

Electronic EVIDENCE

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Chapter 8 ADMISSIBILITY AND EVIDENTIARY CONSIDERATIONS: VIDEO RECORDINGS

New sections added:

B. AUTHENTICATION AND LAYING OF

§ 8:24.1 FOUNDATION Sufficiency of authentication (*New*)

§ 8:24.2 Applicable cases (*New*)

A. ADMISSIBILITY, GENERALLY

§ 8:4 Evidentiary classifications of video evidence, generally'

Videotape depicting tubal ligation reversal was not admissible in case against doctor and hospital for negligently leaving surgical sponge in patient's abdominal cavity, where patient made very general offer of proof, patient failed to complain to trial court, as she did on appeal, that videotape was relevant to show size of incision relative to size of surgical sponge, videotape depicted different procedure than one used in patient's operation, and question involved did not seem beyond grasp of normal lay juror. *Shoemaker v. Ekunno*, 960 S.W.2d 527 (Mo. Ct. App. E.D. 1998).

§ 8:5 Video evidence classified as original, substantive, direct, or conclusive
n.35.

Under North Carolina law, videotapes are admissible both as substantive and illustrative evidence. North Carolina's General Statutes provide: Any party may introduce a photograph, video tape, motion picture, X-ray or other photographic representation as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements. This section does not prohibit a party from introducing a photograph or other pictorial representation solely for the purpose of illustrating the testimony of a witness. Therefore, a surveillance videotape showing van occupants engaging in various physical activities, which was relevant to issues of whether and to what extent occupants were disabled by injuries they sustained in automobile accident, was not unfairly prejudicial in their personal injury action, despite its length and repetitious nature. *Albrecht v. Dorsett*, 508 S.E.2d 319 (N.C. Ct. App. 1998).

Videotapes are admissible in evidence for both substantive and illustrative purposes. *State v. Mewborn*, 131 N.C. App. 495, 507 S.E.2d906 (1998).

§ 8:7 Broad discretion of trial judge

As has been noted in the main volume, admissibility questions ultimately turn on the trial judge's judgment and discretion in interpreting the circumstances of each particular case. Nonetheless, a party's response to evidence and the party's conduct during the trial can govern whether the admission of evidence is ultimately held to have been an abuse of discretion. For example, a defendant's unusual response to videotaped evidence in one case rendered harmless any error in the admission of evidence of the defendant's prior conviction for conspiracy to commit armed robbery. The defendant, at trial, critiqued a videotaped portrayal of a robbery made by a jewelry store surveillance camera, indicating at each step what he would have done differently had he committed the robbery. This testimony, combined with an admission on cross-examination that he had successfully committed approximately 40 armed robberies and volunteered testimony that, if he had been the robber, he would have shot anyone necessary in order to escape with the jewelry as well as the cash, led the court to conclude that reasonable jurors would have found the defendant guilty beyond a reasonable doubt even had evidence of the defendant's prior conviction been suppressed.⁴⁹

Allegations of discrepancies between a videotaped reenactment and actual events and circumstances go to the credibility of the evidence, not its admissibility.⁵⁰

In a products liability action against a football helmet manufacturer, the trial court did not abuse its discretion by excluding a videotape of warnings given to football players in regard to equipment and techniques. The tape had been made five years after the plaintiff suffered his injury and was not relevant as evidence of warnings available or community expectations at the time of injury. The tape was cumulative of other evidence, and any probative value would be outweighed by prejudicial effect.⁵¹

It was within the trial court's discretion, at guilt phase of capital murder trial, to give the jury a transcript of a videotaped conversation between defendant and his friend, where defendant did not challenge the accuracy of the transcript, and the court provided a lengthy cautionary instruction regarding the portions of the transcript that indicated the videotape was inaudible and

49. *People v. Coleman*, 210 Mich. App. 1,532 N.W.2d 885 (1995).

50. *Persian Galleries, Inc. v. Transcontinental Ins. Co.*, 38 F.3d 253, 41 Fed. R. Evid. Servo (LCP) 407,1994 FED App. 349P (6th Cir. 1994).

51. *Arnold V. Riddell, Inc.*, 882 F. Supp. 979, 42 Fed. R. Evid. Servo (LCP) 445 (D. Kan. 1995).

advising the jurors to decide for themselves what was being said. *Burns v. Com.*, 541 S.E.2d-872 (Va. 2001).

District court did not abuse its discretion in determining that the probative value of expert testimony that videotapes and photographs showed drug transactions taking place, and of expert opinion that the extended non-violent period at housing project showed that defendant and codefendant were in firm control of drug trafficking at the project, was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, despite contention that the testimony of the expert was not necessary because the jury was capable of understanding what was going on without expert help. *U.S. v. Hernandez-Vega*, 235 F.3d 705 (1st Cir. 2000), cert. denied, 2001 WL 384743 (U.S. 2001).

§ 8:7.5 -Abuse of discretion (*New*)

Allowing jury to view alleged pornographic films seized from trunk of defendant's car constituted abuse of discretion, in child pornography prosecution in which defendant had allegedly not viewed films at time of seizure and offered to stipulate to all of the elements of his offense other than his knowledge that films portrayed minors engaged in sexually explicit conduct; allowing jurors to view more than ten minutes of film portraying children engaged in graphic sexual conduct had potential to prejudice jury, and films themselves were no more probative than their covers on only issue in dispute, i.e., whether defendant knew that the allegedly unviewed articles in his possession contained pornographic depictions of children. *U.S. v. Merino-Balderrama*, 146 F.3d 758, 49 Fed.R. Evid. Servo 827 (9th Cir. 1998).

§ 8:7.6 -No abuse (*New*)

Trial judge did not abuse her discretion by allowing most of videotape of murder scene to be shown to jury, in light of facts that trial judge previewed videotape herself and did not allow jury to see inflammatory parts of videotape. *Com. v. Murphy*, 426 Mass. 395, 688 N.E.2d 966 (1998).

In an action against the Department of Transportation and Development (DOTD) following an automobile accident, the trial court did not abuse its discretion by admitting into evidence the videotape of a vehicular test performed by DOTD's expert witness; the trial judge found that the videotape aided the court in determining how the vehicle would respond when it encountered the asphalt concrete delineator (ACD) placed between opposing lanes in the construction zone. *Swinford v. Dolphin Const. Co.*, 716 So. 2d 29 (La. Ct. App. 4th Cir. 1998), writ denied, 729 So. 2d 568 (La. 1998).

Trial court did not abuse its discretion in admitting and playing for jury video tapes depicting crash tests of automobiles in products liability crashworthiness action, where sounds accompanying video tapes were explained to jury. *Stamper v. Hyundai Motor Co.*, 699 N.E.2d 678 (Ind. Ct. App. 1998).

Trial court did not abuse its discretion in determining that videotape in which child described act of sexual abuse perpetrated against her when she was three years old was reliable, and thus was admissible under statute establishing exception to hearsay rule for out-of-court statements of child victims in prosecutions for physical or sexual acts perpetrated upon child under age of 13, even though videotape was not made until nearly three years after assault occurred; delay was outweighed by remaining circumstances, including language used by child and lack of motive to fabricate, which established reliability. *People v. Bowen*, 183 Ill. 2d 103, 232 Ill. Dec. 800, 699 N.E.2d 577 (1998), cert. denied, 525 U.S. 1045, 119 S. Ct. 600, 142 L. Ed. 2d 542 (1998)

Trial court did not abuse its discretion, and there was no injustice to defendant, in admitting entire videotaped testimony of child sexual assault victim, including brief opening sequence panning courtroom and showing that defendant was not present, despite claim that jurors could have drawn unfavorable conclusion from defendant's absence that victim was afraid of defendant. *State v. Montini*, 52 Conn. App. 682, 730 A.2d 76 (1999).

Admission of videotapes is generally within the trial court's discretion, subject to the same requirements for admission of still photographs. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), as modified on denial of reh'g, (Feb. 25, 2000).

In prosecution for conspiracy to manufacture more than five grams of methamphetamine, admission of videotape of coconspirator's residence which showed gun, wrapped in plastic, in bedroom drawer was not abuse of discretion, where police officer narrating videotape did not mention gun, it was clear that residence depicted belonged to coconspirator and not defendant, and jury was not permitted to take videotape to jury room. "*State v. Casady*, 597 N.W.2d 801 (Iowa 1999).

Videotape is admissible if it fairly and accurately shows whatever it intends to show and if it is not unduly prejudicial. Trial court did not abuse its discretion by allowing jury to view in slow motion videotapes of expert accident reconstruction, and videotapes of testing required for federal certification of van, in products liability action brought against manufacturer of van which exploded after it struck concrete abutment; it was explained at trial that federal certification videotapes were made to satisfy testing requirements, and slow motion did not render videotapes unduly prejudicial. *Brown v. Ford Motor Co.*, 306 Ill. App. 3d 314, 239 Ill. Dec. 637, 714 N.E.2d 556 (1st Dist. 1999), appeal denied, 185 Ill. 2d 618, 242 Ill. Dec. 134, 720 N.E.2d 1089 (1999).

Twenty-minute portion of store surveillance video that depicted assailant entering store, sound of shot, assailant's attempt to open cash register, and arrival of law enforcement was admissible in murder prosecution. Trial court did not abuse its discretion in refusing to show store's entire two-hour surveillance

videotape in murder trial absent showing how hour-and- forty-minute depiction of customers shopping at store was relevant to shooting of store clerk. *Cromartie v. State*, 270 Ga. 780, 514 S.E.2d 205 (1999), cert. denied, 120 S. Ct. 419, 145 L. Ed. 2d 327 (U.S. 1999).

In determining whether to admit videotaped evidence, trial court should consider whether tape accurately depicts what it purports to represent, tends to establish a relevant fact, and will aid the jury's understanding, weighing against those factors whether tape will unfairly prejudice or mislead jury, confuse issues, or cause undue delay. Driver injured in accident on private road was *not* entitled to introduce videotape of area where accident occurred taken over a week after accident, even if tape showed how public used the street, as it proved only that patrons disregarded pavement markings and signs, and did not show unreasonable conduct on owner's part. *Ibieta v. Star Casino, Inc.*, 720 So. 2d 143 (La. Ct. App. 4th Cir. 1998), writ denied, 735 So. 2d 635 (La. 1999).

Trial court did not abuse its discretion in determining that relevancy, materiality and probative value of videotaped news report concerning accident involving stolen vehicle. and driver's subsequent arrest outweighed any possible prejudice to defendant resulting from its- admission at trial, where videotape was relevant to support state's assertion that defendant committed robbery on date charged and unlawfully possessed vehicle depicted in videotape. *People v. Scutt*, 254 A.D.2d 807, 679 N.Y.S.2d 489 (4th Dep't 1998).

Videotapes deemed gruesome or inflammatory or that lack an evidentiary purpose are always inadmissible as evidence: However, in a capital murder trial, trial court's sua sponte exclusion of color videotape showed forensic odontologist performing direct comparison test of defendant's dental impression and bite mark wounds on victim's body was error, as there was no sound basis for exclusion of tape in that videotape was more useful than still photos and both sides wanted to use tape, but error was not reversible, as it was as compelling for state as it was for defendant and there was nothing in videotape that was not contained in photographs, and thus, videotape was neither necessary nor exculpatory. *Brewer v. State*, 725 So. 2d 106 (Miss. 1998), cert. denied, 526 U.S. 1027, 119 S. Ct. 1270, 143 L. Ed. 2d 365 (1999).

B. AUTHENTICATION AND LAYING OF FOUNDATION

§ 8:10 Effect of technical imperfections on admissibility

Video depictions which are for demonstrative purposes need not exactly portray the event in question to be admissible. A trial court did not abuse its discretion by admitting videotape of a demonstration in which police officers sought to recreate conditions and lighting present at time of a shooting which gave rise to murder charges, in order to determine what the defendant could

have seen from the window where shots were fired, and testimony of officers regarding demonstration, where conditions and lighting depicted were substantially similar to those on night of incident, and issue of what could be seen from window was relevant to questions of intent and premeditation. *State v. Finch*, 137 Wash. 2d 792, 975 P.2d 967 (1999), cert. denied, 120 S. Ct. 285, 145 L. Ed. 2d 239 (U.S. 1999).

. Videotape made by police investigator approximately one week after bloodhound was used to track murder defendant's path from victim's house, in which videotape investigator walked path traveled by bloodhound, was not so prejudicial as to render its admission abuse of discretion, despite fact that videotape did not indicate that bloodhound had lost scent twice and had had to be rescented, and despite fact that investigator's path was more direct and admittedly faster than bloodhound's route; investigator admitted that videotape showed only general contours of bloodhound's path, and explained to jury that it did not precisely show deviations. *State v. Cowans*, 87 Ohio St. 3d 68, 717 N.E.2d 298 (1999), cert. denied, 2000 WL 266745 (U.S. 2000).

Photographs, slides, and videotape of crime scene and murder victim's charred, decomposing, and maggot-infested remains were relevant to the manner and means of victim's death and were not inadmissible merely because of their capacity to invoke an emotional response. *State v. Astello*, 602 N.W.2d 190 (Iowa Ct. App. 1999).

Videotaped interview of defendant conducted at her request by news reporter that contained commentary that cast serious doubts on defendant's story regarding the death of her infant was relevant to show how defendant lied consistently concerning cause of injuries leading to infant's death. *State v. Burgess*, 134 N.C. App. 632, 518 S.E.2d 209 (1999).

. Probative value of audio portion of videotape depicting mesothelioma victim hospital four days prior to his death was sufficient to overcome whatever prejudice it created in products liability action against manufacturer of asbestos-containing products to which victim was allegedly exposed even if tape aroused sympathy of jury and was to some extent cumulative; victim's condition at or near time of his death was necessary part of his widow's case, and even if there were some degree of repetition in tape, it was victim's only opportunity to inform jury about his condition. *Pittsburgh Coming Corp. v. Walters*, 1 S.W.3d 759 (Tex. App. Corpus Christi 1999), Rule 53.7(t) motion filed, (Sept. 17, 1999).

In admitting videotaped discussion between defendant and former coconspirator, occurring after coconspirator had begun working secretly for the government, district court did not abuse its discretion in determining that relevance of the evidence outweighed potential confusion arising from ambiguities and oblique language in the recording; defendant's own statements were admissions, and court told jury that former coconspirator's statements

were not to be considered for their truth. *U.S. v. Vigneau*, 187 F.3d 70 (1st Cir. 1999), cert. denied, 120 S. Ct. 1200, 145 L. Ed. 2d 1103 (U.S. 2000).

Portion of video tape that depicted search of defendant motorist's passenger and defendant's booking at jail was properly excluded, even though portion of tape showing initial stop, search, and discovery of cocaine was shown to jury; excluded portion of tape was irrelevant. *Morris v. State*, 239 Ga. App. 100,520 S.E.2d 485 (1999), cert. denied, (Oct. 29, 1999).

§ 8:11 Materiality, relevance, and competency

In personal injury suit brought against arrestee who allegedly injured officer in course of resisting arrest, videotape of first part of encounter recorded by video camera in officer's patrol car and audio tape of remainder of encounter were relevant to show whether arrestee's conduct was negligent or intentional and to nature and extent of arrestee's resistance. *Ludwig v. Dulan*, 217 Wis. 2d 782,579 N.W.2d 795 (Ct. App. 1998), review denied, 219 Wis. 2d 924,584 N.W.2d 124 (1998)

Police tape of emergency 911 calls made on night of incident, in which defendant kicked down victim's door and chased and shot victim, was excludable as irrelevant, insofar as it was introduced to show emotional state of defendant to support claim of self-defense in prosecution for criminal assault, where no call was from defendant, and call from defendant's partner, a fellow bounty hunter, was 20 minutes after incident. *State v. Woods*, 984 S.W.2d 201 (Mo. Ct. App. W.D. 1999).

Introduction of diagrams of murder victim's injuries, which assisted jury in understanding medical examiner's testimony and crime scene videotape, which gave jury a walk through perspective of crime scene, was relevant to prove aggravating circumstances alleged by state in capital sentencing proceeding and did not result in the needless admission of cumulative evidence. *Brown v. State*, 1998 OK CR 77,989 P.2d ~13 (Okla. Crim. App. 1998).

Videotape of patient in persistent vegetative state, in which she was seen exhibiting a painful reflex during the suctioning of her airway, was relevant and admissible in medical malpractice suit to demonstrate that patient could experience pain and suffering and to corroborate the plaintiffs' testimony in that regard. *Watkins v. Cleveland Clinic Found.*, 130 Ohio App. 3d 262, 719 N.E.2d 1052 (8th Dist. Cuyahoga County 1998).

Surveillance videotape showing van occupants engaging in various physical activities, which was relevant to issues of whether and to what extent occupants were disabled by injuries they sustained in automobile accident, was not unfairly prejudicial in their personal injury action, despite its length and repetitious nature. *Albrecht v. Dorsett*, 131 N.C. App. 502, 508 S.E.2d 319 (1998).

Excerpt of videotaped film which defendant owned and had watched at least six times and which showed character and his cohorts who brutally shoot convenience store clerk during robbery and take store's surveillance videotape was admissible in prosecution for murder, armed robbery and aggravated assault to show defendant's state of mind, despite fact that it could place defendant's character incidentally into question, where state showed defendant's fascination with movie, and criminal activity charged and committed mirrored conduct in film excerpt. *Rushin v. State*, 269 Ga. 599, 502 S.E.2d 454 (1998).

Movie that depicted violent murder, rape, kidnapping, and prison mutiny was admissible in murder prosecution, and was properly shown to jury in its entirety, as it was relevant to show defendant's bent of mind; jury may have made permissible inference that defendant was encouraged by movie to commit violent murder, as he had viewed movie 19 or 20 times and he identified with characters in movie. *Beasley v. State*; 269 Ga. 620, 502 S.E.2d 235 (1998).

Rap music tape containing violent lyrics was admissible in prosecution for murder, robbery, kidnapping, and attempted murder, after one victim testified that tape was played repeatedly while he and other victim were locked in truck of car, as being corroborative of intent of defendant and others in vehicle. in carrying out a plan similar to that suggested by the lyrics. *Britt v. State*, 334 Ark. 142, 974 S.W.2d 436 (1998).

Documents and videos produced by nonparty keyboard manufacturers were relevant in action against another manufacturer to recover for injuries' allegedly caused by repeated keyboard use, even if those materials were internal materials that had not been seen by defendant manufacturer until recently; evidence allowed the inference that, given the state of the art, members of the industry as a whole had, or should have had, the same 'state of mind' with respect to possible damage to users that needed to be considered by each of the manufacturers even though they were operating independently. *Gonzalez v. Digital Equipment Corp.*, 8 F. Supp. 2d 194, 49 Fed. R. Evid. Servo 445 (E.D.N.Y.1998).

Videotapes of transactions at particular "drug point" in housing project, and expert testimony concerning the transactions, were relevant in drug trafficking prosecution despite contention that the evidence did not prove that the drug trafficking at the drug point related to defendant and that he had been absent from the housing project since before the transactions in question, where there was a plethora of evidence as to how defendant and codefendant operated and strictly controlled the enterprise regardless of their occasional physical absence from Puerto Rico. *U.S. v. Hernandez-Vega*, 235 F.3d. 705 (1st Cir. 2000), cert. denied, 2001 WL 384743 (U.S. 2001).

§ 8: 13 Probative value versus prejudicial effects; Rule 403

Pictorial testimony theory of authenticating photograph or videotape, under

Which a witness testifies that tape or pictures fairly and accurately portray incidents reflected thereon, is not the exclusive means of authentication. Under the “silent witness” theory, photographic evidence may be admitted upon proof of reliability of the process that produced photograph or videotape. Relevant photographic evidence may be admitted into evidence on the “silent witness” theory when the trial judge determines it to be reliable, after having considered the following:

- (1) evidence establishing time and date of photographic evidence;
- (2) any evidence of editing or tampering;
- (3) operating condition and capability of equipment producing photographic evidence as it relates to accuracy and reliability of photographic product;
- (4) procedure employed as it relates to preparation, testing, operation, and security of equipment used to produce photographic product, including security of product itself; and
- (5) testimony identifying relevant participants depicted in photographic evidence.

