***The Law of the Visual Trial***

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**Overview**

**Discovery**

**Limitations on Argument, both opening and closing**

**Overcoming Evidentiary Standards**

* + - **Relevance, prejudice/probative, etc.**
    - **Substantive evidentiary standards**
    - **Demonstrative evidentiary standards**

**Media Formats in the Visual Trial Process**

This outline is a living document and is constantly updated, but it is not intended to be an exhaustive list of cases on these topics. It is a great place to start your research. Due to limited amount of cases on certain topics we have cited cases from all over the country. Please note the differences around the country (e.g. Washington vs. New York). Some cases with alleged prosecutor error based on the misuse of PowerPoint may have only been affirmed because of the strength of other evidence in the case (e.g. harmless beyond a reasonable doubt). You must always be sure of the limits and rules in your jurisdiction before you use PowerPoint or litigation technology in trial.

Please read the full opinion of any case from this outline that you intend to use and check the check for any changes to the appellate history. Feel free to contact me anytime with questions.

This article (available on Westlaw) also provides a thorough discussion of “PowerPoint” cases from around the country.

## Litigation of Determination of Prosecutorial Misconduct Arising from Use of Electronic Slide Show Presentation 153 Am. Jur. Trials 129 (Originally published in 2018)

**Discovery**

***Van Houten-Maynard v. ANR Pipeline Co*., No. 89-C0377, 1995 WL 317056, at \*12 (N.D. Ill. May 23, 1995)**

1. 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."
2. **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.

***Industrial Recycling Services v. William Rudner,* Ohio - *Not Reported* - 2002 WL 1821952 (Ohio App. 5 Dist.)**

1. 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 (Corrigan J., *dissenting*)**

1. 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.

**Opening Statement**

***US v. Antonio Burns, Anthony Harden, Jerome Harden, and Michael Jordon,* 298 F.3d 523 (2002) (US 6th Cir. Ct. App. )**

1. 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 of Arizona v. Scott Sucharew,* 66 P.3d 59 (2003)**

1. Before trial, 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 (Georgia),* 707 S.E.2d 56 (2011)**

1. 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.
2. **Comment**: In Michigan, I would recommend against using the slides quoted in paragraph a.

***State v. Lankford,* 130 Haw. 346, 310 P.3d 1047 (Ct. App. 2011)**

1. 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 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,* 2013 WL 543330 Not Officially Published, D059874, Filed February 14, 2013**

1. 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.
2. 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]](#footnote-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]](#footnote-2) As long as the remarks are a fair comment on the evidence, the prosecutor is not limited to Chesterfieldian politeness and may use appropriate epithets.[[3]](#footnote-3)
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. Adv. Op. 94, 313 P.3d 243, 247 (2013)**

1. **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 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 opening statement, she could not do so in her PowerPoint.

***State v. Rivera*,437 N.J. Super. 434, 465, 99 A.3d 847, 865 (Super. Ct. App. Div. 2014)**

1. The prosecutor used a PowerPoint during opening statements with the PowerPoint's twenty-first and final screen containing a photograph showing 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.
2. 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.”
3. 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 prosecutor’s misconduct deprived the defendant of a fair trial.**

**Demonstrative Examination Aid**

***Pennsylvania v. Serge*, 837 A.2d 1255 (Pa. Super. Ct. 2003)**

1. 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 S.W.3d 878 (2013)**

1. During 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* so as to “keep in mind what the goal is here.”

**Substantive Evidence**

***People of Illinois v. Taylor*, 956 N.E. 2d 431 (2011)**

1. 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,”[[4]](#footnote-4) 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 N.E.2d 158, 166**

1. This case is subsequent to *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.
2. 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.

***People of Michigan v. Musser*, 494 Mich. 337, 835 N.W. 2d 319 (2013)**

1. 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.”
2. 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. Afterwards, 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.
3. 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.
4. This is an interesting case that could have the net effect of requiring lawyers to litigate what questions (from a defendant’s interview) are allowed to 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**

***People v. Bulmer*, 256 Mich.App. 33, 662 N.W.2d 117 (2003)**

1. 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:
2. Demonstrative evidence is admissible when it aids the fact-finder in reaching a conclusion on a matter that is material to the case.[[5]](#footnote-5)  The demonstrative evidence must be relevant and probative. *Id.* Further, 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.[[6]](#footnote-6)  The Court allowed the animation.
3. **Comment**: Some shaken baby syndrome diagnoses have recently been challenged*. See* <https://www.washingtonpost.com/graphics/investigations/shaken-baby-syndrome/>

***People v. Unger[[7]](#footnote-7),* 278 Mich.App. 210, 749 N.W.2d 272 (2008)**

1. 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:
2. 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 Mich.App. 442, 444, 584 N.W.2d 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.

***People v. Countryman,* No. 316913, 2015 WL 4591958, at \*5 (Mich. Ct. App. July 16, 2015), *appeal denied*, 498 Mich. 951, 872 N.W.2d 479 (2015)**

1. “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 in an effort 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 as long as it is relevant and not unduly prejudicial.

***Rodgers v. Taras,* No. 321730, 2015 Mich. App. LEXIS 1715, at \*21 (Ct. App. Sep. 15, 2015)**

1. 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.
2. 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,* No. 320016, 2015 Mich. App. LEXIS 2334, at \*7 (Ct. App. Dec. 15, 2015)**

1. Defendant, Mark Douglas Cole was convicted of second-degree criminal sexual conduct (CSC II) (sexual contact with victim younger than 13); and assault with intent to commit CSC involving sexual penetration. Defendant argued on appeal that the trial court abused its discretion in admitting several photographs as demonstrative evidence and that the admission of such photographs denied him due process.
2. Defendant's neighbor, Robert Leaveck, testified that he was in the woods near defendant's house when he saw defendant standing next to an ATV. Leaveck testified that he noticed movement beside defendant. Leaveck walked closer, saw defendant "humping his hips back and forth," and observed that the victim was on the fender of the ATV with one leg out of his diaper. Leaveck was the only witness who saw defendant and the victim in the woods. Leaveck testified that he could see that defendant was "raping a baby."
3. 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. The photographs also assisted the jury in judging Leaveck's credibility as to what he saw. The Court held the trial court did not abuse its discretion in admitting the photographs and the danger of unfair prejudice did not substantially outweigh the probative value of the demonstrative evidence.

***Brown v. State of Florida,* 550 So.2d 527, (Fla. Dist. Ct. App. 1d. 1989)**

1. 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.

**Cumulative Demonstrative Evidence/SuMMARY Evidence**

***Commonwealth of Pennsylvania v. Serge,* Pennsylvania - 896 A.2d 1170 (2006)**

1. 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) Issued November 25th, 2003, (Docket Number 245376)

* 1. Rule 1006-Summary Evidence
  2. 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 N.E. 2d 877, No. 30A01-9612-CV-415 Court of Appeals, Indiana (6/9/97)

1. Rule 1006-Summary Evidence
2. Court ruled that a law clerk’s compilation of voluminous payroll records was appropriate.

**Authentication[[8]](#footnote-8)**

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

1. A sufficient foundation exists if there is evidence of (1) the exhibit’s identity, and (2) its connection to the crime. It wasthe 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 (DC 1981)**

* 1. 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)**

1. A witness is allowed to 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)**

1. 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)**

1. A video recording can be properly authenticated when a witness views some or all of the video itself. The court upheld the admission of a video tape 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 being 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*) issued October 23, 2008 (Docket No. 278537), p4 (Appendix J)**

1. A 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.

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

1. 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.

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

1. Video may be authenticated where there witness testimony establishes the “fairness and accuracy” of the video. 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 F.3d 974, 2010 U.S. App. LEXIS 174 (8th Cir. 2010)**

1. Where Witness Testifies to the Accuracy of a Video’s Depiction of an Event, Such Testimony is Sufficient for Authentication of Video
   * 1. In Smith, the Defendant appealed 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”…***

* + 1. 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 F.3d 618, 2005 U.S. App. LEXIS 4340, (6th Cir. 2005)

* 1. No Requirement Under FRE 901 That Evidence Be Presented On The Making Or Handling Of Video For Its Authentication
     1. 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 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***."

* + 1. 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. Aaron Desean Flake, unpublished opinion per curiam of Mich. Court of Appeals, issued*** [**Nov. 20th, 2014 (Docket No. 317325)**](http://scholar.google.com/scholar?scidkt=7852233387205121730&as_sdt=2&hl=en)

1. Testimony by Police and Pastor Sufficient To Authenticate Surveillance Video. A Perfect Chain of Custody Need Not Be Shown
   1. 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.
   2. 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. Anna Marie Humphries, unpublished opinion per curiam of Mich. Court of Appeals, issued* 09/15/2015, (Docket No. 320633)**

1. A Screen Capture Video 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
   1. 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. Nicholas Jamal-Leevel Thomas,* Unpublished Opinion Per Curiam Of Mich. Court Of Appeals, Decided11/16/2016, (Docket No. 326956)**

1. Testimony by Witness Recorded in Cell Phone Video Was Sufficient for Its Authentication. Chain of Custody Not a Requirement For Authentication
   1. 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 Opinion Per Curiam Of Mich. Court Of Appeals, *Decided* 11/23/2004 (Docket No. 251171)**

1. Testimony Of Eye-Witnesses 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.
   1. 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 video tape 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 of 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 video tape.***[[9]](#footnote-9)

## People v. Kenyatta Khuru Davis, Unpublished Opinion Per Curiam of Mich. Court of Appeals, Decided 03/12/ 2009, (Docket No. 281505)

1. A Replicated Video Which Accurately Portrays An Initial Surveillance Recording Need Not Be Identical For Its Admission As An Original*.* 
   1. 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.”

## People v. Robert David Doster II, Unpublished Opinion Per Curiam of Mich. Court of Appeals, Decided 12/05/2013, (Docket No. 312015)

1. Viral Internet Video was Properly Authenticated through Victims Identification of Video through Single Image Frame and Detectives Testimony About Process of Videos Download.
   1. 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

W**hether 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.**

* 1. 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)**

* 1. Citing the 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 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. Robert Eugene Rocafort Jr., Unpublished Opinion Per Curiam of Mich. Court of Appeals, Decided 12/27/ 2005, (Docket No. 25703)

1. Technicians Who Testified That Security System Was Installed And Working Properly Was Sufficient To Authenticate Surveillance Video
   1. Defendant argued that 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 F.3d 381, 383, U.S. App. LEXIS 20991(6th Cir. 2010)

1. Court Found That Testimony Of Witnesses Was Sufficient To Authenticate Copy Of Missing Original Video.
   1. Where defendant challenged the introduction of video evidence on the grounds that 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 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.[[10]](#footnote-10) In fact, "[w]here there is no evidence indicating that tampering with the exhibits occurred, courts presume public officers have discharged their duties properly."[[11]](#footnote-11) Absent a clear showing of abuse of discretion, "challenges to the chain of custody go to the weight of evidence, not its admissibility.[[12]](#footnote-12)***

## United States v. Rose, 522 F.3d 710, 712, U.S. App. LEXIS 7765, (6th Cir. 2008)

1. 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
   1. 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…"[a]n audio exhibit should not be relegated to muteness because it can be perused only through the use of a tape player."[[[13]](#footnote-13)]…The same principle holds true for digitally recorded audio exhibits*.**

## U.S. v. Seifert, 445 F.3d 1043, 1045-1046, U.S. App. LEXIS 9725, (8th Cir. 2006)

1. Modification Of Surveillance Video (Including Its Conversion From Time Lapse To Real Time) Did Not “Change” Image Or Render Evidence Inadmissible.
   1. In *U.S. 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 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 4 camera projection, brightening the suspect and his surrounding area, and converting the video from time lapse to real time*). After the reviewing both the original and enhanced videos, the district court admitted the enhanced video 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.***

* 1. 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 F.3d 444, 447, U.S. App. LEXIS 6315 (5th Cir. 2012)

1. Camtasia Video Capturing Online Chats Was Properly Authenticated Through Testimony Of Officer Who Created Videos
   * 1. In *Lundy*, 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 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.
     2. Asserting that an insufficient foundation was laid to authenticate this evidence, the Defendant argued that the officer who made the videos was not qualified to operate 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”*)[[14]](#footnote-14)
     3. The Appellate Court rejected this argument. Though expressing that there were a number of 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 F.2d 313, 314, 318 (1st Cir. 1990)

1. 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 F.2d 21, 24 (1st Cir. 1986)

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

## United States v. Gordon, 688 F.2d 42, 43-44 (8th Cir. 1982)

1. 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 F.2d 624, 631 (5th Cir. Fla. 1967)

1. Admission Of Altered Audio Tape Copy Not In Error Where Alteration Improved Sound Quality For Jury
   * 1. 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.***

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***.

## U.S. v. Madda, 345 F.2d 400, 403 (7th Cir. 1965)

1. 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, U.S. Dist. LEXIS 109022 (W.D. Mich. 2015)

1. Utilizing A Copy Of Video Transferred From Surveillance System Onto DVD Was Not Violiative Of MRE 1004
   1. Defendant argued that a detective’s presentation of video that he had transferred from video tape 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 DVR’s 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)

1. 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 N.E.3d 137; Ind. App. LEXIS 92, (Ind. Ct. App. 2015)

1. 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.
   1. 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 Defendants 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.
   2. 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 Defendants phone did not satisfy the requirements for authentication under the silent witness theory and also violated the original evidence rule.
   3. 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." *[[15]](#footnote-15)***

* 1. 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 Defendants 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.
  2. 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](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5DVH-2XW1-F04J-C1HB-00000-00&context=), 141 Ohio St. 3d 462, 25 N.E.3d 1023(2014)

1. Testimony From Apartment Manager About The Operation Of A Security System Was Sufficient To Authenticate Video Evidence Under The Silent Witness Theory.
   1. In *Pickens*, the Defendant challenged his conviction on the grounds that 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[[16]](#footnote-16), the Ohio Supreme Court rejected this argument. Determining 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.”
   2. 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.***

***State v. Waver*, Ohio App. LEXIS 2970, (Ohio Ct. App., Butler County, 2016)**

1. 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
   1. Following Conviction for drug offenses, 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).
   2. 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.”[[17]](#footnote-17)***

* 1. 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, Ohio App. LEXIS 1195 (2016)

1. Testimony of Police Officer who retrieved video from restaurant surveillance system was sufficient to authenticate video.
   1. 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)***](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4M6J-2310-R03J-R2KB-00000-00&context=) ***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****.*

* 1. 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, courts have not imposed it as an absolute precondition to admissibility under [*Evid.R. 901(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4M6J-2310-R03J-R2KB-00000-00&context=).”[[18]](#footnote-18)
  2. 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.
  3. 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](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F34-RPS1-F04J-9015-00000-00&context=), 27 N.E.3d 47 Ohio-126, (2nd Dist. 2015)

1. Court Determined That Video Surveillance Footage Was Properly Authenticated When Investigating Officer Testified That the Video Depictingthe Crime Was the Same Video Taken from Surveillance Cameras in The Area

## [State v. Hoffmeyer, 9th Dist. Summit No. 27065, 2014-Ohio-3578](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5CYB-K5P1-F04J-905C-00000-00&context=)

1. 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, 956 N.E.2d 431, 439, Ill. LEXIS 1822, 20-21 (2011)

1. 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.
   1. 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.
   2. 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 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. [[19]](#footnote-19) 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***…

* 1. 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*.**[[20]](#footnote-20)

## State v. Baker, Ohio App. LEXIS 2311 (2016)

1. Mere Possibility of Video’s Manipulation Was Not Sufficient Grounds For Exclusion
   1. 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…***

## State v. Elmi Abdulahi Abdi, Tenn. Crim. App. Lexis 145 (2015)

1. Admission of Redacted Video Clips Was Not In Error
   1. 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.***

## People v. Roberts, 887 N.Y.S.2d 326 (N.Y. 2009)

* 1. Absence of Witness Testimony to Events Recorded in Video Requires Expert Testimony or Unbroken Chain of Custody for Authentication
     1. 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.
     2. 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…[[21]](#footnote-21) 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."***

* + 1. 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’ "***

* + 1. 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***

* + 1. 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 N.Y.2d 520, 503 N.E.2d 88, 1986 N.Y. LEXIS 20897 (N.Y. 1986)

1. Clear and Convincing Proof that Audio Tapes were Genuine and that They Were Not Altered is a Required for Authentication.
   * 1. 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.
     2. 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 possibility of alteration and, therefore, did not sufficiently establish the tape’s authenticity for their admission into evidence.
   1. ***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 alteration. Though it appears that Ely has not been explicitly overruled, several more recent NY cases appear to have implicitly ignored its strict provisions, finely distinguishing the factual circumstances of Ely (where authentication proof was limited to Defendant’s statements (which failed to completely affirm the tapes accuracy) from that where there was multiple witness testimony to a recordings complete accuracy) (See subsequent New York cases of People v. Becraft;**People v Lind; Matter of Giresi-Palazzolo v Palazzolo listed below).*

## People v Becraft, 140 A.D.3d 1706 2016 N.Y. App. Div. LEXIS 4437, (N.Y. App. Div. 4th , 2016)

1. 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.
   1. 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…[[22]](#footnote-22) Under those circumstances, the People were not required to show a chain of custody before seeking to admit the recording in evidence.[[23]](#footnote-23)***

## People v Lind, 133 A.D.3d 914, 2015 N.Y. App. Div. LEXIS 8102, (N.Y. App. Div. 3d 2015)

1. Testimony of Officer and Dispatcher Was Sufficient to Authenticate 911 Tape By Clear And Convincing Evidence.
   1. 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"[[24]](#footnote-24)***

* 1. 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, 2015 N.Y. App. Div. LEXIS 2801, (N.Y. App. Div. 2d, 2015)

1. Testimony of Single, Interested Witness Was Sufficient To Authenticate Audio Recording
2. 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 P. 3d 1233, Court of Appeals of Alaska (2009)

* 1. 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.
  2. 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).
  3. 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](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019222727&pubNum=0004645&originatingDoc=I4eaa4f36144511e3981fa20c4f198a69&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_footnote_B00882019222727) 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](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019222727&pubNum=0004645&originatingDoc=I4eaa4f36144511e3981fa20c4f198a69&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_footnote_B00992019222727) 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](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019222727&pubNum=0004645&originatingDoc=I4eaa4f36144511e3981fa20c4f198a69&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_footnote_B010102019222727)

***Bichiok v. State, No. A-11283, 2014 WL 1017183, at \*3 (Alaska Ct. App. Mar. 12, 2014) —Not reported in P. 3d---***

1. 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.

**Impeachment**

***People v. Donald,* 103 Mich.App. 613, 303 N.W.2d 247 (1981)**

1. 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 N.W.2d 332 (1980)](http://web2.westlaw.com/find/default.wl?mt=57&db=595&tc=-1&rp=%2ffind%2fdefault.wl&findtype=Y&ordoc=1981112470&serialnum=1981104278&vr=2.0&fn=_top&sv=Split&tf=-1&pbc=4A66B030&rs=WLW13.04" \t "_top).[[25]](#footnote-25) 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 F.2d 513 (5th Cir. 1993)**

* 1. 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 as a result 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 F.3d 357, 369 (5th Cir. 2008)**

1. 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 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.2d 69 (Miss. 2008)**

1. 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 Opinion Per Curiam of Mich. Court of Appeals, Decided 09/28/2010, (Docket No.** **292280)**

1. 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 N.W.2d 247 (1981)](http://web2.westlaw.com/find/default.wl?mt=57&db=595&tc=-1&rp=%2ffind%2fdefault.wl&findtype=Y&ordoc=2023170276&serialnum=1981112470&vr=2.0&fn=_top&sv=Split&tf=-1&pbc=5F2BDD60&rs=WLW13.04" \t "_top), 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 Opinion Per Curiam of Mich. Court of Appeals, Decided 09/27/2011, (Docket No.** **298400)**

* 1. 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.[[26]](#footnote-26) 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.”[[27]](#footnote-27)

***People v. Damitrice Deshawn Vann*, Unpublished Opinion Per Curiam Of Mich. Court of Appeals, Decided 06/29/2012 (Docket No. 30404)**

1. 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](http://web2.westlaw.com/find/default.wl?mt=57&db=0214739&docname=MRE613&rp=%2ffind%2fdefault.wl&findtype=Y&ordoc=2027940075&tc=-1&vr=2.0&fn=_top&sv=Split&tf=-1&pbc=74E42931&rs=WLW13.04" \t "_top). The prosecutor laid a proper foundation concerning the prior statement.[[28]](#footnote-28) Witness Perry was properly impeached by his prior statement because he testified that Defendant Vann did not have a gun.[[29]](#footnote-29) [[30]](#footnote-30)
2. 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.******[[31]](#footnote-31) “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.”******[[32]](#footnote-32)***

***Diamond Offshore Servs. Ltd. v. Williams,* No. 01-13-01068-CV, 2015 Tex. App. LEXIS 7480, at \*21-22 (App. July 21, 2015)**

1. 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. It argued that the trial court erroneously determined that the surveillance video could be used solely for impeachment purposes and that, instead, the video was admissible as both substantive evidence relevant to the extent of Williams's injuries and as impeachment evidence. Williams, however, contended that the prejudicial effect of the "heavily edited" video substantially outweighed any probative value, and is inadmissible under Rule 403.
2. 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 as a result 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 found that the trial court could have reasonably determined that the proffered video, which contained clips from three different days of surveillance edited together into one continuous hour-long video and depicted Williams performing activities that he admitted that he could do, albeit with pain later, created an impression that Williams could engage in physical activity for long periods of time without needing rest and without apparent pain and thus that the prejudicial effect of the video outweighed the video's probative value.

**Closing and Rebuttal Arguments**

***State of New Jersey v. Michaels[[33]](#footnote-33),* 264 N.J. Super. 579 (App. Div. 1993), *Aff’d in* 136 N.J. 299 (1994)**

1. 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 Chartered PLC v. Price Waterhouse*, 945 P.2d 317, 358 (Ariz. Ct. App. 1997)**

1. 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.

***State v. Brown,* 132 Wn.2d 529, 567, 940 P.2d 546 (1997)**

1. 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. 47398-1-I, 2002 WL 258038, at \*2 (Wash. Ct. App. Feb. 25, 2002)**

1. 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 of Connecticut v. Alfred Swinton,* 781, 847 A.2d 921 (2004)**

1. 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.'"

***Ohio v Hilton*, (*Unpublished)* (Ohio Ct App, 2008)**

1. 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. App. 4th 1260 (2009)**

1. 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 of Mich. Court of Appeals, Decided 01/12/2010, (Docket No. 286323)**

1. 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.[[34]](#footnote-34)  Further, a prosecutor is not required to make an argument in the blandest possible terms.[[35]](#footnote-35)  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 arguments were not evidence that could be considered during deliberations.  (Emphasis added).***

1. **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.

***State of Washington v. Walker,* 265 P.3d 191, 164 Win.App.724, (2011)**

1. 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:
2. 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*, No B226624 (*Unpublished*) Cal. Court of Appeal, Second District (9/7/11)**

1. 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 of Washington v. Anthony Sakellis,* 164 Wash.App. 70, Wash. Ct. of App. 2d. No. 37588-5-II, Oct. 4. 2011.**

1. The Court of Appeals, [Penoyar](https://a.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0169120201&originatingDoc=Ief0272fcf42411e0a9e5bdc02ef2b18e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)), C.J., held that prosecutor's display during closing argument of power point 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.
2. **Comment:**  the Court also referenced other slides used by the Prosecution during Closing Argument, but did not seem to have a problem with them.

***In re: Matter of the Per. Rest. of Edward Michael Glasmann,* 175 Wash.2d 696, 286 P.3d 673 (2012)**

1. 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 personal 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).***

1. Ultimately, the court cited a number of 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. Justice Chukwa Chima,* California – *Not reported in* Cal. Rptr. 3d, 2012 WL 1959665**

1. Prosecutor presented a PowerPoint in an assault case against Justice Chukwa Chima[[36]](#footnote-36) 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,* No. 41393-1-II, 2012 Wash. App. LEXIS 2924, at \*45 (Ct. App. Dec. 18, 2012)**

1. 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 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 A.3d 219, 237-38 (2012)**

1. 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 of 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."
2. 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, as long as there is no reasonable likelihood that the particular device employed will confuse the jury or otherwise prejudice the opposing party. . .. [T]he use of such aids is a matter entrusted to the sound discretion of the trial court."
3. The slides were not improper because all of 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.

***California v Otero*, 210 Cal. App 4th 865 (2012)**

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

***State of New Jersey v. Bass*, New Jersey – Not Reported in A.3d, 2013 WL 1798956**

1. 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’d 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 personal 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.”[[37]](#footnote-37)

***Aguilar v. Cate (Habeas),* 2013 WL 1789382 (April 26, 2013)**

1. 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.”

***K.C., a minor, by Natural Mother and Next Friend, Kathleen Calaway, Plaintiff v. Jodi Schucker, M.D., Defendant,* No. 02-2715-STA-cgc-United States District Court, W.D. Tennessee, (11/8/13)**

1. 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.

***The People of the State of New York v. Singleton,* 2013 NY *Slip Op.* 07509, *Decided* 11/13/13**

1. 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.*

***State v. Reineke,* 266 Or. App. 299, 310-11, 337 P.3d 941, 947-48 (2014)**

1. 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 closingargument were not subtle, isolated, or fleeting. The Court found the Defendant’s right to a fair trial was prejudiced.

***In re: Matter of the Personal Restraint of Jay Earl McKague,* No. 71436-81 Division One, Unpublished Opinion, filed 6/30/14**

1. 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).
2. 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***.

1. 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."[[38]](#footnote-38)***

***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.[[39]](#footnote-39)***

***People of the State of Michigan v. Mitchell Jordan Young,* (Unpublished Opinion Per Curiam of Mich. Court of Appeals, Decided 12/23/14, (Docket No. 317981)**

* 1. 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*, (*Unpublished* ) (Mo Ct App, 2014**)

1. 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 presumption of innocence.

***Spence v. State,* 129 A.3d 212, 216 (Del. 2015)**

* 1. 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 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)**

1. 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*, (*Unpublished*) 2016 Pa. Super. LEXIS 1138, \*8-9, 2016 WL 1382909 (Pa. Super. Ct. 2016)**

* 1. 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.
  2. 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 Pers. Restraint Petition of Tillmon,* 193 Wash. App. 1018 (2016)**

1. 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.”
2. 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.
3. 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.
4. 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.
5. 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.*

***New Jersey v Lombardo*, *(Unpublished* ) (NJ Ct App, 2011)**

1. 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, 2017 N.Y. LEXIS 766, NY Slip Op 02588, 4 (N.Y. Apr. 4, 2017)

* 1. 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.
     1. 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 [[40]](#footnote-40)… any type of blatant appeal to the jury's emotions or egregious proclamation of a defendant's guilt would plainly be unacceptable...[[41]](#footnote-41)***

* + 1. 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 evidence, a specific jury instruction will serve to emphasize that such representations are merely argument by counsel*.**

## People v Anderson, 2017 N.Y. LEXIS 769, NY Slip Op 02589, 1-2 (N.Y. Apr. 4, 2017)

* 1. 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.
     1. 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…***

1. **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 particular exhibit annotations

## Rossiter v. State, No. A-11300, 2017 WL 4079458, at \*2–3 (Alaska Ct. App. Sept. 15, 2017)—Not reported in P. 3d---

* 1. The prosecutor's PowerPoint slides and his statements to the jury significantly mischaracterized the law of self-defense.
  2. 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 P.3d 582, 590 (Alaska Ct. App. 2012)**

1. 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. 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.’ ”40

**Standard of REview**

***City of E Grand Rapids v Vanderhart, unpublished per curiam opinion, Mich Ct App., April 11, 2017 (Docket No. 329259)***

* 1. Because this video “is something that [an appellate court] can review as easily as the trial court,” the Court can review Judge Servaas's findings of fact with less deference (*citing* People v. White, 294 Mich. App. 622, 633; 823 N.W.2d 118 (2011).

***People v Kavanaugh***, 320 Mich App 293 (2017)

* 1. Defendant raised the issue again at trial at which time the trial court watched the video and confirmed its prior ruling. Like the trial court, we have watched and listened to the recording. Having done so, we need not rely on the trial court's conclusions as to what the videotape contains *(citing City of E Grand Rapids v Vanderhart,)*

## Love v State,73 NE3d 693, 695 (Ind 2017)

* 1. We hold that Indiana appellate courts reviewing the sufficiency of evidence must apply the same deferential standard of review to video evidence as to other evidence, unless the video evidence indisputably contradicts the trial court's findings. A video indisputably contradicts the trial court's findings when no reasonable person can view the video and come to a different conclusion.

***Scott v Harris*, 550 US 372, 380–81; 127 S Ct 1769, 1776; 167 L Ed 2d 686 (2007)**

1. Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.

## Angilau v United States, No. 2:16-00992-JED, 2017 WL 5905536, (D Utah November 29, 2017)

1. The U. S. Supreme Court has noted the importance of a video account of events in the adjudication of parties' interests*.* See *Scott v. Harris*, 550 U.S. 372, 378–81 (2007) (court need not view facts in light most favorable to party opposing summary judgment where that party's story is “blatantly contradicted by the [video] record, so that no reasonable jury could believe it.”)

**Cell Records/Tracking**

***State of Maryland v. Andrews,* In the Special Court Appeals of Maryland No. 1496 September Term, 2015, Filed 3/30/16**

1. “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.”

***United States v. Carpenter, (Rec. for full-text pub.)* No. 14-1572/1805, Filed 4/13/16**

1. In Fourth Amendment cases the Supreme Court has long recognized a distinction between the content of a communication and the information necessary to convey it. Content, per this distinction, is protected under the Fourth Amendment, but routing information is not. Here, Timothy Carpenter and Timothy Sanders were convicted of nine armed robberies in violation of the Hobbs Act. The government’s evidence at trial included business records from the defendants’ wireless carriers, showing that each man used his cellphone within a half-mile to two miles of several robberies during the times the robberies occurred. The defendants argue that the government’s collection of those records constituted a warrantless search in violation of the Fourth Amendment. In making that argument, however, the defendants elide both the distinction described above and the difference between GPS tracking and the far less precise locational information that the government obtained here. We reject the defendants’ Fourth Amendment argument along with numerous others, and affirm the district court’s judgment.

**MISCELLANEOUS**

Enlargement of photos on screen is not prejudicial as long as photos are admitted.[[42]](#footnote-42)

* 1. ***Conover v Oklahoma*, 933 P2d 904, 914 (Okla Crim App, 1997)**
  2. ***Browing v Oklahoma*, 134 P3d 816, 839 (Okla Crim App, 2006).**
  3. ***Bankhead v Alabama*, 585 So2d 112 (Ala. 1991).**
  4. ***Jones v Georgia*, 293 SE2d 708 (Ga. 1982).**
  5. ***Gopaul v Florida*, 536 So2d 296 (Fla. Ct App, 1988).**
  6. ***US v Yahweh*, 792 F. Supp 104 (SD Fla, 1992).**
  7. ***People v Watson*, 245 Mich App 572, 582 (2001).**
  8. ***North Carolina v Snider*, 168 NC App 701, 706 (2005).**

***Milson v. State of Florida,* 8322 So.2d 897, (Fla. Dist. Ct. App. 3d. 2002)**

1. 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.”[[43]](#footnote-43)

***State v. Michael Hilton,* No.89220, Court of Appeals of Ohio, Eighth District, Cuyahoga County.Released June 12th, 2008)**

1. 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.***

1. 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 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.[[44]](#footnote-44)***

***Due process requires the prosecution to prove, beyond a reasonable doubt, every element necessary to constitute the crime with which the defendant is charged.[[45]](#footnote-45)  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 of Florida,* 18 So. 3d. 1149, (Fla. Dist. Ct. App. 4d. 2009)**

1. 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.***

1. **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 of Florida,* No. 4D09-2062 District Court of Florida, Fourth District 2011)**

1. 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. Walmart Stores, Inc.,* 60 So. 3d. 440-Fla:Dist. Court of Appeals, 3rd Dist. 2011)**

1. The Plaintiff appeals the denial of her motion for a new trial in part because of the expert witnesses’ testimony and use of an undisclosed PowerPoint slide. The Court held:

***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.***

1. 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 N.J. 109, 122, 13 A.3d 873 (2011)**

1. 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*, (*Unpublished*) 2011 Ariz. App. LEXIS 985, at \*4-5 (Ct. App. July 21, 2011)**

* 1. 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.
  2. 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.
  3. 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 of Hawaii v. Daniel Kahanaoi,* (*Not for Pub*.), No. CAAP-110000021, filed 10/13/12 Intermediate Court of Appeals Hawaii)**

1. 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."[[46]](#footnote-46) If the appellant fails to provide the necessary record, the lower court must be affirmed.[[47]](#footnote-47) 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.[[48]](#footnote-48) 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.

***State of Ohio v. Aron Laurence Rich,* No. CA2012-03-44, Court of Appeals of Ohio, Twelfth District, Butler County, March 11, 2013)**

* 1. 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:
     1. 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 PowerPointpresentation 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.
     2. 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.

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# **Case Law/Rules from Texas**

As seen by the cases/rules below PowerPoint is used in two distinct manners. Some (often police officers) use PowerPoint to create actual reports or exhibits for use during testimony. These items are marked and admitted as substantive evidence in most cases.

PowerPoint slide shows are also created to be used as demonstrative aids by an attorney to present an opening statement or closing argument. These are often not admitted as evidence and simply contain slides of the evidence, law, and/or words/phrase describing the evidence and/or law. There is not much case law nationally on the use of litigation software (e.g. Sanction or Trial Director) in the courtroom.

It is clear from a review of the case law in Texas that the courts openly accept the use of PowerPoint slides as direct evidence, demonstrative evidence, and as aids to lawyers in argument. I’ve cited a few interesting cases below for reference. The cases below are listed by date of release.

## TX R PRACTICE FORT BEND CTY 400TH DIST CT Rule 4 Presentation of Evidence

The court urges counsel to agree on as many exhibits as possible and make demonstrative exhibits with Powerpoint (sic) to be projected on the court's evidence presentation system. This saves the parties money and relieves counsel and the court from having to transport and store mounted blowups. An additional advantage of Powerpoint (sic) or other image presentations is that you and the witnesses can mark on them as much as possible and retain the original and the marked-up exhibit on a floppy disc. No person will be allowed to use the evidence presentation system without a certification from the bailiff that they have been instructed in its use.

## Ferguson v. State, No. 02-16-00451-CR, 2017 WL 6047667 (Tex. App. Dec. 7, 2017), petition for discretionary review refused (May 2, 2018) (not designated for publication)

* 1. Use of PowerPoint as an exhibit during testimony.
  2. . . . the State offered exhibit twenty-six, which was a printed-out PowerPoint presentation that summarized Ferguson's criminal history as reflected in the sixteen exhibits mentioned above. Ferguson also raised a Rule 403 objection to exhibit twenty-six, arguing it, too, was cumulative. The trial court overruled that objection and admitted the exhibit. *Id at p. 5.*

## Byrd v. State, No. 02-15-00288-CR, 2017 WL 817147 (Tex. App. Mar. 2, 2017), petition for discretionary review refused (June 14, 2017) (not designated for publication)

1. The defense and prosecution differed over whether a P’s cell tower expert’s PowerPoint should be considered a report.
2. This interesting issue was ultimately not addressed because it was held the defense waived it by not seeking a continuance.

## Sowells v. State, No. 01-14-00461-CR, 2016 WL 3569550, at \*2–3 (Tex. App. June 30, 2016), petition for discretionary review refused (Nov. 2, 2016) (not designated for publication)

* 1. Admission of PowerPoint presentation as punishment evidence

The punishment stage of trial was conducted before the court, sitting without a jury. In his second issue, Sowells asserts that the trial court erred by admitting into evidence the PowerPoint presentation prepared by Sgt. Wood. Sowells contends that the admission of this document violated his rights under the Confrontation Clause of the Sixth Amendment. The PowerPoint presentation incorporated information gathered from interviews conducted by Sgt. Wood. Because the subjects of the interviews were not brought into court for cross-examination, Sowells argues that the presentation effectively was comprised of testimonial out-of-court statements that violated his right to confront witnesses. Sowells takes particular issue with a slide that detailed the hierarchy and structure of the gang and indicated that he had a leadership role. He asserts that harm is evident because the prosecution discussed his gang involvement in its closing argument for punishment, and the judge mentioned his role in the gang during sentencing. *Id at page 5.*

## Orcasitas v. State, 511 S.W.3d 213, 222–23 (Tex. App. 2015)

* 1. Additionally, during rebuttal argument, the prosecutor used a PowerPoint presentation to show the jury the elements of unlawful possession of a weapon and discharging a weapon in a municipality. After closing arguments, appellant objected that the State could not “flash statutes” on a screen during its closing argument and ask the jury to consider them. According to appellant, the only law the jury could \*223 consider was the law in the court's charge. Appellant then asked the trial court to instruct the jury that they could not consider any law other than the law in the charge. In response, the trial court gave the following instruction to the jury:
     1. Ladies and gentlemen, I have not only read the law as it applies to this case, but you also will take the charge with you to the jury room. And I will instruct you that the only law that you will depend on is the charge itself. And with that, you have all of the evidence before you. You have the law. So what I would like for you to do is go back to the jury room, select your foreperson, and begin your deliberations. You are excused.

1. **The second objection was untimely. It was not made contemporaneously with the use of the PowerPoint slides, but after closing arguments were over**. And, once the second objection was made, the trial court advised appellant's counsel that it would provide an instruction to address the objection and it advised him of the substance of the instruction before the instruction \*224 was given. At that point, appellant's counsel stated, “That will be fine, Your Honor.” The trial court then gave the jury the instruction. The second objection was not only untimely, it was not pursued to an adverse ruling. We conclude there was no preserved error arising from improper jury argument. Id at page 223.

## Stobaugh v. State, 421 S.W.3d 787, 801–02 (Tex. App. 2014)

* 1. The use of PowerPoint and technology was not an “issue” in this case. The holding of this case focused on the sufficiency of the evidence. This case is included because it goes into a fair amount of detail about the use of video clips to and PowerPoint templates to present evidence. Regardless, it is worth reading to see how the court describes use of this technology.
  2. Officer Vest into sixteen clips and offered a DVD with the sixteen clips on it into evidence as State's Exhibit 314. The sixteen video clips vary in length, with the shortest being 7 seconds and the longest being 1 minute and 52 seconds. The State excerpted the three-hour Murphree/Kish statement into fifty-five video clips and offered a DVD with the fifty-five clips on it into evidence as State's Exhibit 312. The longest of these clips is 1 minute and 55 seconds; the shortest is 3 seconds. The State excerpted the Horton verbal statement into nine video clips and offered a DVD with the nine video clips into evidence as State's Exhibit 313. The longest is 1 minute and 42 seconds; the shortest is 16 seconds. The State selected certain clips contained on State's Exhibits 312, 313, and 314 to play for the jury; all three of these DVDs that were admitted into evidence also contain clips that were not played for the jury.15 *Id at page 801.*
  3. The DVDs containing the clips—that is, State's Exhibits 312, 313, and 314—also each include a PowerPoint on the DVD titled, respectively, “Murphree-categories.ppt,” “Horton.ppt,” and “Vest.ppt.” Each of these PowerPoints were created by the State and contain a Denton County seal in the upper left-hand corner of each PowerPoint slide. Each of the PowerPoints contains an initial PowerPoint screen setting forth text boxes with captions created by the State of what the State contends each clip shows, such as “Convincing the children” or “Assault 1989.” Each PowerPoint also contains \*802 some of the clips created by the State from the pertinent statement; some of the PowerPoints contain clips not presented at trial. The PowerPoints themselves were never published to the jury during trial. During closing argument, the prosecutor told the jury that if they wanted to review the clips, they should play the PowerPoints.16  *Id at page 801.*

***Hurst v. State,* No. 10-13-00113-CR, 2013 WL 5526226, at \*1–2 (Tex. App. Oct. 3, 2013)** (**not designated for publication)**

1. At trial, the dash-cam video from Sergeant Lewis's vehicle was admitted into evidence without objection. In addition, the State introduced a PowerPoint presentation that was created from still photographs *taken* from the dash-cam video. The photographs purportedly were still frames from the dash-cam video that have boxes on portions of the photographs depicting the offense. The inclusion of the boxes was designed to help the jury focus their attention on the act constituting the offense. Hurst objected to the photographs, arguing that:
   1. It's manufactured evidence. Mr. Jackson's testimony, it's been edited, it's been enhanced, it's been altered by adding boxes. It's a violation of the best evidence rule. And we, therefore, think should not be admitted into evidence or shown to the jury. It's not what the officer brought us. It's been added to so we object.

\*2 The trial court overruled Hurst's objection, and the photographs were admitted into evidence. *Id at page 3.*

1. Hurst also appears to argue that the photographs were inflammatory. We note that Hurst did not make such an argument in the trial court. To preserve error, Texas Rule of Appellate Procedure 33.1(a) requires the complaining party to make a specific objection or complaint and obtain a ruling thereon before the trial court. See TEX. R. APP. P. 33.1(a); see also Wilson v. State, 71 S.W.3d 346, 349 (Tex.Crim.App.2002). Texas courts have held that points of error on appeal must correspond or comport with objections and arguments made at trial. Dixon v. State, 2 S.W.3d 263, 273 (Tex.Crim.App.1999); see Wright v. State, 154 S.W.3d 235, 241 (Tex.App.-Texarkana 2005, pet. ref'd). “Where a trial objection does not comport with the issue raised on appeal, the appellant has preserved nothing for review.” Wright, 154 S.W.3d at 241; see Resendiz, 112 S.W.3d at 547. Because Hurst's appellate argument does not comport with the arguments made in the trial court, we cannot say that Hurst has preserved this argument for review. See TEX. R. APP. P. 33.1(a)(1); see also Resendiz, 112 S.W.3d at 547; Wilson, 71 S.W.3d at 349; Wright, 154 S.W.3d at 241.

And finally, even if we were to conclude that the trial court abused its discretion in admitting the photographs into evidence, we note that the potential harm of the complained-of evidence is defused by other properly-admitted evidence. See King v. State, 953 S.W.2d 266, 273 (Tex.Crim.App.1997). **Therefore, because the dash-cam video was admitted into evidence without objection, any harm associated with the admission of the photographs would be harmless.** See TEX. R. APP. P. 44.2; see also Lane v. State, 151 S.W.3d 188, 193 (Tex.Crim.App.2004) (“An error [if any] in the admission of evidence is cured where the same evidence comes in elsewhere without objection.”); King, 953 S.W.2d at 273. Based on the foregoing, we overrule Hurst's sole issue on appeal. *Id at page 3.*

1. III. Conclusion

\*4 Having overruled Hurst's sole issue on appeal, we affirm the judgment of the trial court. *Id at page 4.*

## Manderscheid v. State, No. 14-12-00579-CR, 2013 WL 6405470, at \*1–2 (Tex. App. Dec. 5, 2013) (not designated for publication)

* 1. Prior to conducting its voir dire, the State shared with appellant a PowerPoint presentation that the prosecutor intended to use as a visual aid during voir dire. Appellant objected to certain questions and phrases contained in the presentation. Appellant first objected to the State's use of the term “child molester” because it was not the term used in the Penal Code. The court instructed the State to “choose another word.” The State did so. During voir dire, the State asked “What does someone that commits aggravated sexual assault of a child look like?” Appellant did not object at the time the State asked the question. *Id at page 1.*

1. \*2 On appeal, appellant argues the prosecutor's questions were impermissible commitment questions. Appellant failed to preserve his complaint that they were commitment questions because he did not make that objection at trial. To preserve an issue for appellate review, there must be a timely objection specifically stating the legal basis for the objection. Rezac v. State, 782 S.W.2d 869, 870 (Tex.Crim.App.1990). An objection based on one legal theory may not be used to support a different legal theory on appeal. Cook v. State, 858 S.W.2d 467, 474 (Tex.Crim.App.1993). The complaint appellant now raises does not comport with the objection he voiced at trial; therefore, appellant waived his complaint that the prosecutor's questions were commitment questions.

Appellant also contends that the State's questions were irrelevant. As explained above, the State rephrased the first question in response to appellant's objection, and appellant made no further objection to that question. Accordingly, no complaint regarding that question is preserved for our review. As to the second and third questions, we hold the trial court did not abuse its discretion in overruling appellant's relevance objection.

In this case, the State's questions regarding whether a child is more likely to be assaulted by someone he or she knows and whether a child is more likely to be assaulted in a broken home sought information that would allow the State to use its peremptory strikes intelligently. Because the complainant had lived with appellant, the State may have wanted to explore whether any of the veniremembers thought it was unusual for a member of the complainant's household to commit sexual assault. In addition, because the complainant's parents were divorced, the State may have wanted to identify any bias by the venire members toward children from a “broken home.” The trial court did not abuse its discretion in permitting the State to ask these questions to aid its use of peremptory challenges. Appellant's first issue is overruled. *Id at page 2.*

## Henricks v. State, 293 S.W.3d 267, 276 (Tex. App. 2009)

* 1. This PowerPoint presentation was used as a demonstrative aid during testimony.
  2. The trial court did not err in allowing Investigator Rossi's PowerPoint presentation. The presentation was only an aid for the jury to understand Investigator Rossi's testimony. A witness may be allowed to demonstrate before the jury so as to make her testimony more plain and clear. Phea v. State, 190 S.W.3d 232, 234 (Tex.App.-Houston [1st Dist.] 2006, pet. ref'd). Her testimony consisted of complex blood spatter analysis, and the presentation was used as a visual aid to assist the jury while she testified. Henricks had access to all the photographs used in the presentation, and they had already been entered into evidence. Further, the PowerPoint presentation was not entered into evidence and was not available to the jury during its deliberations. *Id at page 274.*

# **Case Law/Rules from West Virginia/4th Circuit[[49]](#footnote-49)**

## Wilcox v. Warden of the Nottoway Corr. Ctr., No. 1:13CV01589, 2015 WL 1185795, at \*7 (E.D. Va. Mar. 10, 2015)

1. The prosecution opened its closing argument in petitioner's case with the question “[w]hich straw broke the camel's back for you? Was it the hat? The gloves, the pants, the white shoes that he was wearing ... ? Too many things. Any of these things and—could have been the straw that broke the camel's back for you.” Tr. Tran. (Jan. 21, 2010), at 353–54. *ID at page 8.*
2. The Commonwealth's Attorney also presented a Powerpoint (sic) in which various individuals saw various parts of an elephant. By the time every individual story was placed together, it was clear that the screen showed an elephant. The prosecutor then urged the jury to think of the petitioner's case in the same manner, with all the circumstantial pieces of evidence combining to find petitioner guilty. Id at 387–88. Petitioner states that counsel was ineffective for failing to object to these “dehumanizing” tactics. *See, e.g.,* Pet., at 9# 3. *ID at page 8.*
3. The Court held, “Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.” *Wilcox v. Warden of the Nottoway Corr. Ctr.,* slip op., at 7. This decision was not contrary to or an unreasonable application of clearly established federal law, as the prosecution's closing argument was within the wide range of discretion given to counsel during closing argument. *See, e.g., Oken v. Corcoran,* 220 F.3d 259, 269–70 (4th Cir.2000). Accordingly, defense counsel was not required to make a futile objection to this tactic. *ID at page 8.*

## Jones v. Shanahan, No. 1:12-CV-304-RJC, 2014 WL 991892, at \*5 (W.D.N.C. Mar. 13, 2014)

1. Petitioner argues that his counsel should have lodged a proper objection to the State's summation and PowerPoint presentation regarding the evidence and the jury instructions pertaining to acting in concert with others. (Doc. No. 1 at 67–68). The state court denied this claim on the merits and found that his counsel “was not required to object to legal arguments of the State and instructions by the Court that clearly were supported by the facts and the law associated with the crimes charged. The overwhelming evidence in this case as derived from the transcript was that the defendant acted in concert with his [co-defendants] in the commission of all of the crimes, as to all of the alleged victims.” (MAR Order at 3). Further, the court found, as a matter of state law that the indictments need not allege that Petitioner acted in concert with others. Petitioner directs this Court to no Supreme Court cases on point that would support a finding that the state correct erred in its findings or that it erroneously interpreted the elements of his indictments and this claim will be denied. *ID at page 5.*

## State v. Copen, 211 W. Va. 501, 506–07, 566 S.E.2d 638, 643–44 (2002)

* 1. The defense challenged the prosecutor’s use of a laser pointer to point at evidence.
  2. The appellant also claims that the trial court erred in allowing the prosecution to use a laser pointer to point at evidence in the case including a diagram of the victim. The appellant suggests that the use of the laser pointer subliminally stressed the fact that the appellant might have used a sight on the murder weapon to shoot the victim. The trial court, in overruling the appellant's objections to the use of the laser pointer, stated:

I don't see the potential for any harm at all or prejudice to your client because of the use of a laser pointer, especially when the \*\*644 \*507 evidence is going to show precisely how the laser sight worked in this case. They're going to see whatever they're going to see, in any event. And if there's an impact, if there is, I would expect the impact to be from the demonstration of how the laser sight works.

While in certain situations, the Court can see that the use of a laser pointer might be prejudicial, the Court does not believe that is the situation here. The overwhelming evidence is that the appellant did, in fact, shoot the victim. The appellant's own testimony substantiates this fact, and it is hardly credible that the appellant would not have used the sight on the weapon when he shot it. Additionally, there was evidence as to how the laser sight functioned and evidence that eight or nine of the 11 bullets fired actually hit the body of the victim. Any subliminal suggestion which arose from the use of the laser pointer, in this Court's view, could, under the particular facts of this case, have had only an insignificant impact compared with the other evidence in the case. *Id at p. 643/506 to 644/507.*

Best of luck,

***APA Patrick Muscat***

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1. Citing People v. Dykes (2009) 46 Cal.4th 731, 762 [↑](#footnote-ref-1)
2. Citing People v. Welch (1999) 20 Cal.4th 701, 752–753. [↑](#footnote-ref-2)
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’ ”] [↑](#footnote-ref-3)
4. 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.” [↑](#footnote-ref-4)
5. Citing *People v. Castillo,* 230 Mich.App. 442, 444, 584 N.W.2d 606 (1998). [↑](#footnote-ref-5)
6. Citing *Lopez v. Gen. Motors Corp.,*224 Mich.App. 618, 628 n. 13, 569 N.W.2d 861 (1997). [↑](#footnote-ref-6)
7. *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. [↑](#footnote-ref-7)
8. Also see the digital evidence section at the end of this outline and the attached articles regarding the authentication of electronically stored information (ESI). [↑](#footnote-ref-8)
9. *Citing* *MRE 901(b)(4)*. [↑](#footnote-ref-9)
10. *See also* United States v. Combs, 369 F.3d 925, 938 (6th Cir. 2004) [↑](#footnote-ref-10)
11. Allen, 106 F.3d at 700. [↑](#footnote-ref-11)
12. *See also* United States v. Levy, 904 F.2d 1026, 1030 (6th Cir. 1990) [↑](#footnote-ref-12)
13. See United States v. Smith, 861 F.2d 722, 1988 WL 114817, (6th Cir. 1988) (*unpublished table decision) (quoting* United States v. Bizanowicz, 745 F.2d 120, 123 (1st Cir.1984)) [↑](#footnote-ref-13)
14. 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.")* [↑](#footnote-ref-14)
15. *See* [Knapp v. State, 9 N.E.3d 1274, 1282 (Ind. 2014)](https://advance.lexis.com/document/documentlink/?pdmfid=1000516&crid=97eda5a4-1381-4723-88e6-24adce2ce94b&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5CDN-7W71-F04G-6000-00000-00&pdpinpoint=PAGE_1282_5093&pdcontentcomponentid=6707&pddoctitle=Knapp+v.+State%2C+9+N.E.3d+1274%2C+1282+(Ind.+2014)&ecomp=t3JLk&prid=6515ca1d-068d-4aad-9140-fe8df5bd07a5) [↑](#footnote-ref-15)
16. [↑](#footnote-ref-16)
17. *See Weissenberger’s Ohio Evidence Treastise*, Section 1003.1 (2015). [↑](#footnote-ref-17)
18. 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 N.W.2d 6,(1991) [↑](#footnote-ref-18)
19. *See,* e.g., United States v. Oslund*, 453 F.3d 1048, 1054 (8th Cir. 2006)* [↑](#footnote-ref-19)
20. 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 fac*t." 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*.” [↑](#footnote-ref-20)
21. ## Citing People v. Patterson, 93 N.Y.2d 80, 84, 688 N.Y.S.2d 101, 710 N.E.2d 665 [1999]; People v. Ely, 68 N.Y.2d 520, 527, 510 N.Y.S.2d 532, 503 N.E.2d 88 [1986]; Zegarelli v. Hughes, 3 N.Y.3d 64, 69, 781 N.Y.S.2d 488, 814 N.E.2d 795 [2004]

    [↑](#footnote-ref-21)
22. Citing People v Ely*,* 68 NY2d 520, 527, 503 N.E.2d 88, 510 N.Y.S.2d 532 [↑](#footnote-ref-22)
23. Citing People v Ely, 68 NY2d 520, 527*; see also* People v Dicks*,* 100 AD3d 528, 528, 954 N.Y.S.2d 83. [↑](#footnote-ref-23)
24. Citing [Elyat 527](https://advance.lexis.com/document/midlinetitle/?pdmfid=1000516&crid=a130136a-cc28-4648-8019-f95729964b21&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5K04-9VM1-F04J-719V-00000-00&pdcomponentid=9092&ecomp=m46g&earg=sr13&prid=1fa60db3-0cbc-4001-a48f-06bb978d864f); *see also* People v Bell, 5 AD3d 858, 861, 773 NYS2d 491 [2004]. [↑](#footnote-ref-24)
25. In *Johnson*, the Court applied a broad definition to the term “written” as it appears in MRE 613(a). [↑](#footnote-ref-25)
26. Citing [People v. Jenkins, 450 Mich. 249, 256;](http://web2.westlaw.com/find/default.wl?mt=57&db=542&tc=-1&rp=%2ffind%2fdefault.wl&findtype=Y&ordoc=2026232726&serialnum=1995195587&vr=2.0&fn=_top&sv=Split&tf=-1&referencepositiontype=S&pbc=FDD2FF87&referenceposition=256&rs=WLW13.04" \t "_top) [537 NW2d 828 (1995)](http://web2.westlaw.com/find/default.wl?mt=57&db=595&tc=-1&rp=%2ffind%2fdefault.wl&findtype=Y&ordoc=2026232726&serialnum=1995195587&vr=2.0&fn=_top&sv=Split&tf=-1&pbc=FDD2FF87&rs=WLW13.04" \t "_top). [↑](#footnote-ref-26)
27. *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 N.W.2d (247). [↑](#footnote-ref-27)
28. Citing *People v. Rodriguez,* 251 Mich.App 10, 34-35; 650 NW2d 96 (2002). [↑](#footnote-ref-28)
29. Citing *[People v. White,](http://web2.westlaw.com/find/default.wl?mt=57&db=543&tc=-1&rp=%2ffind%2fdefault.wl&findtype=Y&ordoc=2027940075&serialnum=1985109460&vr=2.0&fn=_top&sv=Split&tf=-1&referencepositiontype=S&pbc=74E42931&referenceposition=488&rs=WLW13.04" \t "_top)*[139 Mich.App 484, 488;](http://web2.westlaw.com/find/default.wl?mt=57&db=543&tc=-1&rp=%2ffind%2fdefault.wl&findtype=Y&ordoc=2027940075&serialnum=1985109460&vr=2.0&fn=_top&sv=Split&tf=-1&referencepositiontype=S&pbc=74E42931&referenceposition=488&rs=WLW13.04" \t "_top) [363 NW2d 702 (1984)](http://web2.westlaw.com/find/default.wl?mt=57&db=595&tc=-1&rp=%2ffind%2fdefault.wl&findtype=Y&ordoc=2027940075&serialnum=1985109460&vr=2.0&fn=_top&sv=Split&tf=-1&pbc=74E42931&rs=WLW13.04" \t "_top). [↑](#footnote-ref-29)
30. *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. [↑](#footnote-ref-30)
31. Citing *Rodriguez,* 251 Mich.App at 35. [↑](#footnote-ref-31)
32. Citing *White,* 139 Mich.App at 488 [↑](#footnote-ref-32)
33. This case has been distinguished on other evidentiary grounds several times. [↑](#footnote-ref-33)
34. Citing [People v.. Bahoda,](http://web2.westlaw.com/find/default.wl?mt=57&db=542&tc=-1&rp=%2ffind%2fdefault.wl&findtype=Y&ordoc=2021094718&serialnum=1995102266&vr=2.0&fn=_top&sv=Split&tf=-1&referencepositiontype=S&pbc=75570CFE&referenceposition=282&rs=WLW13.04" \t "_top)[448 Mich. 261, 282;](http://web2.westlaw.com/find/default.wl?mt=57&db=542&tc=-1&rp=%2ffind%2fdefault.wl&findtype=Y&ordoc=2021094718&serialnum=1995102266&vr=2.0&fn=_top&sv=Split&tf=-1&referencepositiontype=S&pbc=75570CFE&referenceposition=282&rs=WLW13.04" \t "_top)[531 NW2d 659 (1995)](http://web2.westlaw.com/find/default.wl?mt=57&db=595&tc=-1&rp=%2ffind%2fdefault.wl&findtype=Y&ordoc=2021094718&serialnum=1995102266&vr=2.0&fn=_top&sv=Split&tf=-1&pbc=75570CFE&rs=WLW13.04" \t "_top)***.*** [↑](#footnote-ref-34)
35. *Citing* [People v. Fisher,](http://web2.westlaw.com/find/default.wl?mt=57&db=542&tc=-1&rp=%2ffind%2fdefault.wl&findtype=Y&ordoc=2021094718&serialnum=1995183812&vr=2.0&fn=_top&sv=Split&tf=-1&referencepositiontype=S&pbc=75570CFE&referenceposition=452&rs=WLW13.04" \t "_top)[449 Mich. 441, 452;](http://web2.westlaw.com/find/default.wl?mt=57&db=542&tc=-1&rp=%2ffind%2fdefault.wl&findtype=Y&ordoc=2021094718&serialnum=1995183812&vr=2.0&fn=_top&sv=Split&tf=-1&referencepositiontype=S&pbc=75570CFE&referenceposition=452&rs=WLW13.04" \t "_top)[537 NW2d 577 (1995)](http://web2.westlaw.com/find/default.wl?mt=57&db=595&tc=-1&rp=%2ffind%2fdefault.wl&findtype=Y&ordoc=2021094718&serialnum=1995183812&vr=2.0&fn=_top&sv=Split&tf=-1&pbc=75570CFE&rs=WLW13.04" \t "_top)***.*** [↑](#footnote-ref-35)
36. ***Comment:*** Whether “Justice” is the Defendants name or his title is unknown. [↑](#footnote-ref-36)
37. *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?” [↑](#footnote-ref-37)
38. *Citing Hecht*. 319 P.3d at 841. [↑](#footnote-ref-38)
39. *Citing Glasmann.* 175 Wn.2d at 706. No. 71436-8\_I/7 [↑](#footnote-ref-39)
40. Citing People v Santiago, 22 NY3d 740, 751, 986 N.Y.S.2d 375, 9 N.E.3d 870 [2014] [↑](#footnote-ref-40)
41. Citing State v Walker, 182 Wash 2d 463, 341 P3d 976 [2015] [↑](#footnote-ref-41)
42. 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. [↑](#footnote-ref-42)
43. *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.”). [↑](#footnote-ref-43)
44. Citing *Mullaney v. Wilbur*(1975), 421 U.S. 684; *In re Winship* (1970), 397 U.S. 358. [↑](#footnote-ref-44)
45. Citing [In re Winship,supra](http://scholar.google.com/scholar_case?case=14966781063535213924&q=powerpoint&hl=en&as_sdt=4,36)***.*** [↑](#footnote-ref-45)
46. Citing *Union Bldq. Materials Corp. v. Kakaako Corp*., 5 Haw. App. 146, 151, 682 P.2d 82, 87 (1984); *Bettencourt v. Bettencourt*, 80 Hawai'i 225, 230, 909 P.2d 553, 558 (1995). [↑](#footnote-ref-46)
47. Citing *Union Bldq. Materials Corp*., 5 Haw. App. at 151-52, 682 P.2d at 87. [↑](#footnote-ref-47)
48. Citing *State v. Hoancr*, 93 Hawai'i 333, 336, 3 P.3d 499, 502 (2000). [↑](#footnote-ref-48)
49. A recent search of Westlaw for the term “PowerPoint” did not identify many cases that address the proper use or alleged misuse of PowerPoint and other technology in the courtroom. This is of no consequence as the “rules for PowerPoint” are generally no different than the rules for opening statements and closing arguments. [↑](#footnote-ref-49)