

## Top 10 Evidence Issues



Daniel Spiegel, Assistant Professor  
UNC School of Government  
Public Defender Conference  
May 2025

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A graphic with the words "TOP 10" in a large, bold, 3D gold font, set against a black background.

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Rules 401 and 403:  
Relevance and Prejudice Balancing

- Rule 401. Definition of "relevant evidence."
- **"Relevant evidence"** means evidence having **any tendency** to make the existence of **any fact** that is **of consequence to the determination of the action** **more probable or less probable** than it would be without the evidence.

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Rules 401 and 403:  
Relevance and Prejudice Balancing

- Rule 403. **Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.**
- Although relevant, evidence may be excluded if its **probative value is substantially outweighed** by the **danger of unfair prejudice**, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

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*Andrew v. White*, 604 U. S. \_\_\_\_ (2025)

- D on trial for murder of her husband
- Prosecution presented extensive evidence about her sex life:
  - Her sexual partners going back two decades
  - Two witnesses take stand solely to discuss her provocative clothing
  - Display of thong underwear D packed on trip to Mexico with her boyfriend (and co-D) after the murder
- Also presented evidence re: her failings as mother and wife



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Rules 401 and 403: *Andrew v. White*

- Question was whether the evidence was so unduly prejudicial that it rendered the trial fundamentally unfair and violated the Due Process Clause
- Also see recent NC case- *State v. Hicks*, COA20-665-2
  - Plain error when pornographic images were displayed to jury



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### Character Evidence in Self-Defense Cases

- Hypo: D is charged with shooting V outside of a bar after an argument about whether V approached D's girlfriend. D contends V came at him with a knife.
- What can State elicit about D?
- What can D elicit about V?



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### Rule 404(a)- Character Evidence

- Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.
- (a) Character evidence generally. – Evidence of a person's **character** or a trait of his character is **not admissible** for the **purpose of proving that he acted in conformity therewith** on a particular occasion, **except**:
  - (1) Character of **accused**. – Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
  - (2) Character of **victim**. – Evidence of a pertinent trait of character of the victim of the crime **offered by an accused**, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

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### Rule 405- Methods of Proving Character

- Rule 405. Methods of proving character.
- (a) **Reputation or opinion**. – In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. Expert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior.
- (b) **Specific instances of conduct**. – In cases in which character or a trait of character of a person is an **essential element of a charge, claim, or defense**, proof may also be made of specific instances of his conduct. (1983, c. 701, s. 1.)

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### Character Evidence in Self-Defense Cases

- Did V regularly carry a knife?
- Is this habit evidence?
  - Maybe so under Rule 406 (distinguish habit from character)
- Is this relevant?
  - Likely so if parties contest whether V was carrying a knife.



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### Character Evidence in Self-Defense Cases

- V stabbed someone two years ago?
- Comes in if D knew about the incident (either present or learned of it).
- Relevant for D's state of mind, as it shows reasonable fear and reasonable belief in need to defend self. See 405(b)-specific incidents allowed where character is essential element of defense
- Extrinsic evidence allowed- no limitation in 405(b)- (but could become cumulative under 403 if excessive)



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### Character Evidence in Self-Defense Cases

- V's general character for violence – reputation or opinion admissible?
  - If D knew this, likely comes in to show D's fear of harm was reasonable and thus his belief in need to defend self was reasonable – see above slide
- But even if D didn't know this, could come in to show victim was first aggressor under 404(a)(2)



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## Character Evidence in Self-Defense Cases

- What about D?
- Regularly carried a gun?
  - Only if relevant- probably not, unless D denies having a gun
- Assaulted someone previously?
  - Generally no- improper propensity (unless to rebut opinion evidence D elicits re: his peacefulness (405(a)), or as impeachment material with conviction per 609)
- Reputation for violence?
  - Generally no- pure propensity- not allowed under Rule 404. Unless rebutting D's evidence on peacefulness



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## 3 Bodycam and Evidence Issues

Body-Worn Camera (BWC) footage is becoming more and more common as law enforcement agencies adopt the technology



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## Evidence Issues with Bodycam

- Things can get tricky
- What evidence issues commonly arise?
  - Authentication?
  - Completeness?



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## Evidence Issues with Bodycam

- Hearsay issues?
  - What exceptions might apply?
  - (1) excited utterance, (2) present sense impression, (3) then existing mental, emotional or physical condition (Rule 803(1)-(3))
- Confrontation issues?
  - Ongoing emergency?
  - Or aftermath of incident?



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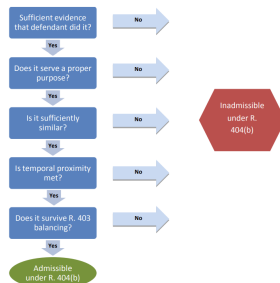
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## 404(b) flow chart



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## Rule 404(b)

- Rule 404(b) **Other crimes, wrongs, or acts.** –
  - Evidence of other crimes, wrongs, or acts is **not admissible** to prove the character of a person in order to **show that he acted in conformity** therewith. It may, however, be **admissible for other purposes**, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

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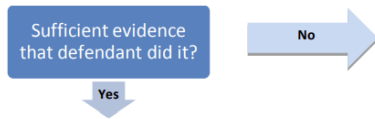
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404(b) flow chart



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404(b) flow chart



Proper purposes: Motive, Opportunity, Intent, Knowledge, Preparation, Plan, Modus Operandi, Identity, Absence of Mistake, Res Gestae/"Whole Story"

(really any relevant purpose other than propensity)

*State v. Moseley*, 338 N.C. 1, 32 (1994)

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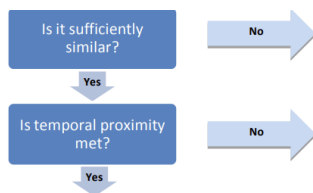
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404(b) flow chart



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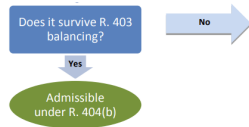
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### 404(b) flow chart



Is the probative value substantially outweighed by danger of unfair prejudice?

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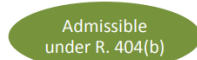
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### 404(b) flow chart



Once admitted, make **ruling on proper purpose** and craft **limiting instruction**

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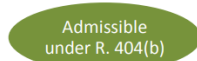
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### 404(b) flow chart



Watch out for “Wilkerson” Rule- “Bare Fact of Conviction” – generally, it is the incident rather than the “bare fact of conviction” that is admissible

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## 5 Confrontation and Domestic Violence cases

- Common Issue: Alleged victim not present at trial

- Confrontation

- Are statements testimonial?
- Statement about a past event or fact that the declarant would reasonably expect to be used later in a criminal prosecution when made.

- Key: **Primary purpose?**  
**Ongoing emergency** when statement made?



Think: 911 call / V's statement as officers arrive on scene / V's statement after being separated from D and time has passed

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## Domestic Violence cases

- What about hearsay protections?
- Remember that Confrontation and Hearsay are separate but related bases for objection
- Common hearsay exceptions State may rely on:
  - Present Sense Impression (803(1))
  - Excited Utterance (803(2))
  - Then Existing Mental, Emotional or Physical Condition (803(3))
  - Statements for Purposes of Medical Diagnosis or Treatment (803(4))



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## 6 Impeachment with Prior Conviction- Rule 609

- "What if any crimes punishable by 60 days or more have you been convicted of in the past 10 years?"
- "Other than Class 3 misdemeanors, what if any crimes have you been convicted of in the past 10 years?"
- "Weren't you convicted of felony larceny in 2019?"
- Can also ask about sentence received, time and place of conviction



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## 7 Vouching - *State v. Aguilar*, 292 N.C. App. 596 (2024)

- ◆ D alleged to have assaulted V at Mexican restaurant where they both worked
- ◆ ADA asked officer whether officer had any reason to doubt victim's story, as well as follow-up questions regarding credibility of the victim's statements
- ◆ D objected



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## 8 Business Records: Custodians, Affidavits, Signed Certificates

### Rule 803(6): Please Hold for the Next Available Representative...

March 13, 2018 Jonathan Holbrook

Post

A few weeks ago I participated in a seminar on digital evidence, and one of the topics we discussed was cell phone records (subscriber information, call detail records, historical location data, etc.). That's not surprising, since the widespread use of cell phones has made these records an increasingly common and important tool in criminal cases. Location data can help prove that the defendant was in the victim's house at the time of the murder, call logs can help prove the co-conspirators were in regular contact with each other, and so on.

What did surprise me was when I asked a group of 75+ prosecutors how often they have used an affidavit to authenticate these kinds of records and get them

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### Tweak to Business Records Hearsay Exception

- Amended Evid. R. 803(6) now allows business records to be authenticated by certification by custodian or witness if made on penalty of perjury
- May use in place of sworn affidavit or notarized document under seal
- Notice requirement: "advance notice" required - unclear exactly what is reasonable for time frame

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State v. Graves, 907 S.E.2d 470 (2024)

Facebook Business Record Page 134

**Emails** Registered Email Addresses: Displays a list of registered email addresses. To "register" an address, it requires confirmation by the account holder.

**Registered** nolan.k.graves@gmail.com  
**Email** 100012076592150@facebook.com

**Name** Name: Name provided by the account holder.  
**Definition** First: First name provided by the account holder.  
Middle: Middle name provided by the account holder.  
Last: Last name provided by the account holder.

**Name** First Jpc  
Middle  
Last Cartel

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State v. Graves

**Author** Jpc Cartel (Facebook: 100012076592150)  
**Sent** 2021-04-13 17:39:31 UTC  
**Body** lena morgan got me busted

Facebook Business Record Page 134

**Author** Jpc Cartel (Facebook: 100012076592150)  
**Sent** 2021-04-11 16:21:08 UTC  
**Body** Got popped. Stay away from Mackenzie Morgan and lena morgan

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Certificate of Authenticity of Domestic Records of Regularly Conducted Activity

I, Addine Ballard, certify:

1. I am employed by Facebook, Inc. ("Facebook"), headquartered in Menlo Park, California. I am a duly authorized custodian of records for Facebook and am qualified to certify Facebook's domestic records of regularly conducted activity.
2. I have reviewed the records produced by Facebook in this matter in response to the Search Warrant received on May 13, 2021. The records include search results for Basic Subscriber Information, IP Address Logs, Messages, Photos, Transmittal Information, Videos, Other Content and records for the account with identifier 100012076592150.
3. The records provided are a correct copy of the records that were made and kept by the automated system. Facebook is the source of regularly conducted records of regularly conducted activity. The records were created in electronic format after searching Facebook's internal systems in accordance with the above-specified legal process. The records were made at or near the time the information was transmitted by the Facebook user.
4. I declare under penalty of perjury that the foregoing certification is true and correct to the best of my knowledge.

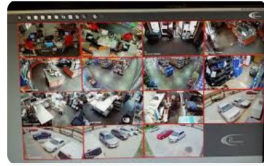
Addine Ballard  
Addine Ballard  
Custodian of Records

Date: June 10, 2021

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## Surveillance Video



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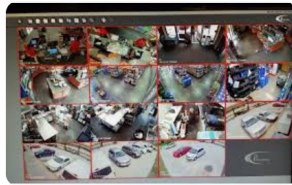
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## Authenticating Surveillance Video

- **Fair and Accurate** method (Illustrative)
  - Witness was present during the recorded events and can testify that the footage is a "fair and accurate" depiction of what occurred
  - Ex. Loss Prevention Officer was actually there and saw D steal items at the store
- **Silent Witness** method (Substantive)
  - No live witness
  - Footage has been retrieved and there is either a chain of custody for the footage or some other combination of factors that go to authenticity/reliability



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## State v. Jones

### North Carolina Criminal Law

A UNC School of Government Blog

Home

#### Surveillance Video- When It Comes In and When It Doesn't

March 30, 2019 • David S. Jones

Read

Video evidence authentication has received a fair amount of treatment on this blog. The topic remains an area of practical significance given the prevalence of video evidence in criminal trials and how common it is for the prosecution's case to hinge on the admission of video. We are increasingly a video-focused society between home security cam, doorbell cam, body-worn cam, in-car cam, pole cam, and even [surveillance U.S. cars](#). Jones increasingly expect to see video, whether the incident in question occurred outside a home, near a business, or on the roadside.

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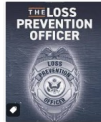
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## Surveillance Video- Common Authenticating Witnesses

- Loss Prevention Officer
- Store Clerk
- Store Manager
- Homeowner
- Law Enforcement Officer who extracted the video from the system (may or may not be specialist/expert)
- Investigating Officer (think *State v. Jones*)



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## State v. Jones

### ADEQUATE

Foundation for Surveillance Video\*

*State v. Jones*, 288 N.C. App. 175 (2023)

Officer testified that:

1. Video was same as footage she saw on night of incident;
2. Homeowner's description of events matched the video;
3. Surveillance system was working correctly "to [her] knowledge."

*State v. Grand*, 368 N.C. 871 (2016)

Loss prevention manager testified that:

1. He was familiar with recording equipment and it was in working order;
2. He viewed the footage on the recording equipment and video was same as the footage he viewed.

*State v. Fleming*, 347 N.C. App. 812 (2016)

Corporate investigator testified that:

1. He was familiar with the recording system, it was functioning properly, and he made a copy of footage;
2. Video was the same as footage he copied, unedited, and same as that created by system.

*State v. Ross*, 245 N.C. App. 472 (2016)

Store manager testified that:

1. Cameras were working properly because time and date stamps were accurate.

### INADEQUATE

Foundation for Surveillance Video\*

*State v. Moore*, 354 N.C. App. 544 (2017)

Officer testified that:

1. The day after the incident, since store manager was unable to make a copy of the footage, officer recorded footage on the store's equipment with his cell phone;
2. The video, which was a copy of the cell phone recording, accurately showed footage he had reviewed at the store.

Store clerk testified that the defendant was seen on video, but did not testify as to whether the video accurately depicted events he observed on day in question.

No testimony pertaining to type of recording equipment and whether it was in good working order/reliable.

*State v. Moore*, 144 N.C. App. 30 (2005)

Two store employees testified that surveillance system was in working order but were unfamiliar with maintenance, testing, or operation.

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## State v. Jones

### ADEQUATE

Foundation for Surveillance Video\*

*State v. Jones*, 288 N.C. App. 175 (2023)

Officer testified that:

1. Video was same as footage she saw on night of incident;
2. Homeowner's description of events matched the video;
3. Surveillance system was working correctly "to [her] knowledge."

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*State v. Moore*

**INADEQUATE**

Foundation for Surveillance Video\*

*State v. Moore*, 254 N.C. App. 544  
(2017)

Officer testified that:

1. The day after the incident, since store manager was unable to make a copy of the footage, officer recorded footage on the store's equipment with his cell phone;
2. The video, which was a copy of the cell phone recording, accurately showed footage he had reviewed at the store.

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*State v. Moore (continued)*

**Store clerk testified that** the defendant was seen on video, but did not testify as to whether the video accurately depicted events he observed on day in question.

**No testimony** pertaining to type of recording equipment and whether it was in good working order/reliable.

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**Surveillance Video- Example**

- Felony credit card fraud trial- surveillance video shows D using credit card at cash register
- Security guard from store is present
  - The security guard retrieved the disc from where it was stored at the store
  - The security guard was not present during the incident
  - A previous security guard (who quit) was the one who burned the disc from the recording system
- Does the surveillance video come in? Why or why not?

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On the horizon- is video just a business record?

- **Surveillance Video was introduced as a business record in *State v. Windseth*, \_\_ N.C. App. \_\_, No. COA24-718 (2025)**
  - Affidavit submitted by Wells Fargo under 803(6)
- **But video in *Windseth* was not objected to, and issue on appeal was more about stillshots taken from video**
- ***Windseth* relies on *State v. Jackson*, 229 N.C. App. 644 (2013) which addressed GPS records admitted as a business record.**



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## 10 Digital Evidence and Authentication

- Authentication is identification
  - The proponent must show that “the [evidence] in question is what its proponent claims.” N.C. R. Evid. 901
- Authentication is “a special aspect of relevancy”
  - Adv. Comm. Note, N.C. R. Evid. 901(a)
- Authentication is a low hurdle
  - *State v. Ford*, 245 N.C. App. 510 (2016) (stating that the “burden to authenticate . . . is not high – only a prima facie showing is required”)
- Authentication often comes from:
  - Testimony of a “[w]itness with [k]nowledge,” Rule 901(b)(1)
  - The “distinctive characteristics” of the evidence or other “circumstances,” Rule 901(b)(4).



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## Two Step Authentication

- (1) Does the exhibit (screen capture, photo, video) accurately reflect the communication?
- (2) Is there reason to believe that the purported author actually wrote the communication?
- “To authenticate [social media] evidence . . . there must be circumstantial or direct evidence sufficient to conclude a screenshot accurately represents the content on the website it is claimed to come from and to conclude the written statement was made by who is claimed to have written it.”
  - *State v. Clemons*, 274 N.C. App. 401 (2020).



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Digital Communications Chart

North Carolina Criminal Law

A UNC School of Government Blog

Home About this Blog

Authentication of Digital Communications Chart

April 24, 2025

Daniel Seibert

Print

A common evidence question that arises is how to properly authenticate digital communications. We have written on the topic in several blogs: [How Can a Party Show Authorship of a Social Media Post or Other Electronic Communication?](#)

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Authentication of Digital Communications Chart

ADEQUATE

Foundation for Digital Communication

State v. Davenport, No. COA24-330, \_\_ N.C. App. \_\_ (2025)

In murder case, Facebook messages (social media) were properly authenticated where:

- A witness identified phone (device) found at the crime scene as decedent's
- Messages were found on the phone in a message thread under defendant's name
- A witness testified that the defendant did not have a phone and communicated with the witness and the decedent through Facebook Messenger app
- Substance of messages contained distinctive personal details such as name of decedent's son

INADEQUATE

Foundation for Digital Communication

State v. Thompson, 254 N.C. App. 220 (2017)

In robbery case, Facebook messages allegedly sent between the defendant and victim referencing drug activity were properly excluded where:

- Defense attempted to use screenshot of messages as extrinsic evidence to impeach victim, but the subject of impeachment may have been collateral rather than material to the pending matter, and defense did not argue that it was material. See State v. Hunt, 324 N.C. 343 (1989) (extrinsic evidence of prior inconsistent statements may not be used to impeach a witness where the questions concern a collateral, rather than a material, matter)
- Defense did not attempt to lay a foundation for the text messages

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Circumstantial Evidence of Authorship

State v. Ford, 245 N.C. App. 510 (2016)

- D's dog DMX killed a neighbor
- D charged: involuntary manslaughter
- Did D know DMX was dangerous?
- State introduced a screenshot of what it said was D's MySpace page, featuring a video titled "DMX the Killer Pit"
- Authentic? Yes. Account name included D's nickname and account contained pictures of D and DMX



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*State v. Clemons*, 274 N.C. App. 401 (2020)

- V has a DVPO against D
- D is released from prison and their adult daughter picks him up
- Shortly thereafter:
  - V begins receiving multiple calls daily from an unknown number; the caller sometimes leaves messages referencing events from D and V's past
  - Comments appear on some of V's Facebook posts; they are made from V's daughter's account, but V testifies that her daughter never comments on her posts and wouldn't make comments of that kind
- V takes screenshots of the Facebook comments and gives them to the police, who charge D with violating the DVPO by contacting V

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*State v. Clemons*, 274 N.C. App. 401 (2020)

- (1) "the screenshots must have accurately reflected [V's] Facebook page. . . . Therefore, the screenshots must have been authenticated as photographs."
- (2) "the screenshots of the Facebook comments are also statements—the State wanted the jury to use the screenshots to conclude [D] communicated with [V] in violation of the DVPO through the Facebook comments. . . . In light of this purpose, the Facebook comments also needed to be authenticated by evidence sufficient to support finding they were communications actually made by Defendant."

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Memory Tool: "SANDVAT"

- "S" is for "Substance" – how does the **substantive content of the digital evidence itself** tend to authenticate it?
  - Remember, this is appropriate under Rule 104(a)- for preliminary questions such as authenticity, the court is not bound by rules of evidence (except for privileges)
  - *Example:* the sender uses the name of a common child and refers to an unusual incident
- "A" is for "Account" – information about the account (login, properties, pieces of identifying information associated with profile)
- "N" is for "Name" – is there a name or "handle" associated with the social media account?
- "D" is for "Device" – who possessed the phone or computer? What can we learn from the hardware itself?

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### Memory Tool: "SANDVAT"

- **"V" is for "Visuals"** - what do the photos/videos show on the account?
- **"A" is for "Address"** - what can we learn from the IP address or physical address associated with the evidence?
- **"T" is for "Timing"**
  - When was the post made?
  - What is the overall chronology and how does that line up with events IRL?  
(Example: D was released from prison in *Clemons* at a particular time and the messages started just after)
- **"SANDVAT"** - remember, this is just a memory tool (not a legal test), but it can be a helpful way to think about the possible paths to authenticate digital evidence

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### Evidence Issues

- 1) Rules 401 and 403
- 2) Character Evidence in Self-Defense Cases
- 3) Bodycam
- 4) 404(b)
- 5) Confrontation and DV cases
- 6) Impeachment with Prior
- 7) Vouching
- 8) Business Records
- 9) Surveillance Video
- 10) Digital Evidence Authentication



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Questions

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## Top 10 Evidence Issues



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