to FRE 901, Noting that:

> ***The key question under Federal Rule of Evidence 901 is whether "the matter in question is what its proponent claims..." The Advisory Notes to Rule 901(b)(4) (which provides that evidence may be authenticated by distinctive characteristics), state: "The characteristics of the offered item itself, considered in the light of circumstances, afford authentication techniques in great variety."***

Noting that there was no requirement that evidence be presented on the making or handling of the video tapes, the Court determined that the Trial Court did not abuse its discretion, quoting

the Trial Courts holding that the tapes were "self-authenticating and also to a degree [were] corroborated by some of the other things that counsel for the government referred to."

***People v Flake,* unpublished per curiam opinion of the Court of Appeals, issued November 20, 2014 (Docket No. 317325)**

Testimony by Police and Pastor Sufficient to Authenticate Surveillance Video. A Perfect Chain of Custody Need Not Be Shown

In *Flake*, the Defendant challenged the admission of an incriminating surveillance video, arguing that it was not properly authenticated and that its admission was precluded because of defects in its chain of custody. Rejecting this argument, the Court of Appeals found that a Police Officer's testimony established that the surveillance video file was secured from a church surveillance system and transported to a police computer, where it was further transferred to additional police employees. Though there was no evidence of who had transferred the files onto the DVD presented at trial, there was sufficient testimony to show that the video came from the church surveillance system and was consistent with video captured by that system. In the absence of any evidence that the video file had been corrupted or tampered with, the Court found that the Prosecution properly demonstrated the video was what it claimed to be—surveillance footage capturing the crime.

Moreover, the Court also held that the prosecution ***was not*** required to submit a perfect chain of custody to properly authenticate and admit the video file. Noting that a perfect chain of custody was not required, the court stated that:

> ***"Once the proffered evidence is shown to a reasonable degree of certainty to be what its proponent claims" [any] "deficiency in the chain of custody goes to the weight of the evidence rather than its admissibility."***

***People v Humphries,* unpublished per curiam opinion of the Court of Appeals, issued September 15, 2015 (Docket No. 320633)**

A Screen Capture of a Surveillance Video was Properly Authenticated Through Testimony of Detective Who had Recorded It. Court Found Video Was Properly Admitted as a Copy of the Original

Where Defendant challenged the authenticity and reliability of a video created by a Detective using a tablet to screen capture a surveillance system's video, the court found that the testimony by Detectives who had viewed both the original and screen captured videos and found them identical, was sufficient for authentication and admitted the screen captured video as a copy of the original. While Defendant further argued that the means of recording the video was unreliable, the Court asserted that whether the recording method was reliable did "*not affect the admissibility of the evidence, but only its weight"* –an element it found was for the jury to decide.

***People v Thomas,* unpublished per curiam opinion of the Court of Appeals, issued November 22, 2016 (Docket No. 326956)**

Testimony by Witness Recorded in Cell Phone Video Was Sufficient for Its Authentication. Chain of Custody Not a Requirement for Authentication

In *Thomas*, the Defendant argued that the prosecution did not properly authenticate a ten-second video captured on the cell phone of an unknown individual and which recorded an altercation between himself and another individual. Though the origin of the video could not be determined, the Court rejected the Defendant's arguments. Noting that the victim had testified that he could identify himself in the video and that the video appeared to accurately represent what had occurred, the Court further cited the Defendants own testimony where he stated that the video appeared to be an actual recording of the events in question. Concluding that the collective witness testimony was sufficient for the purposes of authentication, the Appeals Court affirmed the Trial Court.

***People v Shipp,* unpublished per curiam opinion of the Court of Appeals, issued November 23, 2004 (Docket No. 251171), p 5-6.**

Testimony of Eyewitnesses Was Sufficient for Authenticating Video Where Witnesses Testified That The Video Accurately Depicted The People And Events They Observed At The Time Of The Recording.

In Shipp, Defendant argued that a video of assault for which the Defendant was charged was not properly authenticated. Rejecting the Defendant's position, the Court found that the testimony of two eye-witnesses who observed the video being recorded and testified that the videotape fairly and accurately depicted the party, and the people present, "satisfied the requirement of MRE 901(a) by providing "evidence sufficient to support a finding that the matter in question is what its proponent claims." Additionally, the Court determined that alternatively:

The testimony of all the prosecution witnesses taken together established sufficient distinctive characteristics of the video's content, substance, and internal patterns, in conjunction with the circumstances, to authenticate the videotape[5].

***People v Davis,* unpublished per curiam opinion of the Court of Appeals, issued March 12, 2009 (Docket No. 281505), p 3.**

A Replicated Video Which Accurately Portrays an Initial Surveillance Recording Need Not Be Identical For Its Admission As An Original.

Defendant argued that the admission of a "replica" video of a 7-11 surveillance video was a violation of the best evidence rule because the admitted tapes lacked the time stamps of the originals. Affirming the trial Court, the Appeals Court noted that there was witness testimony indicating that the time stamps were only part of the 7-11 computer system and thus would only appear when watching the video on 7-11's computer. The Appeals Court concluded that the trial court did not abuse its discretion in determining that the "videos accurately reflected the data of the original surveillance recording, and thus were "originals" for purposes of the best evidence rule."

[5] Citing MRE 901(b)(4).

***People v Doster,* unpublished per curiam opinion of the Court of Appeals, issued December 5, 2013 (Docket No. 312015), p 3-5.**

Viral Internet Video was Properly Authenticated through Victims Identification of Video through Single Image Frame and Detectives Testimony About the Process of Videos Download.

In *Doster*, the Defendant challenged the trial courts admission of a viral pornographic internet video which he had allegedly shown to a minor, arguing that it was not authenticated and was therefore inadmissible. On Appeal, the Court rejected the Defendant's arguments and affirmed the Trial Court. The Court of Appeals determined that a detective's testimony that he found the video online and downloaded it – along with the victim's recognition of a still frame image from it, provided "***sufficient evidence that the video was what the prosecution claimed it to be***."

Though the Defendant argued that it was possible that the victim viewed an edited less offensive version, because she was able to identify the still image from the video, the Court found that

> ***Whether the child was shown the pornographic images within the admitted video is an issue that goes to the weight of the evidence and was a question of fact for the jury to decide.***

Noting that Courts are increasingly recognizing the value of internet evidence, the Appellate Court stated:

> ***Despite the fact that the nature of the video at issue – a viral internet video -is different than a video typically introduced in trials such as videos of crime scenes or confessions, the same rules of evidence apply...thus the central inquiry is still, given the plain language of the rule whether the proponent presented evidence sufficient to support a finding that the matter in question is what its proponent claims. (emphasis added)***

Citing Michigan's Supreme Court's decision in *People v Berkey,* 437 Mich 40, 52; 467 NW2d6 (1991) the Court in *Doster* expressed:

> ***Our case law regarding authentication does not require perfect authentication. "It is axiomatic that proposed evidence need not tell the whole story nor need it to be free of weakness or doubt. It need only meet the minimum requirements for admissibility. Beyond that our system trusts the finder of fact to properly sift through the evidence and weigh it properly.***

***People v Rocafort,* unpublished per curiam opinion of the Court of Appeals, issued December 27, 2005 (Docket No. 257031), p 4.**

Technicians Testimony that Security System Was Installed and Working Properly Was Sufficient to Authenticate Surveillance Video

Defendant argued that the trial court abused its discretion in admitting surveillance video into evidence because there was not testimony regarding the acceptability of recording methods. Rejecting this argument, the Court of Appeals noted that:

MRE 901 sets forth the requirements for authentication or identification of evidence such as a security video. It proves that the requirement of authentication is satisfied "by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Explaining that Technicians testified that the video security system was installed and working properly and that other witnesses also testified that the video accurately depicted their activities on the day in question, the Court found that the video met the requirements under MRE 901 for authentication and that the trial court did not abuse its discretion when it admitted it into evidence.

***United States v Knowles,* 623 F3d 381, 383 (CA 6, 2010)**

Court Found That Testimony of Witnesses Was Sufficient To Authenticate Copy Of Missing Original Video.

Where defendant challenged the introduction of video evidence because the FBI did not maintain the chain of custody, the 6th Circuit found that testimony by FBI agent who had made copies of original video and witness who identified herself in the copied video was sufficient to authenticate a copy of missing video footage. Moreover, the Circuit Court noted.

> ***A party must do more than merely raise the possibility of tampering or misidentification to render evidence inadmissible.[6] In fact, "[w]here there is no evidence indicating that tampering with the exhibits occurred, courts presume public officers have discharged their duties properly[7]." Absent a clear showing of abuse of discretion, "challenges to the chain of custody go to the weight of evidence, not its admissibility.[8]***

***United States v Rose,* 522 F3d 710, 712 (CA 6, 2008)**

Allowing Jury to Listen to CD of Admitted Audio Files Which Had Been Transferred From One File Format To Another For Trial Convenience Was Not In Error

In *Rose*, the Defendant argued the district court erred in allowing jury to listen to audio recordings which had previously been admitted into evidence and which had been transferred by prosecution from a file format that could only be played on laptop to a file format that could be played on C.D. Rejecting Defendant's argument, the Court noted that:

The only difference between the recordings when they were taken into the jury room and when they were admitted into evidence was the medium on which they were stored...***The use of CDs was simply a practical solution to the technical challenge of enabling the jury to play the digital recordings..."fa]n audio exhibit should not be relegated to muteness because it can be perused only through the use of a tape player."[9]...***The same principle holds for digitally recorded audio exhibits.

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[6] See also United States v Combs, 369 F3d 925, 938 (6th Cir. 2004);

[7] Allen, 106 F3d at 700.

[8] See also United States v Levy, 904 F2d 1026, 1030 (6th Cir 1990)

[9] See United States v Smith, 861 F.2d 722, 1988 WL 114817, (6th Cir 1988) (unpublished table decision) (quoting United States v Bizanowicz, 745 F2d 120, 123 (1st Cir1984))

***United States v Seifert,* 445 F3d 1043, 1045-1046 (CA 8, 2006)**

Modification of Surveillance Video (Including Its Conversion from Time-Lapse To Real Time) Did Not "Change" Image Or Rendered Evidence Inadmissible.

In *US v Seifert*, the Appeals Court found that the District Court did not abuse its discretion in admitting video which had been edited and enhanced by the prosecution. At a hearing outside the presence of the jury, the government presented an expert in electronic surveillance and video analysis, who described the computer program he used and the steps he took to enhance a surveillance video that was later played for the jury. (*Modifications included: enlarging the video, removing single camera view from a four-camera projection, brightening the suspect and his surrounding area, and converting the video from time lapse to real-time*). After reviewing both the original and enhanced videos, the district court admitted the enhanced video is noting:

It appears to the Court that the enhanced imagery depicts the same image [as in the original tape]. It does so in a fashion which does not change the image but assists the jury in its observation and viewing of the image, which will enhance their understanding. I find that it's still accurate, authentic and trustworthy, and under those circumstances, I will permit its use in the trial.

> On appeal, the Defendant challenged the videos admission arguing that the district court erred in admitting the enhanced video because the changes made to the video were not recorded so that "no one could know for certain whether it accurately reflected the original." In upholding the District Court's admission of the enhanced video, the 8th Circuit Court of Appeals found that although the expert did not keep copies of the images at each stage of enhancement, he described in detail each step of that process. Citing the expert's testimony, the Court of Appeals found that the District Court did not abuse its discretion in admitting the enhanced video noting that:

The government's witness "adjusted" the image without "changing" it..." There were no facts that tended to show that the edited or enhanced . . . videotape [was] inauthentic or untrustworthy.

***United States v Lundy,* 676 F3d 444, 447 (CA 5, 2012)**

Camtasia Video Capturing Online Chats Was Properly Authenticated Through Testimony of Officer Who Created Videos

In *Lundy*, the Defendant was convicted under 18 U.S.C. § 2422(b) (*Using the Facilities of Interstate Commerce (Yahoo IM) to Commit a Crime*) for attempting to persuade a 15 year to have sexual relations with him – a 15-year-old who was, in fact, an undercover officer posing as a minor. On appeal, Defendant argued that the chats between himself and the victim (*as well as Camtasia videos which demonstrated how the agent collected the chats*) should not have been admitted.

Asserting that an insufficient foundation was laid to authenticate this evidence, the Camtasia software; that he did not properly preserve the chats, and that there was no clear indication that the Defendant was "snicker2242002" (*the screen name captured in the video*). The

Defendant further claimed that because Camtasia software "is purposely used for editing video, that there[was] no proof that the video was what it purported to be" (*ie: an accurate representation of how the Defendant chatted with the "minor"*)[10]

The Appellate Court rejected this argument. Though expressing that there were several problems associated with the video and chat conversations (most notably that the videos were made 4 years after the actual crime), the Appellate Court noted that the record indicated that the trial court had held a detailed discussion with the witness (the undercover officer), viewed the videos, and subjected the witness to cross-examination through the Defendants counsel, all before finally admitting the evidence. Describing how the problems associated with the video did not render it inadmissible, the Appeals Court stated:

The problems are not enough to undermine the low bar for authentication of evidence. The jury rejected them as implausible or irrelevant by convicting Lundy and implicitly accepting the veracity of Giroux's testimony regarding the chats. We see no reason to overrule the decision of the district court.

***United States v Panzardi-Lespier,* 918 F2d 313, 318 (CA 1, 1990)**

Admission of Enhanced Audiotape Recording Into Evidence Was Not in Error Where Expert Who Enhanced Tape Testified About How and What He Enhanced.

***United States v Carbone*, 798 F2d 21, 24 (CA 1, 1986)**

Fact That Rerecording Had Been Enhanced to Improve Audibility Did Not Render It Inadmissible.

***United States v Gordon,* 688 F2d 42, 43-44 (CA 8, 1982)**

Affirmed Decision to Admit Filtered Versions of Audiotapes After The Person Who Filtered The Tapes Testified As To The Process And His Care And Control Of The Original Tapes

***Fountain v United States,* 384 F2d 624, 631 (CA 5, 1967)**

Admission Of Altered Audio Tape Copy Not In Error Where Alteration Improved Sound Quality For Jury

Where a significant degree of background noise would have interfered with the jury's ability to understand the substance of the conversations on an audio tape, the 5th Circuit Court of Appeals found that:

> ***The availability of a reliable method of removing the interference by making a copy and running it through the noise suppression device sufficiently justif[ed] the admission and use of the copy.***

[10] The Court in an endnote to its opinion described the Camtasia Software and how it was used by the Undercover Officer: ("Camtasia is a program which lets you record in video form your actions on a computer. These are often used to demonstrate to someone how to complete a task on the computer they are unfamiliar with... This recording of the actual computer screen is recorded using Camtasia and can be edited and shown back in a video. In this instance, it was used to show how Giroux "archived the chats and how he used the archive to create the chat log that [the government] introduced into evidence that [the government] will introduce into evidence again.")

Noting that the District Court found that the copy was an accurate reflection of the conversations transcribed on the original tape, and made the conversations more easily discernible, the 5th Circuit stated:

We have held that mechanical convenience for presentation to the jury is a sufficient ground to justify the introduction of a copy of a recording. Where a copy is proven accurate and serves to present the substance of the original in a more easily understood form, the spirit of the rule permits the admission of the copy.

***United States v Madda,* 345 F2d 400, 403 (CA 7, 1965)**

Affirmed decision to admit tape recording enhanced to remove background noise after court heard testimony from expert that enhanced tape truly and accurately reflected the substance of the original.

***Allen v Perry,* unpublished opinion of the United States District Court for the Western District of Michigan, issued August 17, 2015 (Docket No. 2:10-cv-365)**

Utilizing A Copy of Video Transferred from Surveillance System Onto DVD Was Not Violative Of MRE 1004

Defendant argued that a detective's presentation of a video that he had transferred from videotape to DVD and had edited to be more easily indexed was a violation of MRE 1004 (*Original Evidence Rule*). Asserting that because the original from which the video was taken existed (*the camera recordings at the location of the incident*), the original must be what is presented to the jury. Rejecting this argument, the court found that the originals (the DVRs inside the liquor store equipment) were copied onsite and were not admitted into evidence and so**: "consequently, the video shown to the Jury was arguably the "best evidence" available in evidence.**

***United States v Beeler,* 62 F Supp 2d 136, 148 (D Me, 1999)**

Re-Recordings of Videotapes By A Mechanical Or Electronic Objective Device That Accurately Reproduces The Original Images On The Tape Are 'Duplicates.'

***Wise v State,* 26 NE3d 137 (Ind App, 2015)**

Where CSC Victim Used Camcorder to Record Incriminating Video from Defendants Phone, Changed the Video's Original Titles, Had the Re-Recording Converted From VHS To DVD, And Testified That The Re-Recording Accurately Depicted Videos Seen On Defendants Phone, Then Re-Recording Was A Properly Authenticated Duplicate And Its Admittance Was Not In Error.

In Wise, the Defendants then spouse uncovered video on Defendant's phone showing him performing sexual acts on her, to which she did not recall nor consent. Not knowing how to retain video directly from the phone, the victim played these videos on Defendant's phone, recorded this playback on a handheld camcorder and replaced the phone video's date-stamp filenames with phrases to alert defendant of her discovery.

Subsequently convicted of multiple counts of CSC, the Defendant appealed his conviction, arguing that Trial Court 's admission of these "re-recordings" made by the victim from videos on Defendant's phone did not satisfy the requirements for authentication under the silent witness theory and also violated the original evidence rule.

The Appellate Court rejected all of Defendant's arguments. Describing the authentication requirements under the silent witness theory, the Court noted that:

> ***In cases involving the "silent witness" theory, a witness need not testify that the depicted image is an accurate representation of the scene on the day on which the image was taken... Rather, the witness must provide testimony identifying the scene that appears in the image "sufficient to persuade the trial court ... of their competency and authenticity to a relative certainty."***[11]

Describing the extensive testimony by the victim identifying herself and Defendant in the video, the Court noted that the victim testified to the accuracy of the video shown in court, as well as to how she had recorded this shown video from the videos found on Defendant's phone. Noting that the collective witnesses' testimonies were sufficient to authenticate the video, the Court refused to find an abuse of discretion in its admittance by the Trial Court.

Moreover, the Court found that though the victim altered the original videos titles, re-recorded the phone videos onto VHS, and had the VHS materials converted onto a DVD, the loss of the original videos and the lack of any evidence of tampering allowed for the admission of the Re-recording as a duplicate of the original video under Evidence Rule 1004(a), thus rejecting the Defendant's arguments and affirming the decision of the Trial Court.

***State v Pickens*, 141 Ohio St 3d 462; 2014-Ohio-5445; 25 NE3d 1023 (2014)**

Testimony from Apartment Manager About the Operation Of A Security System Was Sufficient To Authenticate Video Evidence Under The Silent Witness Theory.

In Pickens, the Defendant challenged his conviction because surveillance video admitted by the Prosecution had not been properly authenticated. While the Defendant argued that the Trial Court erred in admitting a video of security camera footage that had been spliced together from multiple surveillance camera clips by Police[12], the Ohio Supreme Court rejected this argument. Determining that that video footage obtained from an apartment complex's surveillance system was admissible under the "silent witness" theory, the Court noted that the property manager testified "from personal knowledge about the installation of the surveillance system, the positioning of the cameras, and the method used for recording the video taken inside and outside the apartment building."

Furthermore, the Court rejected the position that expert testimony was "required to substantiate the reliability of the surveillance system" noting that:

> ***Any objections Pickens may have as to the timing system or other quality problems with the video go to its weight, not its admissibility.***

[11] See Knapp v State, 9 NE3d 1274, 1282 (Ind 2014).

***State v Waver,* unpublished per curiam opinion of the Court of Appeals of Ohio, issued July 25, 2016 (Docket No. CA2015-08-155)**

Videos of Controlled Buys And "Money Drops" Were Properly Authenticated Under Evid. R. 901(B) Despite Date and Time Features of The Recordings Not Being Used

Following Conviction for drug offenses, the Defendant argued on appeal that video made by a confidential informant was improperly authenticated through witness testimony. Rejecting this argument, the Appeals Court found that Agent testimony as to the procedures used for CI recordings, the procedure's use in the Defendant's case, the Agent's receipt of the CI's recording, his familiarity with videos obtained, and his testimony as to the video's accuracy and fairness, were sufficient to authenticate the video, despite the absence of date and time stamps (which derived from the Agents error in programming the device).

Additionally, the Court rejected the Defendants argument that the admitted videos violated the best evidence rule. Noting that Evidence Rule 1003 provides that a copy or duplicate is admissible without requiring the proponent to show that he cannot produce the original...", the Court found:

> ***Evidence Rule 1003 essentially provides that duplicates are presumptively the equal of originals[...] "the burden is on the opponent of the duplicate to establish conditions requiring the use of the original."***[13]

Determining that the Defendant failed to provide any cogent reason for requiring the original video's use, the Court affirmed the Trial Courts decision.

***State v Vermillion,* unpublished per curiam opinion of the Court of Appeals of Ohio, issued March 14, 2016 (Docket No. 15CA17)**

Testimony of Police Officer Who Retrieved Video from Restaurant Surveillance System Was Sufficient To Authenticate Video.

Defendant challenged his conviction, arguing in part that surveillance video admitted into evidence by the prosecution had not properly authenticated. The Court rejected the Defendants arguments noting:

> ***The threshold standard for authenticating evidence pursuant to Evid.R. 901(A) is low, and "'does not require conclusive proof of authenticity, but only sufficient foundational evidence for the trier of fact to conclude that...[the evidence] is what its proponent claims it to be...'"; the proponent "only needs to demonstrate a 'reasonable likelihood' that the evidence is authentic.***

Importantly, the Court determined that authentication of video/pictorial evidence can accomplished in two ways; either through a "sponsoring witness" (one whom can testify from personal observation that the video is a fair and accurate representation of the subject matter) or alternately, under a 'silent witness' theory (theory espousing that the visual evidence "speaks for itself" and is "substantive evidence of what it portrays independent of a sponsoring witness.") While noting that testimony from someone knowledgeable of the recording process of the surveillance video "may be helpful to demonstrating authenticity,

[13] See Weissenberger's Ohio Evidence Treastise, Section 1003.1 (2015).

courts have not imposed it as an absolute precondition to admissibility under *Evid.R. 901(A).*"[14]

In contrast to *Pickens* (*where video was authenticated under the silent witness theory*), the Prosecution in *Vermillion* admitted surveillance video through the testimony of the Police Officer who had retrieved video from a restaurant where the alleged crime occurred. Citing the fact the officer testified to reviewing the video footage with a restaurant employee and that the "video accurately portrayed the scene as he observed it", the Court found that the officer's testimony was sufficient to properly authenticate the video.

Moreover, despite the Defendant arguing that the Prosecution had the burden of establishing the reliability of the date and time stamps on the video in question, the Court found only an initial showing of reliability was required to satisfactorily authenticate the evidence for admission.

***State v Coots,* 2015-Ohio-126; 27 NE3d 47 (Ohio App, 2015)**

Court Determined That Video Surveillance Footage Was Properly Authenticated When

Investigating Officer Testified That the Video Depicting the Crime Was the Same Video Taken From Surveillance Cameras In The Area

***State v Hoffmeyer*, unpublished per curiam opinion of the Court of Appeals of Ohio, issued August 20, 2014 (Docket No. 27065)**

Court Concluded That Trial Court Did Not Abuse Its Discretion by Admitting Video Surveillance Footage When Investigating Officers Testified That the Video Accurately Portrayed The Location On The Night In Question

People v Taylor,* 2011 IL 110067, 439; 956 NE2d 43, (2011*)

Proponent Need Not Show That Evidence Was Free from Tampering or Modification for Its Admissibility. Reliability of Evidence Goes to Weight, Which Is A Question For Jury.

Defendant appealed a Trial Court's decision to admit video evidence from a hidden camera system. The Court of Appeals reversed the trial court's judgment of conviction finding that: "the State failed to establish a proper chain of custody, failed to establish that the camera was working properly and the original DVR recording had been preserved, and failed to give an explanation of the process of copying the recording on the DVR to the VHS tape, concluding that the State failed to establish even the probability that the VHS tape had not been tampered with.

On Appeal, the Illinois Supreme Court rejected the Court of Appeals conclusions, finding instead that there was no evidence that the tape admitted at trial was the result of fabrication or tampering and that the Appellate Courts conclusions regarding the admissibility of video

[14] It should be noted that Michigan's Supreme Court has similarly refused to impose pre-conditions on admissibility under MRE 901. See People v Berkey, 437 Mich 40, 41, 467 NW2d 6, (1991).

evidence were flawed. Recognizing the legitimacy of the "Silent Witness Theory" for the admission of video evidence, the Supreme Court noted that:

> ***The circumstances of each case and, thus, the requirements to guarantee the genuineness of the evidence, will always differ.[15] Thus, while most courts set forth various factors to consider when assessing the process that produced the recording, these factors are not deemed exclusive foundation requirements...***

Importantly, the Supreme Court went on to reject the Appellate Court's conclusion that video evidence is subject to the best evidence rule. Noting that "*digital images placed and stored on a hard drive and transferred to a CD" made the CD "an original*", the Supreme Court rejected the Appeals Court's conclusion that the State had to establish that "no alterations deletions or changes had been made when the original DVR recording was copied" Instead determining that:

> ***Circumstances may make alterations, deletions, or editing 'necessary'" ...most editing will not render evidence inadmissible but rather will go to the weight of that evidence.[16]***

***State v Baker,* unpublished per curiam opinion of the Court of Appeals of Ohio, issued June 16, 2016 (Docket No. 15AP-224), p 2-4.**

Mere Possibility of Video's Manipulation Was Not Sufficient Grounds for Exclusion

Defendant asserted that admitting surveillance video was in error, arguing in part, that there was evidence that the time stamp could have been manipulated; and that the video shown in court was

"whittled down" from a longer one. Rejecting his arguments, the Appeals Court found that:

There was no evidence that the time stamp could have been tampered with... [i]n the absence of some reason to suspect that other parts of the video were potentially relevant, we find no evidence in the record to support that any other portion of the video footage available holds any importance...

***People v Roberts,* 66 App Div 3d 1135; 887 NYS2d 326 (2009)**

In Absence of Witness Testimony to Events Recorded in Video, Expert Testimony or Unbroken Chain of Custody Is Required for Authentication

In Roberts, the Defendant challenged his conviction, arguing in part that the admission of a videotape depicting the Defendant performing oral sex on the unconscious victim was in error.

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[15] See, e.g., United States v Oslund, 453 F3d 1048, 1054 (8th Cir 2006).

[16] The Court set out several examples of where editing of video evidence may be beneficial, noting that when "technical difficulties or distortions are addressed, editing may make the videotape evidence more understandable and thus more useful to the trier of fact." It also determined that in some cases, editing of video evidence may make "otherwise inadmissible videotape evidence admissible", such as when "unimportant, irrelevant, prejudicial, privileged or confidential material should be removed."

Agreeing with the Defendant, The Court of Appeals found that the Prosecution had failed to properly authenticate the video. Discussing how video evidence may be properly authenticated, the court expressed that:

> ***Typically, a videotape is authenticated by the testimony of a participant or a witness to the recorded events, such as the videographer, that the videotape is a complete and accurate representation of the subject matter depicted...[17] Where no witness or participant is available to testify, a videotape may be authenticated by the testimony of an expert that it " truly and accurately represents what was before the camera" and has not been altered."***

Noting that the prosecution had attempted to authenticate the tape through the "chain of custody method", the Court asserted that this method of authentication requires:

> ***...evidence concerning the making of the [video]tape] and identification of the [participants], that within reasonable limits those who have handled the [video]tape from its making to its production in court 'identify it and testify to its custody and unchanged condition.' "***

Expressing that the State had presented no testimony concerning the tape's creation, or who had access to it prior to the time it was found by the Defendants roommate, the Court asserted that the testimony of the Defendant's roommate and the Officer who had received the tape was insufficient for its authentication. Reflecting that expert testimony may have provided a sufficient foundation for the tape's admission, the Court noted:

> ***Had the People provided some other foundational proof-such as expert testimony that the videotape fairly and accurately depicted what was before the camera and that an analysis of it revealed no indication of alterations-" the gap in the chain of custody would affect the weight but not the admissibility of the tape***

The Court however determined that because it was not authenticated, the video's admission was an abuse of discretion by the trial court and remanded the case for retrial.

People v Ely, 68 NY2d 520; 503 NE2d 88 (1986)

Authentication of Audio Required Clear and Convincing Proof that Audio Tapes were Genuine and that They Were Not Altered

Defendant challenged the decision of the Appellate Division of New York's Supreme (Trial) Court) which affirmed defendant's conviction for murder, and which held that there was sufficient foundation for admission of tapes of conversations between defendant and her husband, whom she was accused of murdering.

Rejecting the Intermediate Appellate Court's conclusion, the senior Court of Appeals held that the predicate for admission of tape recordings in evidence was ***clear and convincing proof that the tapes were genuine and that they had not been altered.*** Finding an absent of such proof, the court concluded that the defendant's concession that the voice on the tapes was hers and that she recalled making some of the statements on the tapes did not exclude the

[17] Citing People v Patterson, 93 NY2d 80, 84, 688 NYS2d 101; 710 NE2d 665 (1999); People v Ely, 68 NY2d 520, 527; 503 NE2d 88 (1986); Zegarelli v Hughes, 3 NY3d 64, 69; 814 NE2d 795 (2004).

possibility of alteration and, therefore, did not sufficiently establish the tape's authenticity for their admission into evidence. [18]

***People v Becraft*, 140 App Div 3d 1706; 34 NYS3d 301, (2016)**

A Telephone Recording Was Properly Authenticated Where Victim and Officer Testified That Recording Accurately Reflected Complete Conversation Between Victim and Defendant. Such Testimony Eliminated Chain of Custody Requirement.

In *People v. Becraft*, Defendant challenged the Trial Courts admission of a Telephone recording, arguing that the People failed to establish a proper chain of custody for the recording. Rejecting the Defendant's argument, the Court of Appeals distinguished the Court's holding in Ely with the Defendant's case, stating that:

> ***The People laid a proper foundation for the admission of the recording through the testimony of both the victim and the officer who conducted the controlled telephone call that the recording accurately reflected the complete conversation between the victim and defendant...[19] Under those circumstances, the People were not required to show a chain of custody before seeking to admit the recording in evidence.[20]***

***People v Lind,* 133 App Div 3d 914; 18 NYS3d 786, (2015)**

Testimony of Officer and Dispatcher Was Sufficient to Authenticate 911 Tape by Clear And Convincing Evidence.

Defendant challenged Trial Courts admission 911 recording, arguing that the 911 call made by his adult son should not have been admitted into evidence. Rejecting this argument, the Court of Appeals stated:

> ***The testimony of the officer and dispatcher, taken together, provided the requisite foundation, consisting of "proof of the accuracy or authenticity of the tape by clear and convincing evidence establishing that the offered evidence is genuine and that there has been no tampering with it"[21]***

Noting also that the Defendants son had also testified that he had called 911 and that the voice on the recording was his, the Court rejected the totality of the Defendant's arguments and affirmed the Trial Court.

***Matter of Giresi-Palazzolo v Palazzolo*, 127 App Div 3d 752; 7 NYS3d 222 (2015)**

Testimony of Single, Interested Witness Was Sufficient to Authenticate Audio Recording

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[18] Comment: People v. Ely, appears to apply a more rigorous test for authentication than exists in most other jurisdictions. Ely establishes that New York requires clear and convincing proof for authenticating a recording - a more rigorous standard than that required in Michigan and other Jurisdiction which require a showing of "more probable than not." Additionally, Ely also appears to require that the introducing party show a recording lacks any alteration, rather than requiring that the challenger show that there was likely

[19] Citing People v Ely, 68 NY2d 520, 527; 503 NE2d 88 (1986).

[20] Citing People v Ely, 68 NY2d 520, 527; see also People v Dicks, 100 App Div 3d 528, 528; 954 NYS2d 83 (2012).

[21] Citing Ely at 527; see also People v Bell, 5 App Div 3d 858, 861; 773 NYS2d 491 (2004).

In *Palazzolo,* Court of Appeals found that Family Court did not err in admitting an audio recording of a conversation between the two parties in the case. Noting that the Respondent had testified that he had personally recorded the conversation, that the recording was a complete and accurate reproduction of their interaction, and that the recording had not been altered, the Appellate Court found that:

> ***This testimony, which the Family Court credited, constituted sufficient proof of the accuracy and authenticity of the recording to warrant its admission***

Thompson v State, 210 P3d 1233 (Alas App 2009)

State established authenticity and thus admissibility of audio recordings of two telephone conversations between defendant and victim's mother, in which defendant admitted to having sexual intercourse with 13-year-old victim, even though State failed to establish precise dates and times of two conversations; evidence showed that mother had engaged defendant in conversation about his relationship with victim, that mother recorded two of these conversations, and that she recorded the conversations sometime between time police delivered recording equipment to her and time when she telephoned officer to report that she had recorded two conversations with defendant, and mother testified that transcripts of recordings reflected the two conversations she recorded.

There is good reason to doubt that courts ever insisted on strict proof of all nine of these

suggested foundational requirements. For example, an attentive reader will observe that, according to the seventh and eighth of these listed requirements, the government must establish a chain of custody for the original physical audio tape. This appears to be inconsistent with the "best evidence" rule codified in Alaska Evidence Rules 1001 through 1004. Under Evidence Rule 1003, any duplicate of an audio tape—that is, any "counterpart produced by ... electronic rerecording", see Evidence Rule 1001(4)—is "admissible to the same extent as an original" (absent a genuine question concerning the authenticity of the original from which it was made, or other circumstances making it unfair to admit the duplicate in lieu of the original).

In fact, Professors Imwinkelried and Blinka acknowledge that "courts have begun to liberalize the standards for admission of tape recordings" and that "many modern courts are no longer insisting on the traditional, strict foundation".[8] This is because "courts have gone back to fundamentals and [have] begun to treat the question of a tape recording's authenticity as a simple question of authentication under Federal [Evidence] Rule 104(b)."[9] Thus, the modern test for authentication "is ... [whether] the proponent [of the evidence has] presented sufficient 1239 evidence to support a rational finding [that] the tape recording is authentic".[10]

***Bichiok v State*, ___P3d___; 2014 Alas. App. WL 1017183 (Ct App, Mar. 12, 2014)**

As this Court recognized in *Thompson v State,*[6] the modern test for authentication is "whether the proponent of the evidence has presented sufficient evidence to support a rational finding that the tape [or video] recording is authentic."[7] Here, the State was able to authenticate the video through the collective testimony of various police officers who were able to identify the hotel room, the victims, and the suspects in the videos through various distinguishing features, including the red liquid spilled in the room, the broken hotel mugs, and the clothes worn by the suspects. In addition to this testimony, the State also had the testimony of Eric Estrada,

who testified that the men suspected of committing the robbery and assault had bragged about making a video of their crimes and had shown him a video on a cell phone.

***United States v Ellis,* unpublished opinion of the United States District Court for the Eastern District of Michigan, issued May 23, 2013 (Case No. 12-cr-20228)**

Challenged text messages not hearsay.

First, many of the text messages are questions or commands; questions and commands are not statements covered under the hearsay rule. *United States v Wright*, 343 F.3d 849, 865 (6th Cir.2003) ("a question is typically not hearsay because it does not assert the truth or falsity of a fact. A question merely seeks answers and usually has no factual content."); see also *United States v Rodriguez–Lopez*, 565 F.3d 312, 314–15 (6th Cir.2009). The text messages that are in the form of questions and commands are not statements because they do not contain an assertion and, therefore, are not inadmissible hearsay.

***United States v Farrad*, 895 F3d 859 (CA 6, 2018)**

Government relied primarily on Defendant's Facebook photos to prove he was a felon in possession of a firearm. The Defendant argued that the district court erred in admitting the Facebook photos into evidence. The Court held that the photos were not self-authenticating business records, but admission was proper under Rule 901(a).

***People v Pettes*, unpublished per curiam opinion of the Court of Appeals, issued May 25, 2017 (Docket No. 330711)**

Defendant asserted on appeal that the trial court abused its discretion when it allowed the admission of two photographs taken from the defendants supposed Facebook page—each which depicted the defendant holding a handgun. The defendant argued these photos were improper propensity under MRE 404(b), unfairly prejudicial under MRE 403 and lacked adequate foundation. The Court held that the Facebook images were relevant to the case at hand. Further, the Court found that under MRE 901 adequate foundation was laid. The officer-in-charge testified that the Facebook page in which the images were received boar the defendant's name and the name of the defendant's gang and included photos that looked like the defendant. The jurors were able to determine if the photos were of the defendant. The Court also noted that even though the name on the Facebook was spelled incorrectly the foundational requirement of MRE 901(a) had been satisfied.

***United States v Grant*, ___MJ___; 2011 WL 6015856 (AF Ct Crim App, Oct. 17, 2011)**

Defendant asserted on appeal that the trial court abused its discretion when it allowed the admission of Facebook messages retrieved from the complainants Facebook account, authenticated by the complainant as messages between her and the defendant. The defendant argued that the messages were not properly authenticated under Mil. R. Evid. 901. The Court held that the Facebook messages were properly authenticated where the messages were sent from a "Mike Grant," the photograph from the account was the defendant in his military uniform, and the complainant testified about the proximity in time to meeting the defendant

and receiving the messages and about making plans to meet with the defendant via Facebook messenger.

IMPEACHMENT

***People v Donald,* 103 Mich App 613, 303 NW2d 247 (1981)**

In a trial for felonious assault, after establishing a proper foundation, prosecutor used a recording of preliminary exam testimony for impeachment purposes under MRE 613. The trial court allowed it and gave an instruction to the jury, cautioning them to use it for impeachment purposes only and not assign any substantive value to it. Defendant argued on appeal that under the rule, he may only be impeached with "written statements" and that tape recorded statements did not qualify under the rule. The Court of Appeals cited to *People v Johnson*, 100 Mich App 594, 300 NW2d 332 (1980).[22] Which held a witness may be impeached with a tape recorded statement even though a tape recorded statement is not a "written statement" within the plain meaning of MRE 613.

***Chiasson v Zapata Gulf Marine Corp,* 988 F2d 513 (CA 5, 1993)**

The Fifth Circuit considered whether a post-accident surveillance video constituted substantive evidence in addition to merely impeachment evidence in a personal-injury case. The Fifth Circuit defined "substantive evidence" as evidence that "is offered to establish the truth of a matter to be determined by the trier of fact." *Id*. at 517. The plaintiff, Chiasson, claimed that because of her injury she had suffered "great physical and mental pain and anguish," and she sought damages to "loss of enjoyment from the activities of her normal life." *Id*. The court therefore noted that "the severity of [Chiasson's] pain and the extent to which she has lost the enjoyment of normal activity are among the key issues a jury must decide in calculating her damages." *Id*. The court concluded that evidence that "would tend to prove or disprove such losses" should be considered "substantive" evidence. *Id*. The court also noted that Chiasson had testified at trial that she is able to engage in her usual daily activities, but that she cannot do so "for too long of a period of time" before she starts to feel pain. *Id*. The court doubted whether the surveillance video at issue "discredits her testimony at all," but still ultimately held that not only did the video constitute substantive evidence, instead of merely impeachment evidence, but that the importance of the video was "obvious."

***Baker v Canadian National/Ill.Central Railroad,* 536 F3d 357, 369 (CA 5, 2008)**

After his accident, Baker alleged that his injuries and post-accident limitations included "the inability to count money, make change, or be in crowds." *Id.* Illinois Central offered a surveillance video that depicted Baker "spending long periods of time in casinos," and Baker

[22] In Johnson, the Court applied a broad definition to the term "written" as it appears in MRE 613(a).

argued, among other things, that the video "informed jurors that he engaged in activities many people consider immoral." *Id.* The Fifth Circuit held, pursuant to *Chiasson*, that this video constituted substantive evidence. *Id.* The court also noted that the issue of Baker's "post-accident quality of life was hotly disputed" and that Baker's witnesses "testified in detail regarding the allegedly severe post-accident limitations Baker face[d]." *Id.* The court ultimately concluded that the probative value of the video that contradicted Baker's witnesses "weighs heavily against a hypothetical juror's moral aversion to gambling." *Id.* The court held that the trial court did not abuse its discretion by admitting the surveillance video. *Id.*

***James v Carawan,* 995 So 3d 69 (Miss, 2008)**

The Mississippi Supreme Court addressed whether the trial court abused its discretion in excluding a post-accident surveillance video of the plaintiff, who had injured her back, riding rollercoasters at a Six Flags amusement park. In concluding that the trial court did abuse its discretion in excluding the video, the court noted that "[a] reasonable juror could conclude that the Six Flags video casts doubt on the severity of Carawan's injuries," that "a reasonable juror might conclude that the Six Flags video has a tendency to show that Carawan may not have been as weakened or vulnerable as she indicated to her doctors or as her medical treatments suggest," that "[t]he video also could have been relevant to whether or not she truly had been unable to work," that the video was relevant to the question of appropriate damages for pain and suffering, and that "this video might shed doubt upon the merits of Carawan's case as a whole." The Court found the video was relevant. Aside from its damaging effect to Carawan's case, the Court was unable to determine how its admission would unfairly prejudice Carawan. A reasonable juror could understand that the video calls into question the severity of Carawan's injuries prior to July 29, 2003, and therefore challenged the necessity of at least some of her medical expenses, the validity of her lost wages, the extent of her pain and suffering, and the legitimacy of her entire claim.

***People v Thompson,* unpublished per curiam opinion of the Court of Appeals, issued September 28, 2010 (Docket No. 292280)**

Defendant sought to use a three-second video to impeach the complaining witness; the trial court refused to allow the movie's use. Defendant appealed saying he had the right to impeach witnesses with this media under MRE 613. The Court, *citing People v Donald,* 103 Mich App 613, 617; 303 NW2d 247 (1981), held that tape recordings, though not expressly within the plain-reading of the evidence rule, were admissible for impeachment purposes. The Appeals Court, however, refused to find for the Defendant as the complainant was present and able to testify to the apparent inconsistency alleged.

***People v Moore,* unpublished per curiam opinion of the Court of Appeals, issued September 27, 2011 (Docket No. 298400)**

Moore presented a fact situation very similar to that in *Vann*, in that the prosecutor used a witness' prior statements for impeachment. Though the impeaching "document" was the prosecutor's own notes, the prosecutor established that they were his own "verbatim" recording of Smith's statement from the interview. These notes, once the foundation covered

in *Vann* was laid, constituted extrinsic evidence of a prior statement upon which he could be impeached.[23] Unique to *Moore* is that the court specifically instructed the jury, again, "that the statements and questions of the lawyers were not evidence, and that the jury should consider them only to the extent that they give meaning to the witnesses' answers."[24]

[23] Citing People v Jenkins, 450 Mich 249, 256; 537 NW2d 828 (1995).

[24] Comment: The text MRE 613(a) requires the impeaching document to be shown to the witness; it does not say how that document is to be shown. A generous interpretation of the rules' wording could allow for the digital presentation of the document. A curative instruction, as the one given in Moore, could then prevent a jury from taking the digital representation of the document out of context or misunderstanding the presentation's purpose. See People v. Donald, 103 Mich App 613; 303 NW2d (247).

People v Damitrice Deshawn Vann, **unpublished per curiam opinion of the Court of Appeals, issued June 19, 2012 (Docket No. 304041)**

Defendant appealed his convictions arguing, partly, that the prosecution improperly used a witness' previous testimony to impeach him at trial. The Court of Appeals disagreed with the Defendant, finding the prosecutor "properly used [the witness's] interview to impeach...pursuant to MRE 613(a)." Specifically, the prosecutor questioned the witness about a prior statement as provided by MRE 613. The prosecutor laid a proper foundation concerning the prior statement.[25] Witness Perry was properly impeached by his prior statement because he testified that Defendant Vann did not have a gun.[26] [27]

The court elaborated further:

> ***When a party attempts to impeach a witness or refresh the witness' memory with a prior inconsistent statement made by that witness, a proper foundation must be laid by questioning the witness concerning the time and place of the statement and the person to whom it was allegedly made.[28] "Once a foundation is properly laid and the witness either admits or denies making the statement, the witness may be impeached by proof of that statement."[29]***

Diamond Offshore Servs. v Williams**, 542 SW3d 539 (Tex, 2018)**

Diamond Offshore challenged the trial court's decision to exclude its proffered post-incident surveillance video, an eighty-minute video that depicted Williams performing various outdoor tasks, such as using his excavator to haul debris and working on a vehicle, over the course of three days in December 2012. The video only reflects Williams's outside activities and does not reflect what he did when he was not outside or whether he was in pain because of his activities. During his testimony, Williams acknowledged that he could perform the activities depicted in the surveillance video, although he emphasized that he could only engage in these activities for short periods of time before he felt pain and that he would be in pain later after engaging in these activities. The Court held that the change in scenery and clothing, plus the prominent date-and-time stamp, make clear that two different days are shown on the video footage. Further, jurors can be expected to understand that a half-house segment does not purport to represent an entire day. The Court found that if the jury were to have seen the video

[25] Citing People v Rodriguez, 251 Mich App 10, 34-35; 650 NW2d 96 (2002).
[26] Citing People v White,139 Mich App 484, 488; 363 NW2d 702 (1984).
[27] Comment: The Court noted the witness testified that the Defendant did not carry a gun at trial. The prosecutor referenced the witness' previous interview with police. The prosecutor asked the witness "...if he had read the transcript of the interview, showed him the transcript, and the witness remembered the interview." The prosecutor then read a portion of the interview, including the witness' statement, "I've known him [Defendant] for carrying a gun." When the prosecutor again asked the witness if Defendant had a gun, witness denied saying Defendant Vann had a gun.
[28] Citing Rodriguez, 251 Mich App at 35.
[29] Citing White, 139 Mich App at 488

Williams would have been free to explain what he did the rest of those days and how he felt during and after the activity shown. Therefore, the prejudicial effect of the video did not outweigh the video's probative value and should have been played for the jury.

SUBSTANTIVE EVIDENCE

***People v Taylor,* 2011 IL 110067; 956 NE2d 431 (2011)**

Surveillance video of the defendant committing the crime was taken on a digital medium and transferred to VHS for trial. Defense continually objected on foundational grounds, arguing that it had not been shown the camera worked properly. The Illinois Court of Appeals, after discussing the "silent witness theory,"[30] found the tape inadmissible due to problems associated with demonstrating chain of custody, the camera worked properly, the original digital recording was preserved, and how the digital to VHS transfer took place. The Illinois Supreme Court agreed with the issues the Court of Appeals examined, but disagreed with its analysis, finding adequate support for each foundational factor within the trial record and under Illinois law. The tape was admitted, and the defendant's conviction affirmed.

***People v Tomei,* 2013 IL App (1st) 112632, 45; 986 NE2d 158, 166 (2013)**

This case is after *People v. Taylor*. Defendant argued that the foundation for the video evidence must be judged against the factors set forth in *Taylor*. However, the *Taylor* factors are not applicable to the instant case because the appellate court in *Taylor* used the factors to determine the admissibility of a videotape used under the 'silent witness' theory. In the instant case, the State did not offer a videotape into evidence, but instead heard Calistro's eyewitness testimony about what he observed on the live video feed. Illinois courts have held that a witness's testimony regarding what that witness observed on a live video requires only foundation proof that the video system was functioning properly at the time the images were depicted by the witness. The foundational consideration is a lower standard than the one used when admitting a video tape under the 'silent witness' theory.

Defendant claimed that the camera system malfunctioned because it did not record the video as it was designed to do. However, a witness, Calistro, did not testify that the camera system was broken. Instead, he testified that the record function on his laptop was turned off. There is no other evidence in the case at bar to suggest that the camera system was malfunctioning. The court concluded there was sufficient evidence for a rational trier of fact to find that the security camera system was working properly.

[30] That "photographic or videotape evidence may be admitted without an eyewitness to establish the accuracy of the images depicted if there is sufficient proof of the reliability of the process that produced the photograph or videotape."

***People v Musser,* 494 Mich 337; 835 NW2d 319 (2013)**

John Musser, the defendant in this case, was accused of sexually touching an 11-year-old girl while she was pretending to sleep on a couch at Musser's home. Two Kent County detectives interrogated Musser and videotaped the interview. During the interview, Musser denied touching the girl in the way she had described; the detectives made various comments, including, "Why is she gonna put herself through that if it didn't happen?" and "Kids don't lie about this stuff" and "That's [the girl's allegations] pretty credible; that's pretty detailed."

Musser's attorney objected to some police statements in the video. But the circuit court judge allowed the jury to view and hear much of the video, including the detectives' statements. Afterward, the judge instructed the jury that, "The questions of the lawyers are not evidence, only the answers of a witness are evidence." Similarly, as to the video, the jury could only consider Musser's answers to the detectives' questions; the judge cautioned the jury that the detectives' comments and questions were not evidence.

In this case, the circuit court abused its discretion by failing to redact the majority of the detectives' out-of-court statements from the interrogation recording in which they commented on credibility; most of the statements had no probative value and, even if there was some probative value to the statements that the trial court erroneously failed to redact, the prejudicial effect of the remaining statements outweighed any probative value because of the dangers inherent in child-sexual-abuse cases. Admission of the statements undermined the reliability of the verdict because the jury may have relied on the detectives' repeated out-of-court statements regarding the complainant's credibility, there was a lack of physical evidence and the comments created an aura of expertise for the one police investigator. The belated limiting instruction did not cure the error.

This is an interesting case that could have the net effect of requiring lawyers to litigate what questions (from a defendant's interview) can be heard by the jury. Since most defendant interviews are video recorded, this would force lawyers to have to redact video interviews pursuant to court orders.

DEMONSTRATIVE EVIDENCE

***Van Houten-Maynard v ANR Pipeline Co.,* 1995 WL 317056, at *12 (NDIll, May 19, 1995)**

A federal district court granted a motion in limine with respect to the use of computer animation where the defendant did not receive timely notice of the plaintiff's intention to use it. The court concluded that the failure to provide timely notice of this evidence "severely prejudiced [the defense] in its ability to respond to the credibility, reliability, accuracy and materiality of [the] evidence."

Comment: *Most PowerPoint presentations--either used as demonstrative aids in argument or as actual evidence akin to a report--would not be considered computer animations. Computer animations are often based on scientific calculations.*

***Indus. Recycling Servs., v Rudner,* 2002-Ohio-4068 (Ohio App, 2002)**

Defendants in this civil case retained an expert who used a PowerPoint presentation as a "visual aid" to his testimony; the PowerPoint was a compilation of other items already in evidence. Plaintiff appealed adverse verdict, arguing the trial court erred in allowing the expert to use the PowerPoint when it had not been presented in discovery. As the slides were not placed into evidence and was, itself, a compilation of already discovered evidence, there was no error in allowing the PowerPoint's usage.

***Perry v Univ. Hosp. of Cleveland,* 2004-Ohio-4098 (Ohio App, 2004) (Corrigan J., dissenting).**

Perry, a patient of the hospital, brought a medical malpractice action against the doctor and hospital and appealed on the grounds that an electronically manipulated ultrasound image which was not disclosed to the patient prior to trial should not have been admitted. Justice Corrigan said, "it is not unusual nor novelty to have an exhibit enlarged or blown up for the purposes of presenting it to the jury as a visual aid." The enlarged version of the subject ultrasound was simply an enlargement of Exhibit 2, which was admitted into evidence.

***People v Armstrong,* unpublished per curiam opinion of the Court of Appeals, issued December 14, 2017 (Docket No. 332793)**

Compilation of Admitted Videos Was Demonstrative Aide - Its Use in Closing Arguments Was Therefore Proper

"Defendant also argues that the prosecutor committed misconduct by showing the jury a compilation video during closing argument. More specifically, he argues that there is a "substantial difference between raw evidence (which was admitted) and evidence which is constructed/created from that raw evidence using unknown methods and/or safeguards." He then argues that the prosecutor could not rely on the newly "created evidence" in his closing argument because to do so involved reliance on evidence that was not admitted at trial. Defendant further suggests that the compilation would not be admissible under MRE 1006."

In assembling the videos in a particular order and highlighting certain images, the prosecutor did not offer new evidence, nor did the prosecutor distort the video images that had been admitted into evidence. Instead, the prosecutor simply used admitted video evidence during closing arguments as a demonstrative aid. We see nothing improper in the prosecutor's use of a demonstrative aid during closing arguments, and defendant has not shown plain error. (*Citation Omitted*)"

***People v Batchelor,* unpublished per curiam opinion of the Court of Appeals, issued June, 22, 2017 (Docket No. 330312)**

> Video of Officer "Picking" Lock Was Demonstrative Evidence Which Helped Validate His Testimony
>
> "Batchelor did not object to Laplant's testimony that he had observed that the type of lock at the victim's home could be "easily defeated with a plastic card." The demonstrative video was related to evidence in the case, and it validated what Laplant described in his testimony about the possibility of using a credit card to enter the victim's home without leaving signs of a forced entry."

***People v Levack,* unpublished per curiam opinion of the Court of Appeals, issued May 20, 2014 (Docket No. 311630), p 8.**

> Exhibit Showing Cell Tower Locations Was Properly Used As Demonstrative Evidence
>
> "In this case, defendant asserts that an exhibit showing the location of cell-phone towers in Iron Mountain, Florence, and Crystal Falls did not show scale, and demonstrated that the coverage ranges of the towers were larger than they actually were. This claim is completely frivolous. The exhibit in question appears to have been a helpful visual aid that showed the physical path of phone calls made by the subject number. And it does not seem as if the prosecutor argued that the depicted ranges of the cell-phone towers were representative of their actual ranges. To the extent that the exhibit depicted inaccurate ranges, defense counsel was able to say so [...] Accordingly, the trial court did not abuse its discretion when it admitted the exhibit as a demonstrative aid, and defendant's right to a fair trial was not violated."

***People v Keys,* unpublished per curiam opinion of the Court of Appeals, issued January 16, 2014 (Docket No. 312801), p 3.**

> Use of Cell Phone Records to Show The General Location Of The Defendant Was Proper
>
> Detective Wakefield used cell phone records to determine, within a general area, where defendant was located when he made or received specific calls. This evidence was then used to determine that defendant was not in a specific location—Gallery Tattoo. The information provided in defendant's brief relates to placing an individual at a specific location—for purposes of a 911 call or to determine if that individual was at or near the crime scene. There is an important distinction between concluding that an individual was not in a specific place at a specific time, as opposed to affirmatively stating that an individual was at a particular location at a particular time."

***Audi v A J Estay, LLC,* unpublished per curiam opinion of the Court of Appeals, issued December 3, 2015 (Docket No. 321418)**

Admission of "Condensed" Video Was Not Abuse of Discretion

"In this case, plaintiff has failed to show that the trial court abused its discretion when it admitted the condensed video. Plaintiff's counsel had the opportunity on redirect examination to question plaintiff about any alleged inconsistencies between the full-length video and the condensed video. Plaintiff did not identify any inconsistencies. Moreover, both the full-length and condensed versions of the video were admitted into evidence and provided to the jury. Thus, the jury was free to consider both videos and weigh any alleged inconsistencies. In short, plaintiff has failed to demonstrate that the trial court's decision to admit the condensed video fell outside the range of reasonable and principal outcomes. (*Citation Omitted*) Therefore, plaintiff is not entitled to relief on this issue."

***People v Nelson*, unpublished per curiam opinion of the Court of Appeals, issued July 30, 2009 (Docket No. 283567), p 14.)**

Prosecutors Playing of Video Clips During Closing Arguments Not In Error

"By playing the video clips, the prosecution conveyed an accurate representation of Swank's, Johnson's, and Baisden's testimony in a manner that the prosecutor determined would forcefully convey her argument to the jurors. The prosecutor did not commit prosecutorial misconduct simply because she accurately presented evidence from the trial to the jurors in a manner that Williams dislikes.

***People v Li-Hua Wei*, unpublished per curiam opinion of the Court of Appeals, issued October 17, 2013 (Docket No. 308353), p 11.**

Medical Diagram Used by Prosecutor During Examination Of CSC Victim Was Relevant And Not Prejudicial As It Merely Illustrated The Victim's Testimony

"At trial, the prosecution asked the victim to color in the areas on the diagram where defendant touched her. After the victim colored the area immediately surrounding the vaginal opening, the prosecution confirmed with the victim that defendant touched the areas immediately surrounding the vaginal opening, but he did not touch inside the vaginal opening. This evidence was relevant to assisting the jury in determining whether defendant committed penetration, an element of first-degree criminal sexual conduct [....] Moreover, the diagram was not unfairly prejudicial because it was a standard medical diagram of the female anatomy and it merely illustrated the victim's testimony. The trial court did not abuse its discretion in admitting the evidence."

***People v Bulmer,* 256 Mich App 33; 662 NW2d 117 (2003)**

Computer Animated Slide Showing Simulation was Demonstrative Evidence When Presented with Expert Witness Testimony

Prosecutor admitted a computer-animated slide show simulation of shaken-baby syndrome in conjunction with an expert witness' testimony. The simulation was a basis for the expert's testimony and was not intended to be an exhibit. The trial court found it "demonstrative evidence pursuant to MRE 702 and 703" to explain what happens to an infant's brain during a shaking episode. Furthermore, the Court defined the demonstrative evidentiary standard:

Demonstrative evidence is admissible when it aids the factfinder in reaching a conclusion on a matter that is material to the case.[31] The demonstrative evidence must be relevant and probative. *Id.* Further, when evidence is offered not to recreate an event, but as an aid to illustrate an expert's testimony regarding issues related to the event, there need not be an exact replication of the circumstances of the event.[32] The Court allowed the animation.

Comment: Some shaken baby syndrome diagnoses have recently been challenged. *See* https://www.washingtonpost.com/graphics/investigations/shaken-baby-syndrome/

***People v Unger*[33], 278 Mich App 210;749 NW2d 272 (2008)**

Defendant was convicted of murdering his wife by causing her to fall from the deck of a boathouse. Competing experts testified the victim died from either (1) traumatic brain injury following an impact with concrete or (2) drowning after being dragged or moved into the local lake. A defense expert presented several computer animations. The images based on calculations and understanding of the victim's fall were admitted; those based on the expert's speculation were excluded. Following conviction, the defendant alleged the exclusion denied him a right to present a defense. The Court of Appeals upheld the exclusion after reexamining, and affirming, the state of demonstrative evidence law in Michigan, then added:

Beyond general principles of admissibility, the case law of this state has established no specific criteria for reviewing the propriety of a trial court's decision to admit demonstrative

evidence." *People v Castillo,* 30 MichApp. 442, 444; 584 NW2d 606 (1998). However, "[a]s with all evidence, to be admissible, the demonstrative evidence offered must satisfy traditional requirements for relevance and probative value in light of policy considerations for advancing the administration of justice." *Unger* at 247.

[31] Citing People v Castillo, 230 Mich App 442, 444; 584 NW2d 606 (1998).
[32] Citing Lopez v Gen. Motors Corp.,224 Mich App. 618, 628 n. 13;569 NW2d 861 (1997).
[33] Comment: Unger was distinguished by People v Baker, 2009 WL 723851 (2009) and People v Miclea, 2009 WL 1693398 (2009). Baker addressed allegedly overly prejudicial prosecutor's statements (error) during prosecutor's rebuttal, nothing about animations. Miclea covered the defendant's right to present evidence of his or her defense, nothing about demonstrative evidence or animations.

***People v Countryman,* unpublished per curiam opinion of the Court of Appeals, issued July 16, 2015 (Docket Nos. 316913 and 316919), p 5.**

> "Re-creation" evidence is only admissible if it "faithfully reproduces the conditions that existed at the time in question." In contrast, when evidence is offered, not to recreate an event, but as an aid to illustrate a witness's testimony regarding issues related to an event, "there need not be an exact replication of the circumstances of the event. Instead, demonstrative evidence is generally admissible if it is relevant and not unduly prejudicial.

***Rodgers v Taras,* unpublished per curiam opinion of the Court of Appeals, issued September 15, 2015 (Docket No. 321730), p 21.**

> Plaintiff argues that the trial court abused its discretion when it permitted Maturen to use reconstructed coronal and sagittal images of plaintiff's CT scan because the reconstructed images were colored and enlarged, rendering them dissimilar to the original images and consequently irrelevant.
>
> This case was about whether Kamienecki breached the standard of care in reporting that the radiographic features of plaintiff's lesion were compatible with renal cell carcinoma. The images illustrated Maturen's testimony and were relevant and probative in supporting Maturen's opinion that Kamienecki did not breach the standard of care in reporting that the lesion was compatible with renal cell carcinoma. To the extent plaintiff argues that the images are imprecise, this Court has noted that "when evidence is offered not in an effort to recreate an event, but as an aid to illustrate an expert's testimony regarding issues related to the event, there need not be an exact replication of the circumstances of the event."

***People v Cole*, unpublished per curiam opinion of the Court of Appeals, issued December 15, 2015 (Docket No. 320016), p 7.**

> "Four photographs were admitted in this case. In the photographs, a doll was used to represent the victim and a police officer was used to represent defendant. The photographs depicted the scene
>
> on the ATV as described by Leaveck and were relevant to illustrate his testimony. Leaveck testified that the photographs were in the exact location and that they were a fair and accurate representation of how the woods looked, with the exception of some added foliage. Because the photographs illustrated Leaveck's testimony regarding a material issue in the case (i.e., that he saw defendant engaged in what appeared to be sexual contact with the victim), the photographs were relevant. See Bulmer (After Remand), 256 Mich.App at 35 (holding that demonstrative evidence was relevant and that "[i]t illustrated [a witness]'s testimony regarding a material issue relating to the case"). The photographs also assisted the jury in judging Leaveck's credibility as to what he saw. A witness's credibility is always relevant." (*Citation Omitted*).

***Brown v State,* 550 So 3d 527, (Fla App 1989)**

This case does not mention PowerPoint, but it gives a good review of the use of demonstrative evidence. Always be sure your slides reflect the evidence admitted during the trials.

***Commonwealth v Serge,* 837 A2d 1255; 2003 PA Super 470 (2003)**

Defendant was convicted of first-degree murder for fatally shooting his wife and appealed, asserting several errors with the trial judge's instructions, and also contesting the admission of a "computer-generated animation used to illustrate the expert witness testimony of the crime. Before the animation was played in court, the trial judge gave a cautionary instruction to the jury. The Court on appeal approved the judge's instruction, holding that the trial court "duly minimized any possible prejudice" with its timely and thorough instruction.

***In Re Commitment of Charles Philip Anderson,* 392 SW3d 878 (Tex App, 2013)**

During the testimony of the State's expert, the State's attorney used an ELMO to display questions and text incorporating incomplete portions of relevant statute. Following defense objections, the court ruled it could stay visible to the jury as it was "essentially...the question that the jury is asked...that definition is given to them in the jury charge. It is not an incorrect statement of the law." On appeal, the defense argued this demonstrated judicial bias, but the Texas Court of Appeals reiterated the broad discretion trial judges are allowed in handling cases. When taken in context, the Court of Appeals found the trial court allowed the question to remain on the *ELMO* to "keep in mind what the goal is here."

COMPILATIONS/SUMMARY EVIDENCE

***Commonwealth v Serge,* –586 Pa 671; 896 A2d 1170 (2006)**

During trial, the prosecutor presented a computer-generated animation as demonstrative evidence to illustrate the cumulative testimony of two experts, thereby expressing the theory of the people's case. The court instructed the jury on the "purely demonstrative nature" of the
animation before its presentation and during the jury instructions at the close of proofs. The Pennsylvania Supreme Court treated the animation as any other piece of demonstrative evidence (with similar findings of law as Michigan), noting that "demonstrative evidence continues to evolve as society advances technologically." The court then weighed the probative vs. prejudicial nature of the evidence. As it helped the jury understand technical testimony, and was neither inflammatory nor emotionally evocative, the animation was admitted.

***People v Turner*, unpublished per curiam opinion of the Court of Appeals, issued November 25, 2003 (Docket No. 245376)**

Rule 1006-Summary Evidence

Further, defendant argues, the composite videotape would not qualify as a summary of voluminous recordings under MRE 1006, because it did not "accurately summarize" the original videotapes in a neutral fashion, but rather slanted the contents of the originals in the prosecutor's favor. MRE 1002 allows the use of copies when otherwise authorized by the court rules. MRE 1003, which governs the admissibility of duplicates, was not offended because defendant did not raise a genuine question as to the authenticity of the original videotapes from which casino personnel duplicated a summary, and defendant has not shown that it was unfair under the circumstances to admit the duplicated summary in lieu of the originals. Further, contrary to defendant's argument, MRE 1006 must be read in harmony with MRE 1004 to allow the use of summaries even when original source documents have not been lost or destroyed.

***Shively v Shively*, 680 NE2d 877 (Ind App, 1997)**

Rule 1006-Summary Evidence

Court ruled that a law clerk's compilation of voluminous payroll records was appropriate.

Stewart v. Follis, 140 Tenn. 513, 521, 205 S.W. 444 (1918)

Summaries of the contents of voluminous records are admissible.

LAY WITNESS/EXPERT TESTIMONY

***People v Fomby,* 300 Mich App 46, 53; 831 NW2d 887 (2013)**

All relevant identification case law derives from this case—witnesses may identify defendants in video or photographs although they may not have been present for the crime(s) or at the scene(s) depicted. The appellate court considered whether a certified video forensic technician with the police department could comment on video evidence regarding the identity of individuals in still photographs when compared to surveillance footage. The court found that the testimony was properly admitted as lay witness testimony.

***People v McCray,* unpublished per curiam opinion of the Court of Appeals, issued October 20, 2015 (Docket Nos. 321344 and 321772), p 2.**

Officer's Testimony Describing Events in Video Not Improper but Officer's identifying that the Defendant as Person Depicted in Video Was

"Defendant objects to the investigating officer's testimony describing McCray's actions in the surveillance video and the officer's identification of McCray in the video. We disagree that the officer's depiction of the events in the video was improper. The testimony was rationally based on the officer's perception of the video, and helpful to the jury's understanding of the evidence. MRE 701. However, the issue of whether a defendant is the same person depicted in surveillance video footage is generally a determination properly left to the jury when the witness is in no better position than the jury to identify a defendant in the video. *See Fomby*, 300 Mich App 46 at 52–3;831 NW2d 887 (2013). Thus, we agree that the officer improperly identified McCray in the video.

However, McCray cannot show that this error affected his substantial rights. Significantly, McCray's identity as the person depicted in the video at issue was not seriously disputed at the time of the officer's testimony.

***People v Perkins,* 314 Mich App 140, 161–62; 885 NW2d 900, 915, (opinion vacated on other grounds) (Feb. 12, 2016), superseded in part sub nom. *People v Hyatt,* 316 Mich App 368; 891 NW2d 549 (2016)**

"Officer's Comments About Events Depicted in Video Was Proper, But His Identification of The Individual Depicted In The Video As The Defendant Was Not."

"Green affirmatively identified Hyatt as the individual in the stairwell. Green could properly comment that, based on his experience, the individual appeared to be concealing a weapon, but Green should not have been allowed to identify Hyatt as that individual." "[W]here a jury is as capable as anyone else of reaching a conclusion on certain facts, it is error to permit a witness to give his own opinion or interpretation of the facts because it invades the province of the jury." (*Citation Omitted*) There was nothing about the images (i.e., poor quality of the images, defendant wearing a disguise) that necessitated Green's opinion.

***People v Bynum,* 496 Mich 610, 619; 852 NW2d 570, 575 (2014)**

Trial Court's Allowing Expert Witness Testimony and PowerPoint Presentation About Gangs and Gang Membership Was Proper but Reversal was Required Where Witness Connected Defendant's Gang Membership with Committing the Charged Crime.

"The court allowed Sutherland's testimony and PowerPoint presentations to proceed on the basis that the evidence was relevant to prove Bynum's motive for shooting Carter, Mitchell, and Davis..."

In applying MRE 402 and MRE 702 to the facts of this case, we conclude that the trial court appropriately exercised its role as gatekeeper in determining that expert testimony about gangs and gang culture would assist the jury in understanding the evidence [...] Because Bynum was prejudiced by the expert opinion that, on a particular occasion, he acted in conformity with character traits commonly associated with gang members, we conclude that he is entitled to a new trial.

***People v Lucas,* unpublished per curiam opinion of the Court of Appeals, issued September 23, 2014 (Docket No. 316588), p 2.**

Officer's Describing Similarities and Differences Between Video Still and Mug Shot Was Proper Lay Opinion Testimony Where Officer Did Not Identify the Defendant.

"This case is analogous to *Fomby*. Notably, the testifying police officer in both *Fomby* and this case was Gibson. In both cases, he essentially conducted a photographic comparison and provided testimony regarding his observations and opinions. Here, Gibson first isolated a single frame from the Channel 2 News footage and compared the single frame image to Lucas' mug shot. Gibson then provided his opinion regarding the similarities and differences in the physical features between the two images. Gibson's testimony in *Fomby* and his testimony, in this case, are parallel. Just as he presented lay opinion testimony in Fomby, Gibson also presented his lay opinion here. (*Citation Omitted*) Gibson's testimony was rationally based on his perception because he reviewed the news footage numerous times to isolate the best single image frame and formulate his opinion (*Citation Omitted*). Accordingly, Gibson's testimony was properly admitted as lay opinion testimony."

***People v McCaskill,* unpublished per curiam opinion of the Court of Appeals, issued November 18, 2014 (Docket No. 312409), p 2.**

Officer's Assertions that Still Photograph from Surveillance Video Depicted the Defendant Required Reversal

[W]e conclude that the jurors would have entertained a reasonable doubt regarding the identity of the robber if they had not been presented with Officer Brown's unqualified assertions that the still photographs depicted defendant. We conclude that the erroneous admission of Officer Brown's assertions was not harmless because it is more probable than not that the jury would have

acquitted without this evidence. We therefore again reverse and remand for a new trial.

***People v Jackson,* unpublished per curiam opinion of the Court of Appeals, issued March 12, 2020 (Docket Nos. 346046), p 5.**

> The trial court did not plainly err by allowing Sergeant Carlotto to testify about the inferences that he contemporaneously drew from the video evidence on the day at issue. It also did not plainly err when it elected to instruct the jury to disregard statements of the law made by the witnesses in response to Sergeant Carlotto's statement that the operator of a car is responsible for anything found in the car. Carines, 460 Mich at 763.

***People v Countryman,* unpublished per curiam opinion of the Court of Appeals, issued July 16, 2015 (Docket Nos. 316913 and 316919), p 10.**

> Permissible for Prosecutor to Verbally Describe Events in Video for Transcription into The Record
>
> Insofar as India contends that the prosecutor "testified" by describing the video on the record, this claim is equally without merit. We see nothing wrong in the prosecutor verbally describing something for transcription in the record. Further, it is axiomatic that the remarks of counsel are not evidence. (*Citation Omitted*) The trial court viewed the video for itself and is presumed to know that the prosecutor's remarks were not evidence. (Citation Omitted). Indeed, again it is obvious that the trial court understood this matter of law because the trial court admonished the prosecutor that she could not testify. India has not shown prejudice from the prosecutor's remarks and is not entitled to relief on this basis.

***People v McLilly,* unpublished per curiam opinion of the Court of Appeals, issued January 22, 2015 (Docket No. 318627), p 2.**

> Admission of Officers'Testimony Concerning Events Depicted In Surveillance Video Was Proper, But Identification Of The Defendant As The Person Captured In The Video Was Impermissible Lay Testimony
>
> "Jennings's and Dumanois's testimony was rationally based on their perceptions of the video... (Citing *People v. Fornby*) Further, this testimony was intended to provide a clearer understanding concerning the sequence of events of the robbery, a fact that was at issue in the case (*Citation omitted*). The admission of foundational testimony concerning the events taking place in the video was thus within the trial court's discretion.
>
> However, Jennings and Dumanois testified to more than the events taking place in the video; they also identified defendant at trial as an individual captured in the video... No evidence was submitted indicating that they were in a better position than the jury to identify defendant as a person in the video. Accordingly, this was impermissible lay opinion testimony and should not have been admitted at trial."

***People v Richardson*, unpublished per curiam opinion of the Court of Appeals, issued April 26, 2016] (Docket No. 314245), p 3.**

> Officers' testimony about contents of video did not invade province of the Jury
>
> The Court is not convinced that Det. Morabito invaded the province of the jury. Instead, the Court opines that his testimony was rationally based on his perception of the witness. MRE 701.We agree that Morabito's observations did not invade the province of the jury. Importantly, Morabito did not watch the video while testifying and did not identify defendant in the video for the jury. Instead, Morabito simply testified that he observed defendant in a video provided by Greenleaf that showed defendant returning items at the Home Depot with Hayes' driver's license. Morabito offered his own observation as an explanation for how he conducted his investigation.

***People v Harvey,* unpublished per curiam opinion of the Court of Appeals, issued December 15, 2015 (Docket No. 319482), p 7.**

> **Officer Testimony Explaining How to Interpret Enlarged Video Was Within Scope Of Expertise And Assisted Jury In Understanding Evidence**.
>
> Here, Gibson referred to the two males in the videos and still photos as suspect A and suspect B. Gibson never gave an opinion identifying the subjects as the defendants. He clearly stated that he did not identify the individuals in the video as defendants. His testimony explained how to interpret the enlarged video, which to the untrained eye appears to be dots of light moving in darkness. Although most lay persons could probably figure out that the pairs of lights moving in a straight direction were headlights of a car, most lay persons would require instruction to recognize that the moving pixels depict people walking, or to recognize that a white image is a plastic store bag. Gibson's testimony explaining how the enlarged images relate to the images in the original video was within the scope of his expertise on "scientific, technical, or otherwise specialized knowledge" that would "assist the trier of fact to understand the evidence or to determine a fact in issue." MRE 702. Like Fomby, Sergeant Gibson's testimony that the moving figures in the enlarged video corresponded to the moving persons in the normal size video, was rationally based on his own observations of the video.

***People v Grayson,* unpublished per curiam opinion of the Court of Appeals, issued March 23, 2017 (Docket No. 328173), p 3.**

> Admission of Officers Testimony Identifying Defendant as Suspect Captured in Surveillance Video Was Not in Error Where Officers Had Become Familiar With Defendant And Were In Better Position To Identify Him Then The Jury.

"[B]oth officers identified defendant as suspect one in the surveillance videos. Unlike in *Fomby*, they did not merely link individuals in a video and photographs as being the same individuals. The officers' testimony was based on their perceptions of the video *(Citation omitted)*. The question is whether the testimony was helpful to the determination of a fact in issue and whether it invaded the province of the jury (*Citation Omitted*). Given that defendant was wearing a mask in the video from the party store, the officers' testimony was helpful to the jury in identifying him. (*Citing Perkins*, 314 Mich App at 162).

Similarly, given that defendant's face was not clearly visible in the video from the apartment complex, the officers' testimony was helpful in identifying him. (Citation Omitted). The officers had become familiar with defendant through photographs, and they recognized characteristics of defendant in the videos, such as his hair, the shape of his nose, the shape of his eyes, his skin tone, and his build. Burns testified that he had viewed the video of the party store 40 or 50 times. Therefore, the officers were in a better position than the jury to identify defendant in the videos. Accordingly, the admission of the officers' testimony did not constitute plain error."

***People v Bryant,* unpublished per curiam opinion of the Court of Appeals, issued August 23, 2016 (Docket No. 325569), p 7., overruled in part on other grounds by *People v Bryant*, 889 MW2d 248 (2017)**

Officers' Testimony Identifying Suspect in Video as The Defendant Based on Known Videos And Photographs Of Him Was Improper.

"Here the officers identified the suspect in the surveillance video as the defendant from other known videos and a photo of defendant based on defendant and the suspect opening the door the same way and wearing the same jacket. Their testimonies invaded the province of the jury. "[T]the issue of whether the defendant in the courtroom the person was pictured in a surveillance photo [is] a determination properly left to the jury" (*Citing Fornby*).

***Stanfield v. Neblett,* 339 S.W.3d 22 (Tenn. Ct. App. 2010)**

Trial court did not abuse its discretion in allowing doctor's counsel to use a PowerPoint presentation to present stipulated and properly admissible evidence to jury during opening statement.

CLOSING AND REBUTTAL ARGUMENTS

***State v. Damon Williams,* A-46-19 (083532) argued 9/29/20 decided 1/1921**

HELD: The prosecutor's comments and use of the PowerPoint slide amounted to prejudicial error.

Visual aids such as PowerPoint presentations must adhere to the same standards as counsels' spoken words. Slides may not be used to put forward impermissible evidence or make improper arguments before
the jury. A PowerPoint may not be used to make an argument visually that could not be made orally. The PowerPoint here fell short of that standard.

***Compton v St Elizabeth Med Ctr, Inc,* ___SW3d___; 2005 Ky. App. Unpub. 2005 WL 327116 (Ct App, Feb. 11, 2005)**

The Kentucky Court of Appeals agreed that PowerPoint presentations are essentially a "high-tech blackboard." "The use of blackboards or other visual aids rests in the sound discretion of the trial court." *Meglemry v Bruner*, 344 SW2d 808, 809 (KY 1961) overruled in part.

***State v Michaels*[34], 264 NJ Super 579; 625 A2d 489 (App Div 1993)**

Instead of using a puzzle to demonstrate standards of proof, the prosecution used "magnetic letters on board to spell 'guilty' during closing argument to explain the task of assimilating, collating, and grasping "all the elements of evidence in this" nine-month prosecution. The Appellate Court found it was not improper to use a "puzzle analogy to argue the defendant was guilty." The Court failed to find any basis "on which to conclude that placing the word 'guilty' on a board had either an immediate impact upon the jurors, or a 'subliminal' influence as suggested by defendant. The State was free to contend that the evidence proved defendant guilty as charged."

***Standard Chtd. PLC v Price Waterhouse*, 190 Ariz 6; 945 P2d 317, 358 (App 1997)**

Plaintiff began closing argument by showing the Titanic and all the people happily boarding the ship with a voice-over that stated that, "the Titanic was once the largest, greatest, and strongest ship in the world; but it had internal problems caused by its creators that caused it to sink." Then a picture of the Titanic sinking was shown on the screen. Next, a picture of an advertisement for Price Waterhouse with a voice-over that stated it was the "greatest, largest, and strongest investment banking firm in the world but, it too has internal problems caused by its management that caused it to sink and take the shareholders money with it." The trial judge did not find this to be unduly prejudicial and allowed the plaintiff to use this video in his closing argument.

[34] This case has been distinguished on other evidentiary grounds several times.

***State v Brown,* 132 Wash2d 529, 567; 940 P2d 546 (1997)**

The prosecutor read aloud from a listening aid during his closing argument. The trial judge instructed the jury that only the recording was evidence and any discrepancy between the recording and the listening aid should be resolved in favor of the recording. Because the jury heard the recording during trial, the prosecutor did not prejudice the defendant by repeating portions of it during closing argument. The Court held, when a trial court admits an audio recording into evidence and allows the jury to use a transcript as a listening aid without admitting the transcript as evidence, the prosecutor may quote the transcript during his closing argument.

***State v Robinson*, No. 473398-1-I, 2002 WL 258038, 2 (Wash. Ct. App. Feb. 25, 2002)**

The defendant was charged with arson. During his closing argument, the prosecutor used a PowerPoint presentation showing images of flaming curtains next to text listing the elements of the arson charge. The defendant was convicted. He appealed claiming that he was prejudiced by the prosecutor's closing argument. The Washington Appellate Court held that the prosecutor should not have been permitted to use the flaming curtain images in closing argument because they were too prejudicial. The court stated that "[t]he picture of flaming curtains was not in evidence, added nothing to the evidence, and was not probative of anything at issue in this case. The only purpose served by this irrelevant material was to distract or to prejudice. Its use was dangerous, unnecessary, and in error."

***State v Swinton,* 268 Conn 781; 847 A2d 921 (2004)**

The defendant was on trial for murder. At issue was the introduction of computer-enhanced photographs of bite marks and dentition overlays. The dentition overlays were created using Adobe Photoshop and were images of the defendant's dentition over the actual bite marks on the victim. The trial court admitted both the photographs and the overlays into evidence. The defendant was convicted and appealed to the Connecticut Supreme Court. The court held that admission of the enhanced photographs of the bite marks was appropriate because they were properly authenticated, meaning an adequate foundation was established by a witness who was well-versed in the program used to create the photographs. However, the court held that admission of the dentition overlay exhibits was improper because the witness who testified about their creation lacked the expertise to satisfactorily authenticate them. The court stated that "in order for computer generated evidence to be admitted, there must be 'testimony by a person with some degree of computer expertise, who has sufficient knowledge to be examined and cross-examined about the functioning of the computer.'"

***State v Hilton,* 119 Ohio St 3d 1501; 2008-Ohio-5467; 895 NE2d 564 (2008)**

In closing, balancing scale depicted with "State of Ohio" and prosecution's seven witnesses on one side, and "Defense" and his one witness on the other. As prosecution witnesses are added, scale tips toward State. Prosecutor error to shift burden of proof and to insinuate that number of witnesses or quantity of evidence is a proper consideration.

***People v Katzenberger,* 178 Cal Ap. 4th 1260; 101 Cal Rptr 3d 122 (2009)**

Prosecutor used a PowerPoint presentation to demonstrate proof beyond a reasonable doubt via a photographic puzzle. The photograph was of the Statue of Liberty and cut into puzzle like pieces. Several pieces came together, but gaps in the photo remained. The prosecutor told the jury they all knew what the puzzle depicted without the need for all the pieces. The appellate court determined that the presentation and argument left "the distinct impression that the reasonable doubt standard may be met by a few pieces of evidence, ...invites the jury to guess or jump to a conclusion, a process ***completely at odds*** with the jury's serious task of assessing whether the prosecution has submitted proof beyond a reasonable doubt, and ... suggested the existence of a specific quantitative measure of reasonable doubt." The court found prosecutorial misconduct.

***People v Mullins,* unpublished per curiam opinion of the California Court of Appeals, issued Jan. 12, 2010 (Docket No. 286323)**

During closing arguments, a prosecutor used a PowerPoint which included an admitted photograph of the defendant with the word "guilty" superimposed across his face. After reviewing the standards for a case-by-case/fact-driven analysis for prosecutorial misconduct, the court found examined the limits of argument as applied to this case:

> ***...the prosecutor did nothing more than summarize the facts in evidence and ask the jury to find defendant guilty. A prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his or her theory of the case.[35] Further, a prosecutor is not required to make an argument in the blandest possible terms.[36] Even assuming that the word guilty was flashed over defendant's face in the prosecutor's closing power point presentation; this would merely have been a visualization of the prosecutor's assertion that the evidence adduced established defendant's guilt. Therefore, we conclude that there was no misconduct. Moreover, the trial court properly instructed the jury that the lawyers' statements and***

[35] Citing People v Bahoda, 448 Mich 261, 282; 531 NW2d 659 (1995).
[36] Citing People v Fisher, 449 Mich 441, 452; 537 NW2d 577 (1995).

arguments were not evidence that could be considered during deliberations. (Emphasis added).[37]

***State v Walker,* 164 Wash App 724; 265 P3d 191 (2011)**

The prosecution's closing argument was held to be prosecutorial misconduct. The Court used the fact that the prosecution emphasized this improper argument with PowerPoint in making its ruling. The Court held:

Furthermore, the prosecutor made the improper comments not just once or twice, but frequently. He used them to develop themes throughout closing argument, such as the repeated references to the jury's duty to declare the truth and that the jury would not have done it too. These statements were only further emphasized by the prosecutor's PowerPoint slides**.** Because of the conflicting evidence and the frequent use and repetition of improper statements, there is a substantial likelihood that the prosecutor's mischaracterization and minimization of the reasonable doubt standard, improper argument that the jury declare the truth, and misstatement of the defense of others standard affected the jury's verdict, and that further instructions would not have cured the effect of the prosecutor's comments. (Emphasis added).

We reverse Walker's convictions for first degree murder and first-degree assault and remand for a new trial. We hold that the prosecutor committed flagrant and ill-intentioned misconduct and the cumulative effect of this misconduct requires reversal and remand for a new trial.

***People v Clark*, unpublished opinion of the California Court of Appeal, issued September 28, 2011 (Docket No. B226624)**

Cylinder with arrow pointing about 3/4 of the way up used to demonstrate lack of reasonable doubt. Prosecutorial misconduct to misstate the law. Cannot quantify reasonable doubt.

***State v Sakellis,* 164 Wash App 170; 269 P3d 1029 (2011)**

The Court of Appeals, Penoyar, C.J., held that prosecutor's display during closing argument of PowerPoint slide relating to concept of reasonable doubt, which directed jury to "fill in the blank" about his or her reason for doubt, although improper, did not cause enduring and resulting prejudice that affected jury's verdict. Affirmed.

***Comment**: the Court also referenced other slides used by the Prosecution during Closing Argument, but did not seem to have a problem with them.*

[37] Comment: Since the case was decided several opinions of been issued condemning the use of texts or words across a defendant's mug shot. As a result, in 2017, I would personally recommend against this type of slide.

***In re Glasmann,* 175 Wash 2d 696; 286 P3d 673 (2012)**

Prosecutor, in closing arguments, used a multimedia presentation which included a less-than-complimentary booking photo of the defendant with the phase "guilty" flashing across it. The photo, and other pieces of audio and visual evidence was admitted into evidence. The *Glasmann* Court held this was akin to deliberately altered evidence and considered it an improper and prejudicial expression of the prosecutor's opinion, saying a prosecutor should never in a closing argument say, "Glasmann is guilty, guilty, guilty!" The court additionally determined that such a visual argument will:

*...**manipulate audiences by harnessing rapid unconscious or emotional reasoning processes and... [exploit] the fact that we do not generally question the rapid conclusions we reach based on visually presented information. (cited in Lucille Jewel, through a Glass Darkly: Using Brain and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy).***

Ultimately, the court cited several extra-legal and judicial psychology sources to conclude the prosecutor stepped over the line from presenting a "rational and reasonable" argument to one which prejudicially manipulated the jury's conscious and unconscious emotions.

***People v Chima,* unpublished opinion of the California Court of Appeal, issued June 1, 2012 (Docket No. D060241)**

Prosecutor presented a PowerPoint in an assault case against Justice Chukwa Chima[38] which included the term "wife beater." The slide attacked the defendant's credibility by referencing his past as a "convicted felon and wife beater;" the slide was presented to the jury, but not verbalized by the prosecutor. The trial court gave an appropriate remedial instruction. The appellate court found the phrase inappropriate. That said, however, the court found it did not rise to reversible error and the trial court's instruction eliminated "any minimal prejudice" which would have occurred.

***State v Phillips*, unpublished per curiam opinion of the Court of Appeals of Washington, issued December 18, 2012 (Docket No. 41393-1-II), p 45.**

Following *Brown*, in this case, Defendant argued that the prosecutor committed misconduct by showing the jury slides excerpting portions of the body wire transcript, which was not admitted as evidence. The prosecutor copied excerpts of the listening aid into slides, which he displayed to the jury during his closing argument. Like the

[38] Comment: Whether "Justice" is the Defendants name, or his title is unknown.

judge in *Brown*, the trial judge here instructed the jury that the transcript "is not any sort of replacement for" the recording. Unlike the prosecutor in Brown, the prosecutor here reproduced the listening aid in a visual medium as well as an aural one: that is, he showed the excerpts while also reading them aloud. But the jury had already seen the listening aid during trial; thus, the prosecutor's slides conveyed information that the jury had previously received in the manner that the jury previously received it. Thus, the prosecutor's slides did not prejudice the Defendant.

***State v Francione,* 136 Conn App 302,326-28; 46 A3d 219 (2012)**

Defendant challenged the prosecutor's use of a PowerPoint presentation that summarized testimony by arguing that the prosecutor, in using the presentation, "improperly characterized the evidence; improperly offered his subjective opinion concerning the evidence; improperly commented on facts not in evidence; improperly commented negatively on the defendant's character; improperly highlighted . . . the prosecutor's subjective opinion concerning what the jury should consider as the most salient points of evidence; and repeatedly improperly appealed to the emotions and sympathies of the jurors." The State responded that all the statements in the presentation directly were attributable to witness testimony, and, therefore, "it was not improper for the trial prosecutor to show exhibits or summaries as a way to remind the jury of the evidence presented."

The Court agreed with the State and said, "without more, 'the mere use of PowerPoint does not rise to the level of an impropriety.'" The purpose of closing argument is to comment upon facts properly in evidence and come to reasonable inferences drawn from those facts. The Court went on to say, "counsel is entitled to considerable leeway in deciding how best to highlight or to underscore the facts, and the reasonable inferences to be drawn therefrom, for which there is adequate support in the record. We therefore never have categorically barred counsel's use of such rhetorical devices, be they linguistic or in the form of visual aids, if there is no reasonable likelihood that the device employed will confuse the jury or otherwise prejudice the opposing party. . .. [T]the use of such aids is a matter entrusted to the sound discretion of the trial court."

The slides were not improper because all the information adequately was supported by the evidence, the prosecutor was not appealing solely to the emotions of the jury, the prosecutor did not improperly express his opinion as to the guilt of the defendant or the credibility of the witnesses, and there was no reasonable likelihood that the presentation would confuse the jury or prejudice the defendant.

***People v Otero,* 210 Cal App 4th865; 148 Cal Rptr 3d 812 (2012)**

Outlines of California and Nevada, with misidentified cities, used to demonstrate lack of reasonable doubt. Prosecutorial misconduct to misstate the law.

***State v Bass,* unpublished per curiam opinion of the Court of Appeals of New Jersey, issued April, 30, 2013 (Docket No. A-5633-09T4)**

Prosecutor used an admitted photograph of the defendant in a closing PowerPoint presentation with "guilty" flashing across the screen "for a couple of seconds." The trial court initially thought that it should not have been seen and said he would give a curative instruction. No such instruction was given, however, after the court failed to find case law which supported prosecutorial misconduct in this instance. In his appeal, defendant alleged this slide constituted the prosecutor's opinion. The Appellate Court of New Jersey disagreed, saying the court argued "the evidence adduced at trial supported a guilty verdict." The Appeals Court affirmed the trial court's conclusion and said while "...we do not necessarily endorse the PowerPoint display that was utilized in this case," the display was fleeting and incapable of producing an "unjust result."[39]

***Aguilar v Cate,* unpublished opinion of the United States District Court for the Northern district of California, issued April 26, 2013 (Docket No. C 11-4267 PJH (PR)**

Prosecutor used a PowerPoint presentation, which included a simulated puzzle of the Golden Gate Bridge to explain proof beyond a reasonable doubt. The Appellate Court found that this improperly quantified the reasonable doubt standard by suggesting the standard could be satisfied even if there were large gaps and inconsistencies in the evidence. Furthermore, the Court found such a presentation "trivialized the reasonable doubt standard by likening the entire deliberative process to a simple guessing game."

***KC ex re. Calaway v Schucker,* No 02-2715-STA-cgc, 2013 WL 5972192 (WD Tenn 2013)**

This is a fairly fact specific civil case that discussed PowerPoint in several areas. The plaintiff argued that the defense used video clips in a PowerPoint during closing that were taken out of context or were misquotes. Plaintiff also argued that the law was misstated in the PowerPoint. Plaintiff failed to properly preserve these issues and identify the objectionable slides in question.

***People v Singleton, 974 N.Y.S.2d 548,* 2013 NY Slip Op. 07509 (NY Nov 13, 2013)**

In this interesting case the prosecutor was criticized for "defiance" of a court ruling for not taking down "video projections" of the codefendant's statement. The Court reversed and remanded this conviction. This writer wonders if perhaps a lack of technology skill caused the prosecutor to be in this situation. Always get a good *lit tech second chair.*

[39] Comment: A question arising from this holding, then, is "Does the length of time a questionable slide is shown to a jury bear on the weight of its potential prejudice?"

***State v Reineke,* 266 Or App 299, 310-11; 337 P3d 941, 947-48 (2014)**

The prosecutor's PowerPoint presentation expressly urged the jury to decide that defendant's refusal to speak to the police was one of the four reasons that he was guilty of murdering the victim. The state argued that we should not conclude that defendant was prejudiced because we cannot determine how long the "GUILTY" PowerPoint slides were in front of the jury. The record, however, demonstrated that the prosecutor used the PowerPoint presentation in conjunction with her oral argument, which tracked what was on the slides, and that at least three slides implied that defendant was guilty because he "refus[ed] to speak at the police station." Those repeated references to defendant's silence and guilt during closing argument were not subtle, isolated, or fleeting. The Court found the Defendant's right to a fair trial was prejudiced.

***In re McKague,* 182 Wash App 1008, No. 71436-8-1, 2014 WL 2963441 (2014)**

This case reverses based on the "misuse" of one, single PowerPoint slide. In this unpublished opinion, the Prosecutor used an "all evidence points to slide" but did not label it as such and choose to argue the defendant was "guilty" as opposed to saying "evidence pointed towards guilt. "The single slide had the word "Guilty" superimposed across a surveillance photo of the defendant's face (this was a case involving a theft and an assault).

The Court cited *Glassman* and ordered a new trial. In its analysis, the Court held:

> ***McKague's primary contention is that prosecutorial error deprived him of his right to a fair trial. He argues that the prosecutor's use of the "GUILTY" slide was so flagrant and ill-intentioned that it prejudiced the outcome of the trial. We agree and reverse his convictions.***

The Court held that superimposing the word "guilty" on the slide amounted to improper conduct. The Court further held:

> ***McKague by cropping it and digitally placing the word "GUILTY" across it. Moreover, the slide, coupled with the prosecutor's comment that McKague "is guilty as charged," constituted an expression of the prosecutor's personal opinion on McKague's guilt. We also find that the prosecutor's misconduct in presenting this highly inflammatory slide had a substantial likelihood of affecting the jury's verdict and was incurable by jury instruction.***

The prosecutor's use of the "GUILTY" slide was a deliberate attempt to induce the jury to convict McKague of the charged crimes. No purpose could be served by presenting this slide other than to inflame the prejudice and passions of the jury. As described above, the word "GUILTY" was printed in red and in large, capitalized letters across a photograph of McKague's face, with arrows pointing toward the image. This depiction compelled the jurors to reach a harsh verdict by "drawing the eye, implying urgency of action, and evoking emotion."[40]

Given the prosecutor's position of power and prestige, his expression of opinion as to McKague's guilt potentially had significant persuasive force with the jury.[41]

***People v Young*, Unpublished Opinion Per Curiam of Mich Court of Appeals, Decided 12/23/14, (Docket No. 317981), rev'd on other grounds, *People v Young*, 870 NW2d 722 (2015)**

Closing slides of victims before and after assault; blood-stained bat; defendant's blood-stained pants; and defendant's picture; all accompanied with captions, including "killer" under defendant's photo. Not prosecutor error because text restated testimony at trial or contained reasonable inferences from the evidence; "modified" photograph slides (with text added) not used to inflame the jury.

***Missouri v Walter,* 479 SW3d 118, 125-127 (Mo., 2014)**

In closing, slide of defendant's mug shot (in which he is wearing an inmate jumpsuit) with "GUILTY" in red letters over it. Prosecutor error to undermine the presumption of innocence.

***Spence v State*, 129 A3d 212, 216 (Del., 2015)**

Prosecutor's use of Slide 067 was improper and that the display of the victim's bloody body with the words "Terror," "Fear," and "MURDER" in red lettering served no purpose other than to attempt to inflame the jury. Closing arguments are an opportunity for counsel to argue reasonable inferences drawn from the evidence. While the prosecutor is entitled to focus the jury's attention on admitted evidence, a PowerPoint

[40] Citing Hecht. 319 P.3d at 841.
[41] Citing Glasmann. 175 Wn.2d at 706. No. 71436-8_I/7

slide that achieves no end but to inflame the passions of the jury is improper. This conclusion flows from the recognition that prosecutors represent the people of the State and must act impartially in the pursuit of justice. Fanning the flames of a jury's collective emotions through the use of improper PowerPoint slides to obtain a conviction does not serve the interests of justice.

***Washington v Walker,* 341 P3d 976 (Wash., 2015)**

In closing, 100 slides with heading "DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER," his booking photo with "GUILTY BEYOND A REASONABLE DOUBT" over his face in red letters, and photo of money with "MONEY IS MORE IMPORTANT THAN HUMAN LIFE." Prosecutor error to "alter" exhibits with inflammatory comments and express personal opinion of defendant's guilt. Also, courts encouraged to require pre-approval of presentations.

***Commonwealth v Jackson,* 145 A3d 773 (Pa Super Ct, 2016)**

During his closing argument, the prosecutor utilized a PowerPoint presentation. Two slides showed the phrases "get money" and "go ahead" printed in red lettering. Defense counsel noted that the "get money" slide was shown to the jury for seventeen minutes and the "go ahead" slide was shown to the jury for four minutes. The prosecution also utilized another slide that depicted manacles with a cell phone inside. Defense counsel objected to the use of these three slides following the completion of the prosecution's closing argument and sought a mistrial. The trial court denied the Motion for a mistrial. However, the trial court provided a cautionary instruction to the jury.

The Court found the PowerPoint slides did not convey the prosecutor's personal belief or opinion on Jackson's credibility or guilt, did not appeal to the prejudices of the jury, and did not divert the jury from deciding the case on the evidence presented at trial. Nothing in Jackson's speculative arguments demonstrated that the slides prejudiced the jury in rendering a verdict. A prosecution's summation can include dramatic allusions, such as those found in the PowerPoint slides, which were within reasonable bounds of the evidence supplied at trial. Thus, Jackson's suggestion that the use of any PowerPoint slides during closing argument is somehow suspect is misguided. Finally, the Court noted, that the trial court provided cautionary instruction, which Jackson accepted at trial. Under these circumstances, the use of a PowerPoint presentation during closing argument to summarize facts and evidence produced at trial, combined with the cautionary instruction provided by the trial court, rendered Jackson's argument without merit.

***In re Personal Restraint of Tillmon,* ___P3d___; 2016 Wash. App. WL 1461908 (Ct App, Apr. 12, 2016)**

One of the challenged slides featured what appears to be Tillmon's booking photograph. Superimposed over the image of Tillmon's face are several phrases that appear to refer to various pieces of evidence, such as "PURCHASED SHOTGUN," "IDENTIFIED BY NICHOLAS OATFIELD," "SEEN RUNNING & IDENTIFIED BY DEPUTY DETRICH" and "ADMITTED ROBBERY." A "plus" symbol accompanies each of these phrases in a list organized vertically over Tillmon's photo. At the bottom of this list is an "equals" symbol and the world "GUILTY" appears in red text over Tillmon's chin and lower jaw. Another slide features the same booking photograph of Tillmon with the booking photographs of his two codefendants arranged side-by-side. Underneath the images appears the text "= PARTNERSHIP IN CRIME."

The Court held that although these slides were less egregious than those in *Glasmann, Fedoruk,* and arguably *Hecht,* the State's use of these slides was improper. This is so even if Tillmon's booking photo itself was admitted into evidence because, as in *Glasmann,* the trial court here admitted no evidence that depicted Tillmon's booking photo with the word "guilty" over part of his face. It was improper to present Tillmon's photo "altered by the addition of phrases calculated to influence the jury's assessment of his guilt. Modification of photographs by adding captions is the equivalent of unadmitted evidence. Thus, the powerpoint slides unfairly suggested to the jury that Tillmon was guilty.

However, the Court disagreed with Tillmon that the prosecutor's improper use of the slides required reversal. This case is distinguishable from *Glassman* for several reasons. First, unlike *Glassman*, Tillmon's booking photo does not depict him in a bloody and unkempt manner. Second, unlike *Glassman*, Tillmon's credibility was not directly at issue because he did not testify and none of the prosecutor's slides commented on Tillmon's credibility. Third, the slides did not overly assert that Tillmon was "GUILTY" without reference to the evidence. Instead, the prosecutor linked the "GUILTY" statement with various pieces of evidence presented during the trial. Significantly, one of those pieces of evidence to which the prosecutor referred was Tillmon's own admission of involvement in the robbery on the very morning of the crimes. Finally, Tillmon admitted that he and three friends had committed the crimes, rendering any prejudicial effect of the "partnership in crime" slide less so because the jury knew from his confession that Tillmon had partnered with others.

Crucial to the Supreme Court's decision in *Glasmann* was the fact that the 50–plus slide PowerPoint presentation that was "full of imagery that likely inflamed the jury" and the several other repetitive instances of misconduct, cumulatively caused prejudice sufficient to warrant reversal. But here, of the 57–slide PowerPoint presentation, only the two slides discussed above were improper as they pertained to Tillmon.

The Court held the improper use of these slides did not result in prejudice that had a substantial likelihood affecting the jury's verdict warranting a new trial. Nothing here rises to the level of the misconduct found in *Glasmann.*

***State v Lombardo, ___A3d___;* 2011 N.J. Super. Unpub. WL 5922085 (Super Ct App Div, Nov. 29, 2011)**

Slide with Vowels Missing from Statement "THIS DEFENDANT IS GUILTY" Used to Demonstrate Lack of Reasonable Doubt Did Not Misstate Law Or Communicate Prosecutor's Personal Opinion.

***People v Williams,* 29 NY3d 84, 2017 NY Slip Op 02588, 4 (NY Apr 4, 2017)**

Prosecutor's Annotation of Exhibits in PowerPoint Presentation Did Not Deprive Defendant Of A Fair Trial Where Trial Court Took Corrective Action To Ensure That The Jury Was Not Being Misled And Gave Strong Instructions Concerning Summation.

In Williams, the Defendant argued that her was deprived of a fair trial, in part because of the Prosecutors use of PowerPoint Point to display annotated images of trial exhibits. Rejecting this argument, the Court of Appeals affirmed the Lower appellate court, determining that even if the use of particular annotations was improper, the trial court's instructions to the jury that they should disregard the annotations and that these were not evidence, was sufficient to protect the rights of the Defendant. Discussing the Prosecutions use and presentation of these annotations using PowerPoint, the Court opined:

If counsel is going to superimpose commentary to images of trial exhibits, the annotations must, without question, accurately represent the trial evidence [42]... any type of blatant appeal to the jury's emotions or egregious proclamation of a defendant's guilt would plainly be unacceptable...[43]

Importantly, the Court, however, recognized that even where the use of certain annotations would be unacceptable, such use can be corrected through instructions to the Jury:

In any particular case, where there is a concern that it will not be clear to the jury that the annotated PowerPoint slides are not in evidence or a substitute for the actual

[42]Citing People v Santiago, 22 NY3d 740, 751, 986 N.Y.S.2d 375, 9 N.E.3d 870 [2014]
[43] Citing State v Walker, 182 Wash 2d 463, 341 P3d 976 [2015]

evidence, a specific jury instruction will serve to emphasize that such representations are merely argument by counsel.

***People v Anderson,* 29 NY3d 69, 2017 NY Slip Op 02589, 1-2 (NY Apr 4, 2017)**

Use of PowerPoint Slides and Exhibit Annotations Acceptable in Closing Arguments So Long As They Are Consistent With The Trial Evidence And Could Not Confuse The Jury About What Is Evidence And What Is Commentary. In *Anderson*, the Defendant argued that he was deprived of a fair trial by the prosecutor's use of PowerPoint slides during summation and that defense counsel was ineffective for failing to object to the use of the slides. Rejecting this argument, the Court of Appeals found that:

> ***PowerPoint slides may properly be used in summation where, as here, the added captions or markings are consistent with the trial evidence and the fair inferences to be drawn from that evidence. When the superimposed text is clearly not part of the trial exhibits, and thus could not confuse the jury about what is an exhibit and what is argument or commentary, the added text is not objectionable...*** [44]

***Rossiter v State,* 404 P3d 223, 226 (Alas Ct App, 2017)**

The Prosecutor's PowerPoint Slides and His Statements to The Jury Significantly Mischaracterized the Law Of Self-Defense.

"We acknowledge that, even though Rossiter's attorney objected to portions of the prosecutor's slide presentation, the defense attorney did not object to the prosecutor's closing argument— despite the trial judge's express invitation for him to do so. Accordingly, to the extent that Rossiter now argues that the prosecutor's final argument misstated the law of self-defense, or impermissibly disparaged the defense theory of the case, Rossiter must show plain error. But we conclude that Rossiter has met this burden."

***Rogers v State,* 280 P3d 582 (Alas Ct App, 2012)**

Rogers also complains that, in rebuttal argument, the prosecutor displayed a slide in her PowerPoint presentation entitled "You Don't Get to Make Things Up," and another slide suggesting that Rogers had fabricated his story that aliens ordered him to kill people.

[44] Comment: While Anderson recognizes that the use of Power Point and annotated exhibits during closing arguments is acceptable and proper under New York law, Attorneys should ensure their annotations do not unintentionally misrepresent or expand the testimony or exhibits that were presented. The dissenting opinion in Anderson, though a minority position, does an excellent job of articulating the power of visual evidence and the potential negative interpretation some courts might have towards the use of exhibit annotations

This was also proper argument. Rogers's attorney stated more than a dozen times in his final argument that the State had "made up" evidence in its closing argument and that it was not permissible to "make things up." The State did not commit misconduct by using this same rhetorical device to argue that the defense attorney distorted the evidence in his closing argument. Although a defense counsel's attacks do not give the prosecutor license to make improper arguments, reversal is not warranted if the prosecutor's remarks do "no more than respond substantially in order to 'right the scale.' "

***Milson v State,* 832 So 2d 897 (Fla Dist Ct App, 2002)**

The Court held: "The court did not abuse its discretion in allowing State to use a "PowerPoint" presentation in closing argument to illustrate a verdict form."[45]

***State v Hilton,* ___Ohio App 3d___; 2008-Ohio-3010.** [45]

See also: Brown v State 550 So2d 527, 528 (Fla.1st DCA 1989) (holding "[t}he determination as to whether to allow the use of a demonstrative exhibit is a matter within the trial court's discretion "so long as the exhibit constitutes "an accurate and reasonable reproduction of the object involved.").

The State used a PowerPoint presentation to present the image of a balancing scale during its closing argument. The Court described the image's use noting that:

In its closing argument, the state, via the prosecutor, used a ***PowerPoint*** presentation depicting a balancing scale with balanced weights and the word "Defense" and appellant's name on one side of the scale and "State of Ohio" with no names on the other side. As the prosecutor recounted each witness' testimony, a new image appeared adding the witness' name to the state's side of the scale thus tipping the balance each time in favor of the state. By the end of the closing argument, the scale was tipped completely over to the state's side. The "Defense" weight still had only the one name on it while the state's weight had seven names listed and was twice the size of the Defense" weight. Appellant objected and requested that a hard copy of each of the images be preserved for review by this court.

The Court went on to hold:

Upon review of the state's closing argument and the ***PowerPoint*** slides, we are not convinced that the prosecutor's presentation was manifestly intended as a comment on appellant's silence. Neither do we find that the visual depiction of the scale is of such a

[45] See also: Brown v. State 550 So.2d 527.528 (Fla.1st DCA 1989) (holding "[t}he determination as to whether to allow the use of a demonstrative exhibit is a matter within the trial court's discretion "so long as the exhibit constitutes "an accurate and reasonable reproduction of the object involved.").

character that the jury would naturally and necessarily take it as a comment on appellant's failure to testify.

We find more troubling the possibility that the use of the scale suggests to the jury that appellant had the burden to produce evidence to counterbalance that which the state produced and that he failed to do so by not presenting a case. The prosecution's presentation depicts the state's side of the scale, with seven names, weighing heavily against the defendant's side, with only his name. Such an attempt by the state to shift the burden of proof is clearly improper.[46]

Due process requires the prosecution to prove, beyond a reasonable doubt, every element necessary to constitute the crime with which the defendant is charged.[47] Also improper is the inference that somehow the number of witnesses, or quantity of the evidence produced by the state, relates to the quality of the state's evidence against the accused. Accordingly, we find the trial court erred in overruling appellant's objection and permitting the jury to view the state's ***PowerPoint*** presentation.

Brown v State, **18 So3d 1149 (Fla Dist Ct App, 2009)**

In This Case, The Court Held That During Rebuttal the State Used A Photograph That Was Never Introduced into Evidence and Referred to A Witness Who Never Testified At Trial. The Court Held:

In the case at hand, the State's initial closing went only as far as to assert how the evidence did not support convictions for lesser included charges. On rebuttal, however, the State summarized, in a detailed PowerPoint presentation, the testimony of each witness, what was shown in the surveillance tape, and the elements of each crime for which Brown was charged. The proper limit of a rebuttal is "a reply to what has been brought out in the defendant's [closing]argument." The State's rebuttal not only contained references to evidence that was never admitted at trial but went beyond its function as a reply to Brown's closing argument. This was improper. Thus, we reverse the trial court's denial of Brown's motion and remand this case for a new trial.

Comment*: I doubt that the fact that a PowerPoint was used made a difference in this case, but in the eyes of some, visual displays can enhance certain issues.*

Reeves v State, **67 So3d 380 (Fla Dist Ct App, 2011)**

[46] Citing Mullaney v. Wilbur (1975), 421 U.S. 684; In re Winship (1970), 397 U.S. 358.
[47] Citing In re Winship, supra.

While not getting into specifics, the Court overruled the defendant's objection to the state's use of a PowerPoint presentation during closing argument.

***Thompson v Wal-Mart Stores, Inc,* 60 So3d 440 (Fla Dist Ct App, 2011)**

We affirm the admission of Thompson's prior convictions, but reverse and remand for a new trial, because the trial court abused its discretion when it allowed the introduction into evidence of the testimony of the expert witness who changed his testimony and presented PowerPoint slides at trial without prior notice to Thompson.

Comment: *This case does not mean you have to disclose the PowerPoint presentation that you wish to use in your opening or closing beforehand, but you should be aware of it in case it is offered against you. We will discuss strategies on this topic during the presentation.*

***State v Miller,* 205 NJ 109, 122; 13 A3d 873 (2011)**

The issue was whether it was appropriate for the trial court to play back video-recorded witness testimony at the jury's request. In responding to a request to review testimony, the trial court's focus should be on the proper controls and limits needed to ensure a fair proceeding, not the medium used to create a record. Courts have broad discretion as to whether and how to conduct read backs and playbacks. A video playback enables jurors not only to recall specific testimony but also to assess a witness' credibility — which is precisely what jurors are asked to do.

***State v Vanderschuit,* ___P3d___; 2011 Ariz. App. Unpub. WL 2935881, at 4-5* (Ct App, July 21, 2011)**

The jury found Defendant guilty of attempted child prostitution, a dangerous crime against children. Following the verdict, Defendant moved for a new trial, arguing, in part, that the jury was permitted to deliberate with the State's laptop in the room, which contained a PowerPoint presentation of the State's closing argument. Defendant did not ask the court, in his motion or otherwise, to question the jury as to whether they had touched, manipulated, attempted to access anything on the laptop, or actually reviewed anything on the laptop other than the recorded telephone conversations.

Theo McCalvin, judicial assistant to Commissioner Steven Holding during Defendant's trial, testified that he placed the laptop on a separate table from the jurors, instructed them not to touch it, and played the recorded telephone calls for the jurors. McCalvin testified that although a "couple engineer [] jurors initially attempted to "access the computer," he instructed them not to. He stated that he did not open up a PowerPoint presentation on the laptop when it was in the jury room. McCalvin testified that although he was not permitted to remain in the jury room during the deliberation period, he "checked in every ten or [fifteen] minutes with the jury to see if

they needed anything" while they listened to the recorded telephone calls. McCalvin removed the laptop from the jury room at the conclusion of the recordings and noted at that time that "[t]o [his] knowledge" he was "the only one that handled the" laptop and "[n]othing ha[d] been touched" on the laptop. The trial court ordered the State to reconstruct the

PowerPoint presentation because it no longer had the original presentation.

The Court found that the trial court explicitly instructed the jurors that closing arguments were not evidence. Even assuming that the PowerPoint presentation was akin to extrinsic evidence, Defendant failed to make any showing that the jury received and considered extrinsic

evidence. The Court affirmed the Defendant's conviction.

***State v Kahanaoi,* ___Haw___; 288 P3d 131 (Ct App, 2012)**

This case concerns the preservation of PowerPoint. "The law is clear in this jurisdiction that the appellant has the burden of furnishing the appellate court with a sufficient record to positively show the alleged error."[48] If the appellant fails to provide the necessary record, the lower court must be affirmed.[49] This rule has been applied in the criminal context because the reviewing court has no basis upon which it can determine the merits of the claim if necessary pieces of the record are missing.[50] Here, there is no dispute that Kahanaoi did not provide a record of the PowerPoint slide, which he identifies as the subject of the alleged prosecutorial misconduct. Accordingly, Kahanaoi's failure to provide a record of the PowerPoint slide at issue means there is not a sufficient basis for this panel to review the circuit court's holding.

REDACTION

***Ojeda v State*, ___SW3d___; 2017 Tex. App. WL 3405313 (Tex App, Aug. 9, 2017)**

Prosecutor's "Manual" Redaction of Video by Muting Audio During Certain Statements Was Specifically Discouraged By The Court.

"We would be remiss in not noting the risk of redacting a DVD in this fashion. The court reporter did not transcribe what audio was actually played to the jury, and while there was no disagreement here about what actually was played, there well could have been. See *Basinger v State*, unpublished Memorandum Opinion No. 05–10–00786–CR,

[48] Citing Union Bldq. Materials Corp. v. Kakaako Corp., 5 Haw. App. 146, 151, 682 P.2d 82, 87 (1984);
[49] Citing Union Bldq. Materials Corp., 5 Haw. App. at 151-52, 682 P.2d at 87.
[50] Citing State v. Hoancr, 93 Hawai'i 333, 336, 3 P.3d 499, 502 (2000).

2012 WL 1704322, at *1 (Tex.App.–Dallas May 16, 2012,) (*noting claim that audio was not muted when video was played); Rimes v State*, 05–08–01543–CR, 2009 WL 3298181, at *1 (Tex. App.–Dallas Oct. 15, 2009) (*same*).

Additionally, the jury asked that this DVD be re-played again during their deliberations. Because of the manual audio editing, the attorneys needed to be present for that replay, and again, the parties ran the risk of human error in turning the volume up or down."

***State v Barnhart,* ___Kan App 2d___; 357 P3d 313 (2015)**

Mistrial Required Where Prosecutor Inadvertently Exhibited Un-Redacted Video To Jury

"[W]e find the district court abused its discretion in not granting a mistrial sua sponte when the prosecutor inadvertently violated the agreement with Barnhart's attorney to only exhibit the redacted video to the jury."

***People v Robinson,* unpublished per curiam opinion of the Court of Appeals, issued April 11, 2017 (Docket No. 330304), p 2.**

Prosecutor's Failure to Properly "Redact" Inadmissible Statements In Interrogation Video Prejudiced The Defendant, But Reversal Not Required

"The prosecutor and defense counsel met and agreed that certain portions of the recording needed to be redacted because defendant mentioned other criminal offenses and asked for a polygraph examination. The prosecutor did not have the capability to electronically alter the recording. Accordingly, the prosecutor intended to fast-forward through or mute specific portions of the recording. Defense counsel expressed concern over the efficacy of this method as the interrogation was fast paced [...] Defense counsel's fears were well-founded...."

***People v Ames,* unpublished per curiam opinion of the Court of Appeals, issued June 19, 2014 (Docket No. 315390), p 1.**

The Playing of Unredacted Video Was Not in Error Where Defense Counsel Was Knowledgeable Of Damaging Information In Video And Did Not Request Redaction

"Just before defense counsel introduced this evidence, the prosecutor requested a sidebar conference. According to later statements by the court, the prosecutor warned defense counsel about the polygraph reference (as well as other potentially damaging information within the recorded interview) and defense counsel "indicated that he preferred or was willing to just play the whole thing without any redactions.

The trial court denied defendant's motion for a mistrial, noting that defense counsel wanted the entire interview played for the jury despite awareness that "there were issues" with information that should not reach the jury."

***People v Brunn,* unpublished per curiam opinion of the Court of Appeals, issued December 20, 2016 (Docket No. 329359), p 1.**

Playing of Unredacted Video by Prosecutor Was Not in Error Where Defense Agreed to the Admissibility of Defendant's Statements

"Before trial, defendant moved in limine to exclude from evidence defendant's prior convictions, and the trial court ruled that it would "keep parole out of this." The prosecutor also indicated that evidence of defendant's prior record would not be introduced unless defendant testified. But the motion in limine did not specifically mention the interview of defendant, or the statements that defendant challenges on appeal. Furthermore, defendant did not object to the video of defendant's interview with Detective Raap, either before it was admitted or while it was being played for the jury. Indeed, the trial court specifically inquired about the admissibility of defendant's "statement to Detective Raap" and asked, "Any objection to the statement?" Defense counsel replied, "I believe that comes in per well-settled law, your Honor."

***People v Turner,* unpublished per curiam opinion of the Court of Appeals, issued February 18, 2016 (Docket No. 324372), p 1.**

Defense Attorney's Approval of Prosecutions Video Redactions Did Not Preclude Mistrial Where Statements by Arresting Officer Eluded to The Material Which Had Been Redacted

"During the jury trial, a video from the arresting officer's in-car camera was admitted as evidence. Before playing the video for the jury, the parties discussed the recording, after both parties, as well as a prosecution witness, had an opportunity to review the edited video. The prosecution noted for the record that it had edited out 40 to 45 seconds of the video footage, which had showed defendant taking the PBT. Likewise, the district court noted that the parties had discussed the editing of the video on the record and stated its belief that the parties had indicated that the video "was fine." Defense counsel responded, "That is fine." Subsequently, the edited video was played for the jury.

Given defense counsel's unequivocal approval of the edited video footage on the record,

defendant has arguably waived review of any error arising from the prosecution's allegedly intentional failure to remove the police officer's statement from the video."

Comment: *No Appeal was taken as to whether the Trial Court abused its discretion in declaring mistrial over statements from video that had been approved as "fine" by the Defense. The Court*

of Appeals instead discussed these issues in responding to whether the Defendant's Conviction on Retrial Was Barred by Double Jeapordy.

***People v George,* unpublished per curiam opinion of the Court of Appeals, issued March 7, 2017 (Docket No. 327812), p 4.**

"In the present case, defendant asked the trial court to suppress the entire videotaped interrogation based on the interrogators' statements questioning her credibility. However, as the foregoing shows, such comments can be admissible when used as an interrogation technique to uncover the truth and to provide context for a defendant's responses. Thus, the mere fact that the interrogator questioned defendant's credibility during the interrogation does not provide grounds for exclusion of the entire videotaped interrogation. Unlike the defendant in Musser, the present defendant has not pointed to any specific statements that were irrelevant because they did not provide context for her responses"

***United States v Bundy*, No. 2:16-CR-046-GMN-PAL, 2016 WL 7030431, at *4 (D Nev November 30, 2016), app dis No. 17-10000, 2017 WL 6765120 (CA 9 January 25, 2017)**

Protective Order Appropriate Where Evidence Was Voluminous as To Make Review and Redaction Costly and Time Consuming

"This is a complex case with over 1.4 Terabytes of digital information, including hundreds of hours of audio and video recordings, along with at least 23 social media search warrant returns, consisting of over 250,000 pages of digital documents. *(Citations Omitted)* In its Response, the Government explains that requiring it to complete another review of this information for redaction purposes is time consuming and would delay the production of discovery. (*Citation Omitted*) This Court agrees that, under these circumstances, there is a risk that redaction would lead to a waste of resources, delay, confusion, unintentional violations, and collateral litigation [...] The current Protective Order will promote the timely, efficient, and expeditious production of voluminous discovery information while preventing inadvertent dissemination of the information.

***United States v Virgen-Nunez*, ___F Supp 2d___; 2009 U.S. Dist. WL 10678140 (SD Iowa, Oct. 21, 2009).**

Court Required the Prosecution To Prepare Unredacted Transcript Of Video For Defense.

The government shall continue to maintain the video in the discovery file. In addition, the unredacted transcript of the audio in the video prepared by the government shall also be placed in the discovery file. Though the redactions are not material to the defense, it is desirable for both sides to be on the same page with respect to what the extraneous material is in the event any portion of the video is offered in evidence. It makes no sense to require defense counsel to listen to the audio portion of the video to parse the redacted contents himself which would surely lead to conflict about the content of the redactions.

***State v Elmi Abdulahi Abdi*, ___SW3d___; 2015 Tenn. Crim. App. LEXIS 145 (Crim App, Mar. 2, 2015).**

Admission of Redacted Video Clips Was Not in Error

Appellate Court found that Trial Court did not abuse its discretion in admitting redacted video clips into evidence. Noting that "the Defendant failed to "require" the introduction of the unredacted video under Rule 106 [*Rule of Completeness*] the Appellate Court stated that because the record did not contain the information necessary to compare the un-redacted to the redacted video, it could only decide whether the trial court erred in admitting the redacted video. In deciding this question, the Appellate Court stated that:

> ***The trial court explained that it allowed only portions of the videotaped statement to be played to protect the Defendant from prejudice that may have resulted from the jury hearing questions and answers concerning other robberies. Clearly, in reaching its decision, the trial court weighed the danger of admitting the entire video and determined that, in order to protect the Defendant, all questions and answers related to other robberies should be redacted.***

TRANSCRIPTS

***People v Mansfield,* unpublished per curiam opinion of the Court of Appeals, issued April 3, 2008 (Docket No. 277155).**

Failure to Provide Videotaped Statement to Defendant Not Reversible Error Where Transcript Was Provided of Statement. The Trial Courts Admission of the Transcript Instead of the Original Recording Violated the Best Evidence Rule This Was Not Reversible Error

"The defense received a written transcript of the victim's videotaped statement, and defense counsel used this transcript to impeach the victim at trial. Defendant now asserts that trial counsel would have been better able to impeach the victim with the actual videotape than with the written transcript...We cannot conclude that the failure to turn over the actual videotape of the victim's statement in any way affected the outcome of defendant's trial. Id. No reversal is required on this ground.

Nor can we conclude that reversal is required under the best evidence rule, MRE 1002, which requires the admission of an original recording in order to prove the contents of that recording. We find that the trial court strictly violated the best evidence rule by admitting the written transcript in place of the original recording. However, defendant has not established that it is more probable than not that this evidentiary error influenced the outcome of his trial" (*Citations Omitted*).

***People v Diangelo,* unpublished per curiam opinion of the Court of Appeals, issued February 2, 2017 (Docket No. 327745), p 3.**

Trial Court Did Not Abuse Discretion in Admitting Transcript into Evidence Where Detective Testified Transcript Was Fair And Accurate And Jury Had Chance To Verify Transcript's Accuracy By Comparing With Audio.

"At trial, the prosecutor offered both an audio recording of the interview and a transcript into evidence. Defense counsel objected to the transcript because it was created by the prosecutor and was uncertified. The record shows that the parties did not stipulate to the accuracy of the transcripts, the transcriptionist who created the transcript did not testify, and the transcript was not certified. However, the trial court verified the accuracy of the transcript when it questioned a detective who participated in the interview.

The detective testified that he reviewed the audio recording and the transcript and affirmed that the transcript was fair and accurate. Moreover, the jury had the chance to independently verify the transcript's accuracy by comparing their copies of the transcript to the audio recording, which was played aloud in court. Further, defendant does not point to any specific errors in the transcript. Given that the trial court verified the transcript's accuracy by questioning the interviewing officer, that the jurors had an independent opportunity to compare the transcript and the recording, and that record does not reflect any inaccuracy in the transcript, the trial court did not abuse its discretion in admitting it into evidence."

TRANSLATIONS

People v Hernandez-Tello, **unpublished per curiam opinion of the Court of Appeals, issued May 9, 2017 (Docket No. 331436), p 1.**

> Prosecution's Statement That Bilingual Juror Could Interpret Statements from Body-Cam Video for Jury Was Improper, But Not Plain Error Where Defendant Failed to Object.
>
> "It would have been improper to instruct the jury that the bilingual juror could serve as an ad hoc interpreter for the jury during its deliberations. (*Citing MCR 1.111(F), MRE 604*). Here, however, the jury was not so instructed. Moreover, and while we consider the prosecution's statement regarding the bilingual juror to have been improper, it appears that the statement, viewed in context, was made as part of a larger response to defense counsel's argument concerning the fact that neither of the alleged victims testified at trial. (*Citation Omitted*)
>
> The statement was also an isolated remark. If defendant had made a timely objection to the prosecution's statement, the trial court could have instructed the jury that the bilingual juror could not serve as an interpreter, which would have alleviated any potentially prejudicial effect of the statement. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *(Citation Omitted)* Because a curative instruction would have sufficiently prevented any prejudice in this case, we do not find plain error requiring reversal. (*Citations Omitted*) Further, defendant has not cited a single statement from the video that would have prejudiced him if translated from Spanish to English. Because defendant has not shown how any error could have affected the outcome of his trial, defendant has also failed to demonstrate plain error requiring reversal (*Citations Omitted*)."

CELL RECORDS/TRACKING

State v Andrews, **227 Md App 350; 134 A3d 324 (2016)**

> We conclude that people have a reasonable expectation that their cell phones will not be used as real-time tracking devices by law enforcement, and—recognizing that the Fourth Amendment protects people and not simply areas—that people have an objectively reasonable expectation of privacy in real-time cell phone location information. Thus, we hold that the use of a cell site simulator requires a valid search warrant, or an order satisfying the constitutional requisites of a warrant, unless an established exception to the warrant requirement applies."

***State v Lewis*, ___P3d___; 2013 Haw. App. WL 6762403 at 4* (Ct App, Dec. 23, 2013)**

Camtasia Videos Capturing Chat Conversation Between Officer and the Defendant Were Admissible

The Circuit Court considered the arguments and ruled that the Camtasia videos were admissible under the Hawaii Rules of Evidence (HRE) because they were relevant to the Electronic Enticement charge, they went to the issue of Lewis's sexual intent with "Shanna," they helped to positively identify Lewis, and they would corroborate what was occurring in the text of the chat.

The court also noted that it would limit the prejudicial impact of the recordings by issuing cautionary instructions to prevent the jury from considering the Camtasia videos for improper purposes, directing the jury to only consider the videos for the purpose of determining Lewis's state of mind.

***State v MacMillan*, 152 NH 67, 68; 872 A2d 1031 (2005)**

Use of Camtasia by Officer to Capture Online Conversations with Defendant Violated New Hampshire's Recording Statutes. Admission Was Proper however because information in videos was obtained firsthand, and not solely through the recording.

Detective Warchol preserved the online conversation using "Camtasia," a program which records online conversations in real time, and by cutting and pasting the on-screen dialogue into a word processing document that was saved on the hard drive of his computer. The trial court concluded that Detective Warchol illegally recorded the contents of his online conversation with the defendant. In granting the defendant's motion, the trial court found that the Camtasia software functions as an "on-screen recording," analogous to a tape recorder, allowing the detective to play back the online conversation in "real time." (Emphasis added.) The State argues that disclosure should be permitted in this case because the detective obtained his knowledge of the contents of the conversation first-hand, not through the interception. We agree.

***Krise v Sei/Aaron's, Inc,* ___F Supp 3d___; 2017 U.S. Dist. WL 3608189 (ND Ga, Aug. 18, 2017)**

Use of Automatic Screencapture Software to Capture Communication Content Did Not Violate The ECPA

Detective Mode's screenshot function presents a more difficult question. Few courts have examined screenshot technology under the ECPA. Nevertheless, the Plaintiffs contend that Shefts v. Petrakis supports their argument that a screenshot that captures an image of a communication on a computer is contemporaneously copying the communication as it is transmitted. In Shefts, the plaintiff alleged that the defendants intercepted messages from his web-based email account by using a software called SpectorPro.158 Similar to Detective Mode, SpectorPro operated by taking images of the user's activities on the computer.159 The Shefts court held that the screen-captures constituted an interception under the ECPA.160 It found that "any emails sent by Plaintiff on his Yahoo! account via his desktop computer would have been captured by

SpectorPro as they were transmitted to Yahoo! via the internet."161

The Court, however, finds that SpectorPro is distinguishable from PCRA's Detective Mode. According to the Shefts court, SpectorPro was "always on," meaning it was constantly capturing screenshots.162 Therefore—by default—it "capture[d] all communications simultaneously with their transmission."163 But Detective Mode's screen-capture function was not always running. Instead, according to the Plaintiffs' expert, it took screenshots every two minutes.164 This means that Detective Mode did not automatically capture all communications simultaneously with their transmission. In fact, Detective Mode's screen-capture function is more akin to a different intercepting device discussed in Shefts. Specifically, the Shefts court found that "where the allegedly intercepting device operates only intermittently (rather than continuously, as in the SpectorPro instance), the amount of time between the transmission and interception by the spy is not the primary determining factor, but rather the fact that interception was automatically triggered by transmission or reception."

***United States v Dennington*, ___F Supp 2d___; 2009 U.S. Dist. WL 2591763, at 6* (WD Pa, Aug. 21, 2009)**

Court Accepted Screen Capture Video into Evidence in Deciding Factual Dispute As To Its Depictions

The Government disagrees with the Defendant's characterization of what the screen capture shows. The Government maintains that the overall content of the GGN photo section is more ambiguous than the Defendant allows and, in any event, cannot be described as being clearly and overwhelmingly dedicated to adult pornography.

Given this dispute, this Court accepted a copy of the screen capture video into evidence at the Defendant's request. Having viewed the screen capture for itself, the Court disagrees with the Defendant's characterization of what Detective Lynn's screen capture shows.

***In re Providence Journal Co,* 293 F3d 1 (CA 1, 2002)**

Court Declined Request to Compel Creation and Production of Trial Evidence Presented In Sanction

"Here, the government has not merely played individual tapes, but, rather, has used cutting-edge technology (the Sanctions software) to play for the jury medleys of selected excerpts from the universe of taped material stored on its laptop computer. As a result, there is no electronic medium—no tape or CD–ROM—currently in existence that contains the precise medleys of taped excerpts that have been played in open court. Consequently, we must decide whether the common-law right of access compels a court to create (or order the creation of) a new medium that contains only taped excerpts that have been played in open court. This is a question of first impression at the appellate level....

We decline THE JOURNAL's invitation to second guess these findings. In the first place, the parties' representations as to how the software operates and how difficult it would be to reproduce the evidence seen and heard by the jurors are sharply conflicting. As a result, the record before us is hopelessly imprecise—and the Sanctions software package is not part of it. In the second place, the fact that the public and the press have had ample opportunity to see and hear the evidentiary tapes when those tapes were played in open court during trial takes much of the sting out of the district court's decision. Given these considerations, we cannot say that the district court abused its discretion in denying THE JOURNAL's request to compel the creation and production of excerpt only tapes or CD–ROMs mimicking the materials actually played to the jury"

***Fresenius Med Care Holdings, Inc v Baxter Int'l, Inc,* ___F Supp 2d___; 2008 U.S. Dist. WL 2020533 (ND Cal, May 7, 2008)**

Although Court Found Sanction Software to Be Useful in Presenting Trial Materials, It Declined To Tax Its Cost To The Losing Party.

The Court explained, "[j]ust as in *Affymetrix*, the use of the Sanctions software may in fact have been a useful means of conveying information, but it does not appear reasonably necessary to the sixty-one documents shown to the jury. The $22,289.04 in costs for the Sanctions software will not be taxed." *Id*.

State v. Sims, No. E201801268CCAR3CD, 2020 WL 5088737, at *19 (Tenn. Crim. App. Aug. 28, 2020)

In this case, we conclude that the trial court did not abuse its discretion in determining that the potential for unfair prejudice did not substantially outweigh the probative value of the evidence of the on-going gang feud. Unlike the breadth of evidence presented in *Jeremy Reynolds*, the evidence in this case was specifically tailored to

those acts of violence that were directly connected to this specific feud. Investigator Winbush's testimony and the State's accompanying PowerPoint presentation were straightforward and did not include any overly graphic or salacious details. While ten specific acts of violence may seem like a lot, the number of incidents presented by the State was necessary to show the retaliatory nature of the feud. Although the trial court did not give any specific limiting instruction with regard to this evidence, the trial court did instruct the jury that it could only consider the Defendant's alleged gang membership for the limited purposes of identity, motive, and intent. We note again that "Rule 403 is a rule of admissibility, and it places a heavy burden on the party seeking to exclude the evidence." *James*, 81 S.W.3d at 757. The Defendant has not established that the trial court abused its discretion in admitting this evidence of an on-going gang feud and, therefore, is not entitled to relief.

GEO-FENCING AND CELL TOWER SEARCH WARRANTS

Carpenter v United States, **___US___; 138 S Ct 2206; 201 L Ed 2d 507 (2018)**

The government's acquisition from wireless carriers of defendant's historical cell-site location information (CSLI) is a search under the Fourth Amendment. A warrant is necessary to obtain CSLI in the absence of an exception such as exigent circumstances. Further, the fact that the information is held by a third party does not by itself overcome the user's Fourth Amendment protection. The Court found that when the Government accessed CSLI from the wireless carriers, it invalidated Carpenter's reasonable expectation of privacy [51]

United States v James, **___F Supp 3d___; 2018 U.S. Dist. LEXIS 210433 (D Minn, Nov. 26, 2018)**

Defendant was arrested on several robbery charges. Defendant moved to suppress the evidence that had been obtained as a result of searches conducted pursuant to nine warrants issued. The first three warrants, each of which authorize the collection of cellular tower dumps and call detail record information from cell phone companies, of all cellular devices utilizing the cell site/sector near the specified areas for a variety of dates, times and locations correlated with the robberies. The Court held that even

[51] The Court notes this is a narrow decision and does not express a view on the matters of real-time CSLI or "tower dumps" (a download of information on all the devices connected to a particular cell site during a particular interval).

assuming the defendant had a reasonable expectation of privacy in the cellular tower data that was subject of the warrants, his motion fails because the search warrants for the cellular tower data were supported by probable cause and were sufficiently definite.

MISCELLANEOUS

Enlargement of photos on screen is not prejudicial as long as photos are admitted.[52]

a. ***Conover v Oklahoma*, 933 P2d 904, 914 (Okla Crim App, 1997)**
b. ***Browing v Oklahoma*, 134 P3d 816, 839 (Okla Crim App, 2006).**
c. ***Bankhead v Alabama*, 585 So2d 112 (Ala. 1991).**
d. ***Jones v Georgia*, 293 SE2d 708 (Ga. 1982).**
e. ***Gopaul v Florida*, 536 So2d 296 (Fla. Ct App, 1988).**
f. ***US v Yahweh*, 792 F. Supp 104 (SD Fla, 1992).**
g. ***People v Watson*, 245 Mich App 572, 582 (2001).**

DIGITAL MEDIA – VIDEO AND EVIDENCE – MICHIGAN LAW

Introduction

While there are no "special" or unique admission requirements particular to digital media evidence, challenges to such evidence continue to be raised within the courtroom, requiring prosecutors to marshal persuasive legal authorities that succinctly illustrate the proper considerations for a particular media's authentication and admission. This section, therefore, focuses on setting out the evidentiary requirements for digital media authentication, the methods that can be employed to meet these foundational requirements, and the challenges commonly invoked to bar or suppress such the evidence's admission.

Common Arguments

One of the most voiced arguments concerning digital evidence is its purported potential for manipulation. Arguing that digital evidence can more easily (and remotely) be distorted or modified, challengers have asserted that digital and electronic evidence requires more rigorous showings of authenticity, and proponents

[52] Also, mathematically, a 4x6 printed photo at one foot has the same perspective as a 80x120 projection of the photo on a screen 20 feet away.

must show that no manipulation, modification, or tampering occurred in order to sufficiently meet foundational requirements for authentication[53].

This position however has been almost universally rejected by both State and Federal Courts (including those of Michigan.)[54] Despite these rejections, arguments for heightened evidentiary standards continues to be voiced, with some legal scholars arguing for a revision of the Rules of Evidence to impose more arduous requirements for electronic and digital evidence's authentication and admission in Court proceedings.

As Michigan's Court Rules and Case Law make clear however, the admissibility of all evidentiary submissions regardless of form, are governed by the provisions set down in the Michigan Rules of Evidence. Any challenge to the admission of video, audio, and other digital evidence, therefore, must be based on one of these evidentiary rules. Key among these is the requirement of authentication.

Authentication – MRE 901

Perhaps the most frequent basis for a challenge to the admission of video and audio evidence, the authentication requirement is foundational for the admissibility of all forms of evidence, whether traditional or digital, documentary, or visual. This predicate requirement for admissibility is set out in MRE 901(a) which provides:

The requirement of authentication or identification... is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.[55]

Challenges to Digital Media authentication are commonly invoked where:

- The origin of a video/audio exhibit is unknown.
- There is a missing/incomplete/suspect chain of custody
- The media presented is not in its original form

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[53] See e.g. People v. Ely, 68 N.Y.2d 520, 503 N.E.2d 88, 89, 1986 N.Y. LEXIS 20897 (N.Y. 1986)

[54] See e.g., State v. Baker, Ohio App. LEXIS 2311 (2016); United States v. Lundy, 676 F.3d 444, 447, U.S. App. LEXIS 6315 (5th Cir. Miss. 2012); United States v. Knowles, 623 F.3d 381, 383, U.S. App. LEXIS 20991(6th Cir. 2010);

[55] Comment: (It should be noted that the provisions of MRE 901(a) are consistent with the authentication requirements under FRE 901(a) and reflects the authentication requirements set forth in most U. S. jurisdictions) (See Alaska: Alaska R. Evid. 901(a); Arizona: Ariz. R. Evid. 901(a); Arkansas: Ark. R. Evid. 901(a); California: Cal. Evid. Code § 1400; Colorado: Col. R. Evid. 901(a); Delaware: Del. R. Evid. 901(a); Florida: Fla. Stat. Ann. § 90.901; Hawaii: Hawaii R. Evid. 901(a); Iowa: Iowa R. Evid. 901(a); Kansas: Kan. Gen. Stat. Ann. § 60-464; Louisiana: La. Code Evid., Art. 901(A); Maine: Me. R. Evid. 901(a); Minnesota: Minn. R. Evid. 901(a); Mississippi: Miss. R. Evid. 901(a); Montana: Mont. R. Evid. 901(a); Nebraska: Neb. Rev. Code § 27-901(1); Nevada: Nev. Rev. Stat. § 52.015(1); New Jersey: N.J. R. Evid 67; New Mexico: N.M. R. Evid. 901(a); North Carolina: N.C. R. Evid. 901(a); North Dakota: N.D. R. Evid. 901(a); Ohio: Ohio R. Evid. 901(A); Oklahoma:12 Okla. Stat. § 2901(A); Oregon: Ore. Rev. Stat. § 40.505(1); Rhode Island: R.I. R. Evid. 901(a); South Dakota: S.D. Comp. L. § 19-17-1; Tennessee: Tenn. R. Evid. 901(a); Texas: Tex. R. Evid. 901(a); Utah: Utah R. Evid. 901(a); Vermont: Vt. R. Evid. 901(a); Washington: Wash. R. Evid. 901(a); Wisconsin: Wis. Stat. Ann. § 909.01; Wyoming: Wyo. R. Evid. 901(a)) See also: Modern Visual Evidence § 5.02

- Modification, manipulation, or editing has been done to an original image or recording.

These situations however are not preclusive bars to either the authentication, or the admissibility of digital media evidence. Both Michigan and Federal Appellate Courts have refused to apply more rigorous authentication requirements based on the form in which evidence is presented and have recognized that the provisions of MRE 901(b) and FRE 901(b) provide numerous means to authenticate evidence and have applied them to various media.[56]

Indeed, the variety methods and proofs which can be offered to authenticate media evidence are extensive. Importantly, MRE 901(b) sets out several examples which, as the rule itself notes, are in no way exclusive. The following are illustrations set forth in both MRE and FRE 901(b) and which are especially applicable for use in authenticating media evidence:

Testimony of Witness with Knowledge

Testimony that a matter is what it is claimed to be.

This method of authentication appears to be one of the most common methods for digital media authentication. A" Witness with Knowledge" may include:

- An individual who can identify themselves in a recording[57]
- An individual who created the video/audio recording[58]
- An individual who witnessed the event or conversation depicted [59]
- An individual who secured video/audio from initial source and is aware of the circumstances surrounding its creation[60]

Comparison by Trier or Expert Witness

Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated

Often, video or audio evidence that is utilized in trials may not be in the specific form or format in which it was created and may instead be a copy or duplicate of the original media, yet which is not identical to it in all respects. Where the original is able to be authenticated, this method may be used to similarly authenticate the copies; either through a Court comparing the original and prospective evidence to determine whether

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[56]

[57] People v. Thomas (Unpublished)Mich. App. LEXIS 2178 (2016)

[58] United States v. Lundy, 676 F.3d 444, 447, U.S. App. LEXIS 6315 (5th Cir. Miss. 2012)

[59] State v. Waver, Ohio App. LEXIS 2970, (Ohio Ct. App., Butler County, 2016); State v. Hoffmeyer, 9th Dist. Summit No. 27065, 2014-Ohio-3578

[60]People v. Humphries (Unpublished), Mich App Lexis 1747 (2015); State v. Vermillion, Ohio App. LEXIS 1195 (2016); State v. Coots, 27 N.E.3d 47 Ohio-126, (2nd Dist. 2015)

the prospect accurately represents the original, or may alternatively, allow testimony by an expert witness to evaluate the accuracy of the prospective media evidence.

Distinctive Characteristics and The Like.

Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.
Especially utilized for video evidence authentication, Courts often reference this provision where a combination of proofs are presented, especially third-party testimony, and is typically utilized as an evidentiary "Catch all".[61]

Voice Identification.

Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

As the name implies, this method of authentication is primarily utilized for audio evidence. Testimony by a witnesses or witnesses who can connect a recorded voice to a specific individual or identify the voice as belonging to themselves or another, is sufficient to authenticate an audio recording.

Process or System.

Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

This is method of authentication is especially utilized when video or audio is obtained from independent surveillance systems yet where no witness is available to testify to observing the event captured by the video system or to the accuracy of the video's depiction of the event. Often referred to in the case law as the "Silent Witness Theory" of authentication, Courts routinely admit evidence under this theory where testimony can be presented as to the operation/maintenance/protocols etc. surrounding the particular video or audio recording system and the reliability of such system. Proofs are typically elicited through the testimony of non res gestae witnesses and may include the systems operator, a representative of the entity which owns/utilizes the system, law enforcement officers, expert witnesses, etc.[62]

While none of the methods are required to be utilized for evidence authentication, nor meant to encompass all the ways in which such evidence may be authenticated, the Trial Court has extensive discretion in determining whether sufficient proofs have been

[61] People v. Shipp (Unpublished), Mich. App. LEXIS 3207(2004); People v. Doster, (Unpublished) Mich.App. LEXIS 1983 (Mich. Ct. App. 2013)
[62] People v. Flake (Unpublished) Mich. App. LEXIS 2266 (2014); People v. Rocafort, (Unpublished) Mich. App. LEXIS 3274 (2005); Wise v. State, 26 N.E.3d 137; Ind. App. LEXIS 92, (Ind. Ct. App. 2015); State v. Pickens, 141 Ohio St. 3d 462, 25 N.E.3d 1023(2014); People v. Taylor, 956 N.E.2d 431, 439, Ill. LEXIS 1822, 20-21 (2011)

offered to authenticate any piece of digital evidence. As such, the use of ***multiple*** authentication methods will greatly support a showing that the offered media evidence is "what it is purported to be" and may make any contrary determinations by the Trial Court more likely to be considered "an abuse of discretion" and subject to reversal on appeal.

Best Evidence/Original Evidence Rule

Closely tied with MRE 901's requirement of Authentication, the Original Evidence Rule, (often

incorrectly described as the "Best Evidence Rule) is set forth in *Michigan Rules of Evidence 1001-1009*. [63] [64] [65] Frequently utilized in challenging the admissibility of media evidence, MRE 1002 requires that in order to prove the content of a writing, recording, or photograph, ***the original writing, recording, or photograph is required except as otherwise provided…***[66] MRE 1002's requirement of an original however has numerous caveats.[67] Particularly, MRE 1003 (*Admission of Duplicates*)[68] and MRE 1004 (*Admissibility of Other Evidence of Contents*)[69]both provide important exceptions for the requirement of original evidence, allowing for the admission of duplicates (*MRE 1003*), as well as any other evidence of an original's contents in circumstances where the original is unable to be used (*MRE 1004*).

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[63] MRE 1001 (Contents of Writing, Recordings, and Photographs) An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

[64] MRE 1001(3) defines an "original" as: "a writing or recording itself or any counterpart Intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

[65] MIRE 1001(4) defines a "duplicate" as: "a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques, which accurately reproduces the original."

[66] MRE 1002

[67] See MRE 1003 to 1008

[68] MIRE 1003 states: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

[69] MIRE 1004 states: "The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if–

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

While Michigan Courts continue to recognize *MRE 1002's* requirement that an Original be provided when in existence, *MRE 1001's* definition of "Original" has undermined the success of most evidentiary challenges to digital evidence under *MRE 1002*. As the definition of an "Original" includes ***"any counterpart intended to have the same effect..." or "any printout... shown to reflect the data accurately***," an infinite number of what one might consider "copies" of a digital file can be created, and yet which are defined as "Originals" under the definition of Original set out in MRE 1001.

Moreover, even where an Original piece of evidence cannot be obtained, *MRE 1004* allows for the dispensation of MRE 1002, providing alternative avenues of proof in the place of the Original evidence. In the context of digital evidence, Courts regularly allow for the admission of:

1. **"Re-Recordings**" (a recording taken using one medium to capture recording from another)[70]
2. **Converted Recordings** (recordings transferred from one file or media format to another)[71];
3. **Enhanced/Edited Recordings** (Recordings which have parts removed or modified);[72]
4. **Witness Testimony about Recordings** (*Where the recording no longer exists*).[73]

Also see ***People v. Haywood,*** unpublished per curiam opinion of the Court of Appeals, issued December 3rd, 2019 (Docket 342729) pages 7, 8, and 9 listed within this document.

SPECIAL ISSUES – META DATA

Though limited case law exists regarding the production or publication of meta-data in the criminal law context, there has been some development regarding its use and production in the civil context. Governed by the Federal Rules of Civil Procedure, litigants are obligated to discuss the scope and form of electronic evidence production, a process which normally allows for the mutual consensus regarding the form in which electronic evidence should be produced. As highlighted by a range of Federal Cases, while either party may object to the form and extent electronic discovery is to be

[70] People v. Humphries (Unpublished), Mich App Lexis 1747 (2015); Lundy, 676 F.3d 444, 447, (5th Cir. Miss. 2012)
[71] People v. Kenyatta Khuru Davis (Unpublished), Mich. App. LEXIS 595 (2009); Allen v. Perry, U.S. Dist. LEXIS 109022 (W.D. Mich. 2015); Taylor, 956 N.E.2d 431, 439,
[72] U.S. v. Seifert, 445 F.3d 1043, 1045-1046, U.S. App. LEXIS 9725, (8th Cir. 2006); Fountain v. United States, 384 F.2d 624, 631 (5th Cir. Fla. 1967)
[73] United States v. Knowles, 623 F.3d 381, 383, U.S. App. LEXIS 20991(6th Cir. 2010)

received or provided, a party is generally only obligated to produce metadata when the following conditions are met:

- **It is relevant**
- **It has evidentiary value,**
- **It is not available from other sources**
- **It is not unreasonably burdensome to produce**

CP Solution PTE, Ltd. v. Gen. Elec. Co., U.S. Dist. LEXIS 27053, at 14 (D. Conn. 2006)

Where A Dispute Exists as To the Form in Which Evidence Is to Be Produced, The Requesting Party Must Show A Particularized Need for The Metadata Sufficient To Offset The Cost And Burden In Reviewing And Producing The Metadata

Kentucky Speedway, LLC v. Nat. Assoc. Stock Car Auto Racing, Inc., U.S. Dist. LEXIS 92028, at 23 (E.D. 2006)

Requesting Party Failed to Make Showing of Particularized Need for Metadata *O'Bar v. Lowe's Home Ctr*., U.S. Dist. LEXIS 32497, at 13-14 (W.D.N.C. 2007)

Where Party Requested Production of Discovery in Its Native File Format, The Court Issued A Pretrial Order Requiring Showing Of Particularized Need**.**

Wyeth v. Impax Labor., Inc., U.S. Dist. LEXIS 79761, (D. Del. 2006)

The Production of Metadata Is Not Required When Party Failed to Show Particularized Need for Native File Format

Production of Metadata "Would Be Extremely Burdensome, With No Countervailing Discovery or Evidentiary Benefit."

District of Maryland - Suggested Protocol for Discovery of Electronically Stored Information ("ESI"), at 11(C)
http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf

Metadata Should Not Routinely Be Produced**.**

Michigan First Credit Union v. Cumis Ins. Soc., U.S. Dist. LEXIS 84842, (E.D. Mich. 2007).

Maine and First Federal Circuit

Rule 616—Illustrative Aids

(a) Otherwise inadmissible objects or depictions may be used to illustrate witness testimony or counsel's arguments. (b) The court may limit or prohibit the use of illustrative aids as necessary to avoid unfair prejudice, surprise, confusion, or waste of time. (c) Opposing counsel must be given reasonable opportunity to object to the use of any illustrative aid prepared before trial. (d) The jury may use illustrative aids during deliberations only if all parties consent, or if the court so orders after a party has shown good cause.42 Illustrative aids remain the property of the party that prepared them. They may be used by any party during the trial. They must be preserved for the record for appeal or further proceedings upon the request of any party.

State v. Irving, 2003 ME 31, 818 A.2d 204, March 7, 2003

[¶ 22] An illustrative aid is a depiction or object which illustrates testimony or argument. M.R. Evid. 616(a). It does not go into the jury room unless counsel agree or by order of the court for good cause. *Id.* 616(d). While it does not have to meet the requirements of admissibility, *id.* 616(a), it has to be related to the testimony or argument which it illuminates. When used to illustrate argument, the aid must not be used for an improper purpose just as an opening statement or closing argument cannot contain improper references. In *State v. Pineau,* 463 A.2d 779 (Me.1983), we affirmed an American Bar Association standard which provides:

The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader that the guilt or innocence of the accused under the controlling law ....

Id. at 781 (quoting from AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION § 5.8(d) (1971)). An illustrative aid used during argument that diverts a jury from the evidence or injects a risk of unfair prejudice would be improper.

Irish v. Gimbel, 2000 ME 2, 743 A.2d 736, January 6, 2000

5[¶ 9] The Irishes challenge the use of a two-foot by three-foot blow-up of the panel finding by defense counsel. They assert that our ruling in *Irish I* prohibited the use of blow-ups depicting panel findings.

However, the trial court correctly read *Irish I* and M.R. Evid. **616**(a)2 and ruled that the blow-up could be used, but only while counsel was making direct reference to it. The blow-up could not, as occurred in *Irish I,* be left facing the jury during the entire course of the trial. Nothing in *Irish I* can be read to suggest that we prohibited the use of blow-ups in ***739** connection with presentations being made to juries as long as the blow-up does not divert the jury's attention when the information in the blow-up is not the matter

being presented to them. Further, in connection with the use of the blow-up, we do not see in the record any improper comment by defense counsel.

The entry is:
Judgment affirmed.

State v. Williams, 2012 ME 63, 48-49, 52 A.3d 911, 922 May 3rd, 2012 (emphasis added)

D. Sufficiency of the Evidence
232425 [¶ 49] We review the sufficiency of the evidence in the light most favorable to the State to determine whether the jury could have found beyond a reasonable doubt each of the elements of the crimes charged. *State v. Severy,* 2010 ME 126, ¶ 8, 8 A.3d 715. **The factfinder is permitted to draw all reasonable inferences from the evidence**. *State v. Medeiros,* 2010 ME 47, ¶ 16, 997 A.2d 95. To that end, the fact-finder is free to selectively accept or reject testimony presented based on the credibility of the witness or **the "internal cogency of the content."** *State v. Mahaney,* 437 A.2d 613, 621 (Me.1981).

State v. Hansley, 2019 ME 35, 9-10, 203 A.3d 827, 831 March 5th, 2019

1. Eyewitness Identification

[¶10] The United States Supreme Court has endorsed the use of jury instructions that discuss the potential risks of eyewitness identification. *See Perry v. New Hampshire*, 565 U.S. 228, 246, 132 S.Ct. 716, 181 L.Ed.2d 694 (2012). Recently, we revisited this issue and determined that the following instruction was "consistent with the evolution of the law regarding eyewitness identification" and "a correct statement of the law":

> You should carefully consider any testimony relating to eye witness identification. For instance, you should consider the following in determining the accuracy of any eye witness identification: whether the accuracy of an eye witness identification may be affected by the fact that the person identified is of a different race, which may make it more difficult to identify an individual, whether the accuracy of an eye witness identification may be affected by the circumstances under which it was made, how much weight, if any, you should give to the amount of certainty expressed by a witness given that there may not be a correlation between the reliability of an eye witness identification and the amount of certainty expressed by the witness in making that identification. It's up to you to consider those issues and evaluate whether those affect any eye witness identification.

§ 24:9. Voluminous records, 4 Maine Prac., Trial Handbook § 24:9 (2021 ed.) (emphasis added)

Summary Exhibits

Voluminous or detailed records which can be produced only with difficulty, and which would be cumbersome to have read to the jury, present another circumstance in which secondary evidence may be permitted. The court may allow a witness who has carefully examined the records to testify summarily as to their contents. **Rule 1006, and State v. Huff, 157 Me. 269, 171 A.2d 210 (1961).** The court will be especially likely to permit this with books of account and similar records which require running tabulations to be comprehensible, and which would require too much time and expertise for the jury to decipher in their original form.

§ 17:2. What constitutes corroboration, 4 Maine Prac., Trial Handbook § 17:2 (2021 ed.)

Corroborating evidence need not emanate from other witnesses but may be furnished by surrounding circumstances. See State v. Doughty, 408 A.2d 683 (Me.1979). Corroboration need not be sufficient to support the verdict independently nor must every essential allegation be corroborated. See State v. Galloway, 247 A.2d 104 (Me.1968).

There is no formula or rule for determining what is adequate corroboration, and each case rests on its own facts and circumstances. The degree and quality of corroboration will vary with the case. See State v. Swain, 493 A.2d 1056 (Me.1985); and M.R.Evid. 801(d)(1)(B) "prior consistent statement".

***United States v. Cadden*, No. CR 14-10363-RGS, 2017 WL 2695289, at *4–5 (D. Mass. June 22, 2017), aff'd, 965 F.3d 1 (1st Cir. 2020)**

Summary Exhibits

***5** The easiest issue to dispose of is the allegation that the PowerPoint used by the government in support of its closing argument was a distorted, prejudicial, misleading, and incomplete Rule 1006 summary chart. It was not.

As the court previously noted, the PowerPoint presentation was
a perfectly acceptable Rule 611(a) pedagogical aid supporting the government's closing argument. As the court observed in ... ruling on the pertinent motion in limine:

While a Rule 1006 chart is typically admitted in evidence, a Rule 611(a) pedagogical device distilling and simplifying complex data to aid counsel's argument to the jury is not. *See United States v. Milkiewicz*, 470 F.3d [390,] 397 [(1st Cir. 2006)]. The

difference, as explained in [*United States v. Bray*, 139 F.3d 1104 (6th Cir. 1998)], is that charts admitted under Rule 1006 are explicitly intended to reflect the contents of the documents they summarize, and typically are substitutes in evidence for the voluminous originals, while Rule 611(a) pedagogical aids are intended to illustrate or clarify a party's position and may by way of captions or method of organization permissibly promote the inferences and conclusions the proponent seeks to draw from the evidence. 139 F.3d at 1111; *cf. United States v. Johnson*, 54 F.3d 1150, 1157-1161 (4th Cir. 1995) (summary testimony and charts allowed in a complex drug trial as a permissible "pedagogical device" under Fed. R. Evid. 611(a)).

Dkt # 1036.
The court, of course, sat through the argument and the original presentation of the PowerPoint and has reviewed it again. While it makes a forceful (and coherent) brief for the government's view of the case, it does nothing that strays out of the bounds of permissible (if vigorous) advocacy. Consistent with Rule 611(a), the PowerPoint was not admitted into evidence or given to the jurors as a chalk for use in their deliberations. There is no reason given for the court to alter its original ruling.[16]

United States v. McForbes, No. 16-1281, 2018 WL 7959183, at *1 (1st Circ. Nov. 26, 2018)

As to the admission of the transcripts, this court has "long approved the use of properly authenticated transcripts of tape recordings for the purpose of helping the jury listen to and understand the recordings themselves." United States v. Young, 105 F.3d 1, 10 (1st Cir. 1997) (citing United States v. Campbell, 874 F.2d 838, 849 (1st Cir. 1989) and United States v. Rengifo, 789 F.2d 975, 980 (1st Cir. 1986)).
In the present case, the case agent authenticated the transcripts at trial, and the trial court instructed the jury that the transcripts were only an aid for the jury and that the audio recordings were controlling. There was no abuse of discretion. See United States v. Ademaj, 170 F.3d 58, 65 n.6 (1st Cir. 1999).

New Mexico and Tenth Federal Circuit

State v. Serrano, No. S-1-SC-35277, 2016 WL 6078551, at *6 (N.M. Oct. 17, 2016)

PowerPoint use in Closing Argument

The Closing Video in the State's final presentation to the jury focused on a looped six-second clip from the already admitted State Exhibit 53 to emphasize the State's position. Quiroz testified that she did not edit or alter the video in any way, but merely increased the volume of the original audio and provided the State with a looped and a nonlooped version.

The State then incorporated the looped version of the video into its final PowerPoint presentation with the contested words "It's right here" superimposed on the image. In State v. Orzen, the state similarly replayed a film previously admitted into evidence during closing argument but displayed it on a screen different from the one used when the jury originally viewed it. See 1972-NMCA-006, ¶ 27, 83 NM. 458, 493 P.2d 768. To emphasize portions of that film to the jury, the prosecutor "slowed the film, stopped it, reversed it, and made comments concerning what was shown," which the defendant claimed amounted to misconduct. Id. The Court of Appeals disagreed, determining that the previously admitted film was evidence and the prosecutor's comments about the film "were no more than comments directing the jury's attention to what the exhibit showed."

Id. ¶ 28. **Similarly in this case, the Closing Video did not alter or distort evidence but rather highlighted portions of the cell phone video already admitted into evidence without objection.** And "[t]he prosecutor's comments [referring to the video] during the closing arguments stated conclusions and inferences reasonably drawn from the facts and circumstances and were within the permissible range of argument." Duffy, 1998-NMSC-014, ¶ 58 (internal quotation marks and citation omitted).

State v. Orzen, 1972-NMCA-006, ¶ 28, 83 N.M. 458, 463, 493 P.2d 768, 773 (Jan. 14. 1972)

Case from 1972 cited in PowerPoint use case in 2016 (see above).

The film, admitted into evidence without objection, was demonstrative evidence. See Paradis, The Celluloid Witness, 37 U. of Colo.Law Review 235, at 259 (1965). The prosecutor's comments were no more than comments directing the jury's attention to what the exhibit showed. State v. Blancett, 24 N.M. 433, 174 P. 207 (1918), appeal dismissed 252 U.S. 574, 40 S.Ct. 395, 64 L.Ed. 723 (1920). The comments were based on the evidence and were thus permissible. State v. Santillanes, 81 N.M. 185, 464 P.2d 915 (Ct.App.1970).

State v. Macias, No. 33,065, 2013 WL 11109479, at *4 (N.M. Mar. 11, 2013)

Objection to slide overruled as it was based on the evidence

5 {15} Second, Macias argues that the State briefly displayed a PowerPoint slide during its closing that drew attention to Macias's choice not to testify at trial. The slide apparently read, "All the aforementioned testimony is true and corroborated by Robert [Macias], and Robert is incriminated." Macias interprets this as a comment on his choice to testify in the first trial and not to testify in the trial at issue.
{16} "Comment by the prosecutor upon a defendant's failure to testify violates the privilege against self-incrimination guaranteed by the Fifth and Fourteenth Amendments." State v. Clark, 108 N.M. 288, 302, 772 P.2d 322, 336 (1989), overruled on other grounds by State v. Henderson, 109 N.M. 655, 659, 789 P.2d 603, 607 (1990), overruled by Clark v. Tansy, 118 N.M. 486, 493, 882 P.2d 527, 534 (1994). When evaluating allegations that prosecutors made such comments, we ask "whether the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." Clark, 108 N.M. at 302, 772 P.2d at 336.

{17} The comments in this case do not violate the Clark standard. The slide did not directly refer either to Macias's earlier trial or to his failure to testify in the second trial. **As the State points out, statements made by Macias were admitted into evidence through the testimony of other witnesses. Therefore, there was no reason for the jury to think that the phrase "the ... testimony is ... corroborated by Robert [Macias]" was an oblique reference to Macias's testimony or lack thereof. The slide did not create reversible error.**

State v. Foster, 1998-NMCA-163, ¶ 28, 126 N.M. 177, 184, 967 P.2d 852, 859 (September 22, 1998)

Visual Aids

{28} We find no abuse of discretion here. During voir dire outside the presence of the jury, the medical examiner testified that the clothes on the mannequin would be useful in demonstrating to the jury the location of the wounds and that the wounds were the result of close-range firing. Defense counsel argued that the autopsy report would reveal the same information. The court held that there was probative value in showing the mannequin with the clothing and that the probative value of the exhibit outweighed any prejudice. **We cannot say that the court should have required the prosecutor to rely on a written report and thereby denied the prosecutor the use of visual aids to explain what happened.** Demonstrative exhibits are likely to be merely illustrative of other evidence. That does not make them inadmissible as cumulative evidence. See State v. Hoxsie, 101 N.M. 7, 9, 677 P.2d 620, 622 (1984), overruled on other grounds by Gallegos v. Citizens Ins. Agency, 108 N.M. 722, 731, 779 P.2d 99, 108 (1989).

State v. Vance, 145 N.M. 706, 204 P.3d 31 (Dec. 9, 2008)

Use of PowerPoint by a witness

{18} Defendant argues that the district court abused its discretion by allowing a witness to testify using a PowerPoint presentation describing the manufacture of methamphetamine. Defendant contends that (1) the presentation was irrelevant because he was not charged with using the manufacturing method that was described and (2) the testimony accompanying the presentation used inflammatory or derogatory terms such as the "Nazi Dope Method" of manufacture and "Beavis and Butthead" methamphetamine cooks.

Rojem v. Trammell, No. CIV-10-172-M, 2014 WL 4925512, at *6 (W.D. Okla. Sept. 30, 2014), aff'd sub nom. Rojem v. Royal, 673 F. App'x 797 (10th Cir. 2016)

PowerPoint admissible as an exhibit used by witness

The record does not reflect that any federal law, or the law of any other jurisdiction, was referred to in any way by either party, Cunningham or any other witness. The State suggests that the trial court prohibited the PowerPoint demonstrative aid because the court was afraid reference to the DOJ model would confuse the jury's understanding of Oklahoma law, particularly concerning the continuing threat aggravating circumstance. Nothing in the record supports this assertion. The trial court's concern was clearly and vigorously expressed several times: the court believed that any reference to the U.S. Department of Justice was a reference to federal law generally, not as applied to any issue in the trial, and he would not permit it. The trial court never suggested jury confusion was an issue or concern in the case, and the record does not support any conclusion that the jury would have been misled by the PowerPoint presentation.

Green v. City of Norman, Oklahoma, No. CV-17-510-D, 2018 WL 6802101, at *2 (W.D. Okla. Dec. 26, 2018)

We review the district court's decision to admit evidence under an abuse of discretion standard. An abuse of discretion relating to the admission of evidence is measured by whether the district court's ruling was clearly untenable or not justified by reason, and by whether the ruling was clearly against the logic and effect of the facts and circumstances of the case.

7{19} **The PowerPoint presentation was demonstrative evidence.** "New Mexico *711 **36 cases define demonstrative evidence, also sometimes referred to as real evidence or evidence by inspection, as such evidence as is addressed directly to the senses of the court or jury without the intervention of the testimony of witnesses, as where various things are exhibited in open court." State v. Tollardo, 2003–NMCA–122, ¶ 10, 134 N.M. 430, 77 P.3d 1023 (internal quotation marks and citation omitted). "Diagrams and

exhibits to illustrate testimony are admissible so long as they are not misleading." Zemke v. Zemke, 116 N.M. 114, 122, 860 P.2d 756, 764 (Ct.App.1993).

The Court again agrees with Defendant, provided the PowerPoint exhibit is properly identified and its limited evidentiary purpose is made clear. Although it comes in a different form, this exhibit is not unlike an internal document that might be prepared by an employee's supervisor to explain a recommendation for discipline of the employee to a higher-level supervisor who would decide the matter. See, e.g., Miller v. Jefferson Cty. Bd. of Cty. Comm'rs, No. 16-CV-2445-JWL, 2018 WL 1116673, *2, *5-7 (D. Kan. Mar. 1, 2018) (memorandum prepared by county employee's manager stating reasons for termination and presented to county commissioners for approval of decision was not hearsay and was relevant to show decision was not pretextual). Reasonable jurors can understand that the PowerPoint was prepared as an informational tool and provided a basis for Mr. Komiske's belief regarding Plaintiff (if witnesses so testify); jurors are unlikely to view it as findings of fact or a matter of actual truth. The Court finds that Plaintiff has not shown the PowerPoint's probative value "is substantially outweighed by a danger of ... unfair prejudice [or] confusing the issues," as required for the exclusion of relevant evidence under Rule 403. Therefore, Plaintiff's Motion regarding the PowerPoint presentation is denied.

Morales-Murillo v. City of Las Cruces, No. D-307-CV-2014-01026, 2016 WL 11567299, at *1 (N.M. Dist. Jan. 25, 2016)

Trial Court Order in Civil Case allowing PowerPoint format in opening statement.

Plaintiffs, during opening statements, are not allowed to use portions of the Defendants' allegations contained in the Pretrial Order. Plaintiffs, however, are allowed to use statutes and city policies, as applicable.

The use of PowerPoint or similar presentation formats is permitted.

State v. Schrader, 1958-NMSC-056, ¶ 10, 64 N.M. 100, 102, 324 P.2d 1025, 1026 (April 30, 1958)

There is no dispute as to the law relating to the admission in evidence of summaries of voluminous records. It may be simply stated to be that most courts require as a condition that the mass of data shall, if the occasion seems to require it, be placed at hand in court or at least be made accessible to the opposing party.' (Emphasis by the Court.)

State v. Ramming, 1987-NMCA-067, ¶¶ 32-33, 106 N.M. 42, 47, 738 P.2d 914, 920 (May 12, 1987)

"Doubts" regarding the summary evidence go towards weight, not admissibility

{32} Defendant contends that summaries of telephone records should not have been admitted into evidence because they were irrelevant and more prejudicial than probative. He contends they were irrelevant because there was no evidence that defendant himself actually made or received any of the calls. It is undisputed that the calls were made to and from defendant's numbers. Defendant also contends that the error was magnified because calls on certain dates were highlighted. The purpose of the telephone records was to show defendant's many contacts with Rowand.

789 {33} Admission of evidence is discretionary with the trial court. State v. Martinez, 102 N.M. 94, 691 P.2d 887. Although the evidence must in some manner be connected with defendant, State v. Young, 103 N.M. 313, 706 P.2d 855 (Ct.App.1985), it is not necessary that it relate directly to the facts in controversy. Id. **Evidence may be relevant even if it is circumstantial. Doubts concerning the connection of the summaries with this case go to the weight of the evidence, not to their admissibility**. State v. Copeland, 105 N.M. 27, 727 P.2d 1342 (Ct.App.1986); State v. Belcher, 83 N.M. 130, 489 P.2d 410 (Ct.App.1971). The fact that all the calls were made to and from defendant's numbers and other numbers connected to the case made them relevant. The fact that the calls occurred at times that were associated with the bribes, kickbacks and contracts awarded Rowand also makes the evidence relevant.

United States v. Behrens, 689 F.2d 154, 161–62 (10th Cir. 1982)

Summaries to Prove Content FRE 1006

Defendants Behrens and both Wilketts contend that the introduction of a summary evidence chart was without proper foundation and prejudicial. The chart outlined the Dilaudid prescriptions written by Dr. Conklin and filled by pharmacist Hoover.
18 Evidentiary summaries are permissible where a case involves "voluminous writings ... which cannot be conveniently examined in court ...." Fed.R.Evid. 1006. A proper foundation for such a summary can be laid through the testimony of the witness who supervised preparation of the exhibit. See United States v. Scales, 594 F.2d 558, 563 (6th Cir.), cert. denied, 441 U.S. 946, 99 S.Ct. 2168, 60 L.Ed.2d 1049 (1979).

19 The authenticity of the prescriptions summarized by the chart was adequately established. See generally United States v. Bruner, 657 F.2d 1278, 1284 (D.C.Cir.1981). Drug Enforcement Administration Agent Beck, who prepared the chart, testified that: (1) he personally served Hoover with an administrative search warrant seeking the Dilaudid prescriptions; (2) Hoover identified his files containing prescriptions for schedule II narcotics; (3) Beck reviewed the prescriptions and took out those pertaining to Dilaudid; (4) the Dilaudid prescriptions were prescribed by Dr. Conklin; (5) a number of the prescriptions were made out to James Wilkett, Wilkett family members, and employees of James D. Wilkett; and (6) James D. Wilkett subsequently admitted he had received all the Dilaudids from all the prescriptions. Beck's testimony critical to authentication was neither inadmissible nor undermined by the subsequent severance of actions against Conklin and Hoover.

20 We also reject defendants' claim that the chart size was prejudicial.
The purpose of the chart was to aid the jury in organizing the evidence, and the summary *162 accurately reflected the underlying prescriptions. See generally United States v. Seelig, 622 F.2d 207, 214 (6th Cir.), cert. denied, 449 U.S. 869, 101 S.Ct. 206, 66 L.Ed.2d 89 (1980). "Size alone does not render inadmissible an exhibit containing otherwise unobjectionable objective evidence." Scales, 594 F.2d 563.

United States v. Ojimba, No. CR-17-246-D, 2018 WL 1884822, at *2 (W.D. Okla. Apr. 19, 2018)

Summarize Evidence rely on previous testimony under Rule 611(a)

In United States v. Ray,1 the Tenth Circuit adopted a two-part test to determine whether summarized exhibits relying on previous testimony are admissible under Rule 611(a): first, the court considers "whether the summary chart ... aids the jury in ascertaining the truth." Id. at 1046. Relevant factors include the length of trial, the complexity of case, and the possible confusion generated by a large number of exhibits. Id. at 1047. Second, the court considers any resulting prejudice, looking at whether, for example, the preparer was available for cross examination and whether the court gave any limiting instructions. Id.

The Court is familiar with the extensive underlying facts of this case and finds admission of summary evidence is warranted. The Court has previously declared this case to be a complex case requiring extended litigation under the Speedy Trial Act, 18 U.S.C. §§ 3161(h)(7)(A), 3161(h)(B)(ii) [Doc. No. 16]. The present case consists of an alleged conspiracy spanning two years involving multiple communications, transactions, and locations. Moreover, in Ms. Ejiofor's trial, the Court permitted the use of a summary witness—Agent Schmitz—who was subjected to extensive cross examination and will likewise be subject to cross examination here. Lastly, the Court can issue limiting instructions to the jury regarding their consideration of such evidence. See, e.g., Pattern Jury Instructions for the Tenth Circuit, Criminal Instruction No. 1.41. Defendant's motion on this issue is DENIED.

Nebraska and the Eight Circuit

State v. Figures, 308 Neb. 801 at 832, 957 N.W.2d 161 (Nebraska Supreme Court, 2021)

First, Figures' claim that his trial counsel should have renewed his pretrial motion to preclude Dieguez from testifying has no merit. Figures argued in his pretrial motion that § 29-1602 required that the State disclose that Dieguez would serve as an expert witness. However, while statute mandates that the State endorse a list of witnesses known to it, it does not require that the State highlight a witness' expert status.[62]

5960Next, Figures could not have properly objected to Dieguez' testimony or the exhibits presented. Dieguez' testimony and exhibits discussed relevant statements made by Figures and had a probative value that was not outweighed by any unfair prejudice. Also, the exhibits did not violate *Crowder.*[63]

The exhibits were a PowerPoint presentation of the digital forensic reports of Figures', Vanessa's, and Dennis' phones. The documents summarized by the exhibits were identifiable, admissible, voluminous, and previously disclosed to Figures. Figures' claim has no merit.

State v. Williams, 26 Neb.App. 459 at ,920 N.W.2d 868 (Nebraska COA, 2018)

To the extent that some level of opinion exists in the exhibits, we find that those opinions were admissible as demonstrative evidence. Demonstrative exhibits are admissible if they supplement a witness' spoken description of the transpired event, clarify some issue in the case, and are more probative than prejudicial.

State v. Daly, 278 Neb. 903, 775 N.W.2d 47 (2009) (affirming admissibility of PowerPoint presentation that included several diagrams, photographs, and videos illustrating medical terms and concepts). Demonstrative exhibits are inadmissible when they do not illustrate or make clearer some issue in the case. Id. In this case, we find that the exhibits in question were supplemental to Ruth's spoken description of the transpired event, clarified an important issue in the case, and were more probative than prejudicial. We again note that no conclusion exists in the exhibits that was not fully explained in the testimony.

8We are mindful however that demonstrative exhibits are not automatically sent to the jury room to be utilized in deliberations. However, a trial judge may exercise his or her broad discretion to allow or disallow the use of demonstrative exhibits during jury deliberations. State v. Pangborn, 286 Neb. 363, 836 N.W.2d 790 (2013). Here, the exhibits in question were received without qualification. Therefore, no limiting instruction was given to the jury as to how the exhibits should be considered. While the cautious approach at trial may have been to receive the exhibits at least in part on a

demonstrative basis only and give a limiting instruction, we find that no harm resulted from the district court's approach. As stated, *481 the majority of the information in the exhibits was not hearsay. Any opinion evidence was cumulative to the testimony. Moreover, there was significant further evidence adduced during the course of trial which established that Williams was traveling at a high rate of speed at the time of the impact. Even if admitted in error, where the evidence is cumulative and there is other competent evidence to support the conviction, the improper admission or exclusion of evidence is harmless beyond a reasonable doubt. See State v. Rieger, 260 Neb. 519, 618 N.W.2d 619 (2000). As such, we find that Williams suffered no prejudice as a result of the admission of exhibits 139 through 141, 143 through 147, and 150

State v. Parnell, 294 Ne. 551 at 661, 883 N.W.2d 652 (Nebraska Supreme Court, 2016)

Shute also testified regarding the locations of Parnell's cell phone around the time of the shooting.

He prepared a PowerPoint presentation that included Parnell's call detail records. The records showed that Parnell's cell phone connected to tower: (1) 201 at 7:52 p.m., (2) 729 at 8:07 p.m., (3) 201 at 8:11 p.m., (4) 729 at 8:20 p.m., and (5) 201 at 8:20 p.m. Shute plotted the towers and their coverage areas on a map. The map showed the coverage areas as shaded “pie wedges.”

Shute testified that the coverage areas for towers 201 and 729 overlap. He said that the way that Parnell's cell phone switched between towers 201 and 729 showed that it was definitely located within the overlapping coverage area at the time of the shooting.

A map in his PowerPoint presentation depicted the crime scene within the overlapping area.

The court overruled Parnell's motion in limine. It concluded that Shute was qualified to testify as an expert and that his methods were reliable.

State v. Daly, 278 Neb. 903 at 924, 775 N.W.2d 47 (Nebraska Supreme Court, 2014)

Demonstrative Exhibits

26 Daly objected to the admission at the *Daubert/Schafersman* hearing of exhibit 30, a PowerPoint presentation that was used as a demonstrative exhibit during Citek's testimony. Citek generally testified about the effect of drugs on movement of the eyes. Exhibit 30 included several diagrams, photographs, and ***925** videos illustrating some of the terms and concepts described during Citek's testimony, and Citek relied on exhibit 30 for illustration throughout his testimony.

Daly argues on appeal that the exhibit was not relevant and that it was hearsay. But we conclude that it was admissible as a demonstrative exhibit. Demonstrative exhibits are admissible if they supplement a witness' spoken description of the transpired event, clarify some issue in the case, and are more probative than prejudicial.[53] Demonstrative exhibits are inadmissible when they do not illustrate or make clearer some issue in the case; that is, where they are irrelevant or where the exhibit's character is such ****67** that its probative value is substantially outweighed by the danger of unfair prejudice.[54] And a judgment will not be reversed on account of the admission or rejection of demonstrative evidence unless there has been a clear abuse of discretion.[55]

In this case, exhibit 30 provided helpful illustration of Citek's detailed medical testimony. No unfair prejudice is apparent from the record. And the exhibit was not hearsay because it was not a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.56 Rather, it was simply illustrative of Citek's testimony at the hearing—about which he was cross-examined—and Daly does not contend that the exhibit did not accurately represent and did Citek's testimony. Thus, we conclude that exhibit 30 was an appropriate illustration of Citek's testimony and that the county court did not abuse its discretion by admitting it for purposes of the *Daubert*/ *Schafersman* hearing.

Daly makes similar arguments with respect to exhibits 41 and 42, which were charts prepared by Spirk listing various drugs and their physiological effects. For similar reasons, we also find those arguments to be without merit.

United States v. Kramer, 768 F.3d 766 at 772 (Eight Circuit, 2014)

Even if the PowerPoint presentation should not have been shown to the jury, it ***522** did not render the trial fundamentally unfair and the resulting verdict did not constitute a denial of due process. During the guilt phase of trial, the jury had seen the graphic crime scene and autopsy photos. The arrangement of the photos and their projection on a screen during closing argument no doubt reminded the jury of the gruesome nature of the crime. But the presentation arguably served to show that Strong acted with "depravity of mind [,]" Mo.Rev.Stat. § 565.032.2(7), in that he "committed repeated and excessive acts of physical abuse" upon the victims, MAI-CR 3d 313.40. *See Rousan,* 436 F.3d at 958–59 (holding that the admission of photos showing the "severely decomposed" bodies of the victims did not violate the petitioner's right to due process because the photos arguably were relevant and probative); *Kuntzelman v. Black,* 774 F.2d 291, 292–93 (8th Cir.1985) (per curiam) (holding that the admission of "flagrantly gruesome" photographs did not violate the petitioner's right to due process because the photos "were at least arguably relevant and probative"). In light of the overwhelming evidence of Strong's guilt and the

Strong v. Roper, 737 F.3d 506 (Eight Circuit, 2013)

> Next, Kramer asserts that the district court erred in refusing to grant a mistrial on the basis that the prosecutor made improper remarks during closing arguments.
>
> ***772** Specifically, during closing arguments, the government described Kramer's business scheme as "Robbing Peter to pay Paul" and placed the statement on a PowerPoint slide. Kramer argues that the statement insinuates violence (robbery) and has added force in the present context because Kramer's first name is Paul. "The district court enjoys broad discretion in controlling closing arguments. We will overturn a conviction only for a clear abuse of that discretion." *United States v. Beaman*, 361 F.3d 1061, 1064 (8th Cir.2004).
>
> As the district court recognized, the phrase "Robbing Peter to pay Paul" is a figure of speech that has no specific ties to violence in this case.
>
> Moreover, after Kramer's counsel objected to the PowerPoint, the government explained the nature of the phrase, that this case involved no violence, and that it was merely happenstance that Kramer's first name was also Paul. When viewed in context, the district court did not abuse its discretion in allowing the government to use the common phrase, and Kramer cannot establish that he was prejudiced by use of the words. *See United States v. Jumping Eagle*, 515 F.3d 794, 806 (8th Cir.2008) ("To obtain a reversal, the defendant must show that (1) the prosecutor's remarks were improper, and (2) the remarks prejudiced the defendant's rights in obtaining a fair trial.").

Rule 1006. Voluminous writings, recordings, or photographs; summaries; availability; orders.

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The judge may order that they be produced in court.

Source

- Laws 1975, LB 279, § 69.

Annotations

- Requirements for admission of an exhibit into evidence pursuant to Neb. Evid. R. 1006 set out this case. Crowder v. Aurora Co-op Elev. Co., 223 Neb. 704, 393 N.W.2d 250 (1986).
- This section had no application to an exhibit listing persons for whom building moving services had been performed with enumeration of dates and charges, but oral testimony by one who had personal knowledge of the facts laid appropriate foundation for its admission. Groenewold v. Building Movers, Inc., 197 Neb. 187, 247 N.W.2d 629 (1976).

NJI2d Crim. 5.2 Evaluation of Testimony—Credibility of Witnesses
You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. In determining this, you may consider the following:
1. The conduct and demeanor of the witness while testifying;
2. The sources of information, including the opportunity for seeing or knowing the things about which the witness testified;
3. The ability of the witness to remember and to communicate accurately;
4. The reasonableness or unreasonableness of the testimony of the witness;
5. The interest or lack of interest of the witness in the result of this case;
6. The apparent fairness or bias of the witness;
7. Any previous statement or conduct of the witness that is consistent or inconsistent with the testimony of the witness at this trial; and
8. Any other evidence that affects the credibility of the witness or that tends to support or contradict the testimony of the witness.

1 Neb. Prac., NJI2d Crim. 5.2 (2016-2017 ed.)

§ 23:12. Summaries of voluminous writings, recordings, or photographs—Evidence Rule 1006
2 NEPRAC 23:12 Nebraska Practice Series TM, Nebraska Trials

Nebraska Evidence Rule 1006 provides:

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The judge may order that they be produced in court.

§ 23:12.Summaries of voluminous writings, recordings or photographs—Evidence Rule 1006, 2 Neb. Prac., Nebraska Trials § 23:12 (3d ed.)

NJI2d Crim. 5.6 Accomplice Testimony
There has been testimony from *(here insert name)*, a claimed accomplice of the defendant. You should closely examine *(his, her)* testimony for any possible motive *(he, she)* might have to testify falsely. [You should hesitate to convict the defendant if you decide that *(here insert name)* testified falsely about an important matter and that there is no other evidence to support *(his, her)* testimony.

1 Neb. Prac., NJI2d Crim. 5.6 (2016-2017 ed.)

JI2d Crim. 5.0 Direct and Circumstantial Evidence
There are two kinds of evidence, direct and circumstantial.

Direct evidence is either physical evidence of a fact or testimony by someone who has first-hand knowledge of a fact by means of his or her senses. Circumstantial evidence is evidence of a fact from which another fact logically can be inferred.
A fact may be proved by direct evidence alone; by circumstantial evidence alone; or by a combination of the two.

1 Neb. Prac., NJI2d Crim. 5.0 (2016-2017 ed.)

NJI2d Crim. 5.1 States of Mind Proved Inferentially
Intent *(purpose, knowledge, willfulness, premeditation, deliberation)* is an element of *(here insert crime)*. In deciding whether the defendant acted with intent *(purpose, knowledge, willfulness, premeditation, deliberation)* you should consider *(his, her)* words and acts and all the surrounding circumstances.

1 Neb. Prac., NJI2d Crim. 5.1 (2016-2017 ed.)

Kyle C. Reeves, PowerPoint in Court the Devil's Own Device, or A Potent Prosecution Tool?

48 DEC PROSC 26, Kyle C. Reeves at 27
Prosecutor
October/November/December 2014

**Full article available on Thomson Reuters Westlaw Edge*

Notwithstanding the current climate across the legal landscape, **it is undeniable that when used properly during trial, PowerPoint is a potent technological device for all attorneys, including prosecutors**. When combined with effective oral advocacy skills, PowerPoint can supplement a prosecutor's closing argument, helping to narrow issues for the jury, and at the same time, forcefully join the main theme and theory of a case with the admissible evidence. However, if used improperly, PowerPoint can quickly become the noose that prosecutors put around their own necks, either by displaying improper arguments or themes, showing the jury things that were not properly received in evidence, or oversimplifying the legal concepts relevant to the case. And because a prosecutor's improper oral argument was accompanied by an equally improper visual display, many appellate courts are likely to reverse convictions because of the increased magnitude of the perceived error.

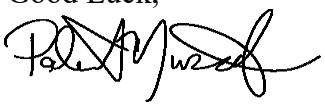
But do not despair! The focus of this article is not to dissuade aggressive, experienced prosecutors from being on the cutting edge of technological advocacy. Instead, this article is designed to encourage all prosecutors to continue to be skillful, competent attorneys, by using every available tool at their disposal to advocate for their victims, within permissible bounds. By doing so, we can assure that the guilty will be swiftly convicted and properly punished, that the wrongfully accused will be quickly exonerated, and the public's confidence in our criminal justice system is rightly restored.

Litigation of Determination of Prosecutorial Misconduct Arising from Use of Electronic Slide Show Presentation

153 Am. Jur. Trials 129 (Originally published in 2018)
**Full article available on Thomson Reuters Westlaw Edge*

American Jurisprudence
October 2021 Update
Trials
Theodore Z. Wyman, J.D.*

Good Luck,



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