

# *Electronic* EVIDENCE

**JORDAN S. GRUBER**

**Cumulative Supplement  
by The Publisher's Editorial Staff**

**INSERT** this cumulative supplement into pocket located  
on the inside cover of your volume.

*Issued August 2001*



## § 8:22' Authentication of video evidence

n.67.

Properly authenticated videotape of robbery and individual pictures taken from videotape were admissible; even though victim could not identify defendant in those pictures; pictures were probative of robber's identity, and defendant's acknowledgment that pictures looked like him and person with whom he fought eliminated any serious question that videotape accurately recorded events. *Wilson v. Com.*, 29 Va. App. 236, 511 S.E.2d 426 (1999).

*After sentence containing note 73, add:*

Authentication under the "pictorial testimony" theory is one means of authenticating a photographic or videotape; it is not however the exclusive means of authentication. Under the "silent witness" theory, photographic evidence may be admitted upon proof of the reliability of the process which produced the photograph or videotape. Therefore, even though no human is capable of swearing that he personally perceived what a photograph purports to portray (so that it is not possible to satisfy the requirements of the "pictorial testimony" rationale) there may nevertheless be good warrant for receiving the photograph in evidence. Given an adequate foundation assuring the accuracy of the process producing it, the photograph should then be received as a so-called silent witness or as a witness which "speaks for itself." *Wagner v. State*, 707 So. 2d 827 (Fla. Dist. Ct. App. 1st Dist. 1998), review denied, 717 So. 2d 542 (Fla. 1998).

*At end of section add:*

A surveillance videotape cannot be self-authenticating. Surveillance videos are prepared solely to impeach a party or witness in a lawsuit. People who make their living by doing surveillance have an incentive to find something favorable to the party employing them. Video cameras can be selectively turned off and on. Tapes can be edited or altered, and advancing technology

will make alterations harder to detect. Therefore, the person operating the video camera ought to be exposed to cross-examination under oath. *Cirillo v. Davis*, 1999 WL 140672 (Fla. Dist. Ct. App, 4th Dist. 1999)

A trial court's concern about authentication, that a fire department sergeant would not be able to explain the editing of a videotape which was prepared on the day of a gasoline spill and showed the area covered by the gasoline, and concerns about considerations such as lack of relevancy, undue prejudice, confusion, or waste of time were justified, and thus, exclusion of the videotape was not an abuse of discretion. *Forest City Enterprises, Inc. v. Leemon Oil Co.*, 228 Mich. App. 57, 577 N.W.2d 150 (1998).

Allowing jury to read transcripts of defendant's tape-recorded statement while listening to it was not prejudicial error in capital murder prosecution. *State v. Moore*, 81 Ohio St. 3d 22,689 N.E.2d 1 (1998).

Testimony of police officers who had been present at time robbery defendant crashed stolen vehicle and at defendant's subsequent arrest, to effect that videotaped news report accurately depicted events, provided adequate foundation for admission of videotape into evidence at trial. *People v. Scutt*, 254 A.D.2d 807, 679 N.Y.S.2d 489 (4th Dep't 1998).

Though authentication requirements for admission of a videotape have become more flexible, authentication must establish that the videotape is ,an accurate reproduction of that which it purports to demonstrate. *Suanez v. Ege-land*, 330 N.J. Super. 190, 749 A.2d 372 (App. Div. 2000).

#### § 8:23 Fair and accurate portrayal

Video presentations can used effectively, to bring an accident reconstruction expert's tests to life and to; offer this evidence to a jury in a concrete and memorable fashion.<sup>67</sup>

In order to obtain admission of such evidence it is important to assure that the tests accurately reflect the occurrence underlying the lawsuit, unless the video presentation is offered as a demonstration rather than as a reconstruction. Particularly risky is a video presentation that portrays happenings close to, but not exactly the same as, those at issue. Both these shortcomings~inaccuracy in reflection of the underlying occurrence and portrayal of events not exactly the same as those in issue-were present in a tort suit seeking to hold an automobile manufacturer strictly liable for defective seat design. The

67. See § 8A:5 in this supplement for related discussion of the use of computer-generated simulations as evidence in accident reconstructions.

plaintiffs were unable to introduce a videotape depicting sled tests conducted by their expert in accident reconstruction and biomechanics.<sup>68</sup>

The videotape was ruled inadmissible because the sled tests prejudicially suggest that the plaintiffs flipped over backwards during a crash, when, in fact, their seats rotated rearward and they remained in their seats, lying on their backs and because the sled tests were just similar enough to the plaintiffs' accident to confuse the jury.<sup>69</sup>

Notwithstanding the importance of assuring that a videotape accurately portrays the occurrence at issue, all is not necessarily lost if there are some differences between the videotaped portrayal and the real-life event when the applicable standard for admissibility is, like the federal standard,<sup>70</sup> that the probative value of the evidence not be outweighed by the danger of undue prejudice, confusion of issues, or, misleading of the jury. For example, a videotape showing a com picker was held admissible as helping the jury in a products liability action to understand its mechanical operation even though the tape contained close-up footage of three warning signs on the picker (such closes comprising approximately one-half the length of the tape), since the court found it clear upon viewing the tape in its entirety that any danger of unfair prejudice, confusion of issues~ and misleading of the jury would be minimal.<sup>71</sup>

Similarly, admission into evidence of a photograph of cracked pavement where a personal injury plaintiff fell was upheld even though orange paint sprayed on the pavement after the accident by the defendant was visible. A ruler was positioned in the photograph so that the difference in elevation between sections of the pavement could be seen. Agreeing that the trial judge properly recognized that the plaintiff had a right to admit a photograph of the location where her fall occurred, but that evidence of subsequent remedial measures was not admissible for the purpose of establishing the defendant's negligence, the reviewing court found that a sensible compromise to balance the parties' competing interests was made when the photograph was admitted for the purpose of depicting the measurement of the cracks in the pavement and the trial judge directed that the photograph was not to be used to draw

68. As to the use of biomechanical experts in products liability litigation, see 46 Am Jur Trials 631.

69. U.S. v. Kitchen, 57 F.3d 516 (7th Cir. 1995), reh'g denied, (July 27, 1995) and related reference, 1995 WL 656691 (N.D. Ill. 1995).

70. Fed. R. Evid. 403.

71. Bellinger v. Deere & Co., 881 F. Supp. 813, 42 Fed. R. Evid. Servo (LCP) 474, 32 Fed. R. Servo 3d (LCP) 740 (N.D.N.Y. 1995).

attention to the defendant's use of spray paint to warn future customers of the cracked pavement.<sup>72</sup>

If there is some meaningful distinction between what is shown in a video presentation and the actual time, place, or event in question, this distinction must be brought to the court's attention by the party opposing admission of the video into evidence. One cannot merely rely on an assumption that the difference is as clear as night and day; the evidentiary meaning of this difference must be spelled out. Thus, in one murder prosecution, a videotape re-enacting what a witness saw on the night of the murder was held properly admissible even though the videotape was filmed during the day. The court reasoned that the tape was not admitted to show lighting conditions. Therefore, the fact the tape was made in day light although the murder occurred at night was not in issue and that once the witness confirmed that the video accurately showed the area where she was and where she saw the assailants, the court could conclude that the tape was a reasonable representation of the physical layout of the apartment building in question and the witness' vantage point. The video was offered to show jurors the relative locations of various features of the crime scene (the victims' apartment, the witness' apartment, a rear stairway, and the driveway of the apartment building). This videotape was admissible because the defendant was unable to demonstrate how any inaccuracies could have made the videotape misleading since the inaccuracies were either obvious to the jurors or were brought to their attention.<sup>73</sup>

While the facts of this particular case might not have permitted a successful argument excluding the tape and while it may have suggested nothing to the jury other than the physical layout of the murder scene,<sup>74</sup> the issue raised underscores the fact that counsel is in a much stronger position if he or she is able to exclude a video representation from evidence than if counsel can only present arguments that a jury should believe counsel's words explaining why

72. *Eldridge v. Casey's General Stores, Inc.*, 533 N.W.2d 569 (Iowa Ct. App. 1995).

73. *People v. Rodrigues*, 8 Cal. 4th 1060, 36 Cal. Rptr. 2d 235, 885 P.2d 1 (1994), as modified on denial of reh'g, (Feb. 16, 1995).

74. Much more harmful to the defense might have been a videotape taken by neighbors of the accused showing him standing in his yard waving a pistol before deputies arrived, as happened in *State v. Price*, 118 N.C. App. 212, 454 S.E.2d 820 (1995) where the videotape was held admissible in a prosecution for assault with intent to kill and related offenses for the limited purpose of illustrating testimony regarding events before the shooting and the deputies' perception of the situation when they arrived.

Even worse from the defense perspective is the jury's viewing of a police videotape of the crime scene showing the victim's body as it was found in a bathroom wedged in a small space between a bathtub and the bathroom wall after the victim had been stabbed to death. *Com. v. Simmons*, 419 Mass. 426, 646 N.E.2d 97 (1995). The use of gruesome depictions is discussed in this supplement in § 8:14.

the video is not persuasive. If the cliché' that one picture is worth a thousand words has even a modicum of validity, counsel is better off assuring that the jury never sees a pictorial representation than trying to explain away the pictures after the jury has seen them.

A demonstration is not the same as a re-enactment and may be used even though the event demonstrated differs from that sued upon. Thus a videotape offered to demonstrate how a railroad "dumper" works is not rendered inadmissible by the fact that the tape shows only one car on the track whereas there had been more than 20 cars on the track at the time of the accident since the tape was being offered only to show how the dumper functioned and not as a re-enactment of the accident.<sup>75</sup>

Counsel must be alert to the danger of a demonstration being perceived as unfairly prejudicial, in which case it will be excluded from evidence if the danger of any unfair prejudice outweighs the probative value of the evidence. Thus a videotape of a "kick test," in which a metallurgical expert kicked a vehicle door to illustrate the physical principles underlying certain expert opinions, was excluded under Federal Rule of Evidence 403 where the court found the video to be only minimally probative of the mechanism by which the vehicle's rear door opened.<sup>76</sup>

A demonstration using a videotape to show the workings of a pneumatic nail gun was found admissible (assuming the plaintiff could establish relevance) in a products liability action, by one who was injured when a co-worker's pneumatic nail gun accidentally discharged. One portion of the video demonstrated trigger-only activation of the nail gun while another portion of the video demonstrated contact-only activation. The portion demonstrating trigger-only activation was found relevant to the plaintiff's claim of a design defect as well as to a claim for punitive damages for not complying with applicable standards and a claim for breach of implied warranty of merchantability. The fact that the conditions under which the video was taken did not duplicate those at the time of the plaintiff's injury was not dispositive since the tape was offered as a demonstration to determine and clarify causes and contributing factors to the accident, rather than as an enactment. The court noted any, changed conditions could be explored on cross-examination. The portion of video showing contact-only activation of the nail gun was also held admissible, even though: the conditions under which the witness demonstrated contact-only firing were acknowledged to be different from those existing at the time of the accident, provided the jury was instructed that the video was

75. *Potlatch Corp. v. Missouri Pacific R. Co.*, 321 Ark. 314, 902 S. W.2d 217 (1995).

76. *Nakajima v. General Motors Corp.*, 894 F. Supp. 18 (D.D.C. 1995).

not a re-enactment but only evidence supporting the basis of the witness' opinion<sup>77</sup>

Where a video recording is not used to prove disputed facts, but is proffered to provide background information or explication, the standard for admissibility may be lowered to a showing of "substantial similarity."<sup>78</sup>

For example, a trial court properly admitted a defendant's videotape of rollover tests performed with a 1982 Malibu car, even though the accident leading up to trial involved a 1987 Blazer. Before admitting the evidence, the trial judge conducted voir dire of the defendant's expert to determine the tape's relevancy and allowed plaintiff's counsel to voir dire the expert. The court also gave a limiting instruction to the jury that the tape was not a reenactment of the accident.<sup>79</sup>

Moreover, where a videotape is offered to illustrate scientific principles, a dissimilarity in the circumstances of the tape and actual conditions at issue in trial does not preclude admissibility of the tape.<sup>80</sup>

Defendant's lack of remorse during post-arrest videotaped interview with detectives was probative of defendant's demeanor, which was evidence of his guilt or innocence as to charge of capital murder, and thus, videotape was admissible at guilt phase of trial. *Darks v. State*, 1998 OK CR 15, 1998 OK CR 15, 954P.2d 152 (Okla. Crim. App. 1998).

When determining admissibility of videotape, the trial court must consider whether the videotape accurately depicts what it purports to represent, whether it tends to establish a fact of the proponent's case and whether it will aid the jury's understanding; against those factors; the trial court must consider whether the videotape will unfairly prejudice or mislead the jury, confuse the issues or cause undue delay. The trial court may exclude videotape if the factors favoring its admission are substantially outweighed by the factors against admission. *State v. Sartain*, 746 So. 2d 837 (La. Ct. App. 4th Cir. 1999).

Crime scene video depicting victim's partially decomposed body lying next to a fence with one arm pointing away from the fence and fragments of teeth and jaw bone was admissible to corroborate testimony that defendant told witness he shot victim then threw body over a fence, to show injuries

77. *Edwards v. ATRO SpA*, 891 F. Supp. 1085 (B.D.N.C. 1995).

78. *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 25 Fed. R. Evid. Servo (LCP) 1153 (7th Cir. 1988).

79. *Crossley by Crossley v. General Motors Corp.*, 33 F.3d 818, 41 Fed. R. Evid. Servo (LCP) 201 (7th Cir. 1994).

80. *Misener v. General Motors*, 165 F.R.D. 105, 44 Fed. R. Evid. Servo (LCP) 592 (D. Utah 1996), related reference, 924 F. Supp. 130, 44 Fed. R. Evid. Servo (LCP) 741 (D. Utah 1996).

police observed on body at time it was discovered, and to offer a reasonable inference that victim was lying helpless when shot in face. *State v. Middleton*, 995 S.W.2d 443 (Mo. 1999) cert. denied, 120 S. Ct. 598, 145 L. Ed. 2d 497 (U.S. 1999).

Defendant did not show that videotape depicting crash test dummy in automobile being struck at five miles per hour was accurate reproduction of that which it purported to demonstrate, as required to authenticate videotape for admission during expert's testimony in trial on damages arising from low speed rear-end automobile accident, where defendant provided little to explain circumstances surrounding videotape's creation, there were many differences between test depicted on video and actual accident, and extreme slow motion of video made it capable of influencing jury. *Suarez v. Egeland*, 330 N.J. Super. 190, 749 A.2d 372 (App. Div. 2000).

Video-taped statements of defendant, who was diagnosed with paranoid schizophrenia, were voluntary, despite fact that defendant told police officers several times that he was "mind-altered," where officers did not coerce defendant into giving statement, defendant's speech was clear and his demeanor calm, and defendant stated that he understood his rights and initialed each line of Miranda form. *State v. Caenen*, 19 P.3d 142 (Kan. 2001).

#### § 8:24 Authentication under "silent witness" theory

n.8S.

By calling a witness with expertise in surveillance camera systems, the State properly established that the pawnshop's surveillance system was in proper working order and capable of recording accurately what was happening in the area of the pawnshop it was focused on. The police officer's testimony indicated that the videotape recording was correct and authentic. Therefore, the State properly satisfied the elements of the Voudrie test. *Pressley v. State*, 1999 WL 13549 (Ala. Crim. App. 1999).

n.87.

Under the "silent witness" theory, a witness must explain how the process or mechanism that created the item works and how the process or mechanism ensures reliability. When the "silent witness" theory is used, the party seeking to have the [videotape] admitted into evidence must meet the seven-prong Voudrie test. *Pressley v. State*, 1999 WL 13549 (Ala. Crim. App. 1999).

*At end of section add:*

Where whole videotape of robbery was properly authenticated and admitted, individual pictures taken from videotape were also admissible. *Wilson v. Com.*, 29 Va. App. 236, 511 S.E.2d 426 (1999)

It has been held that 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 the time and date of the photographic evidence;
- (2) any evidence of editing or tampering;
- (3) the operating condition and capability of the equipment producing the photographic evidence as it relates to the accuracy and reliability of the photographic product;
- (4) the procedure employed as it relates to the preparation, testing, operation, and security of the equipment used to produce the photographic product, including the security of the product itself; and
- (5) testimony identifying the relevant participants depicted in the photographic evidence. *Wagner v. State*, 707 So. 2d 827 (Fla. Dist. Ct. App. 1st Dist. 1998), review denied, 717 So. 2d 542 (Fla. 1998).

Video surveillance tape was properly admitted into evidence under silent witness theory, as testimony established location of and operation of videotaping mechanism. *Dolan v. State*, 743 So. 2d 544 (Fla. Dist. Ct. App. 4th Dist. 1999).