AUTHENTICATION AND "ORIGINAL" WRITINGS

W. David Lee
Superior Court Judge, District 20B
Advanced Criminal Evidence Seminar
May 22, 2008

I. Standard for Authenticating Verbal and Physical Evidence

A. GENERAL PRINCIPLES:

1. **Determine the relevance, or connection of the evidence to the case.**
2. **Determine whether there has been a sufficient preliminary showing from which a jury can rationally find that the evidence is what it purports to be? (Low threshold. Indulge in all reasonable assumptions/inferences. Judge is generally not bound by the Rules of Evidence.)**
3. **Judge generally has a limited screening role. Jury finally determines authenticity.**
4. **Be familiar with the illustrations, or examples of authentication set out in Rule 901.**
5. **Determine whether *other prerequisites to admissibility* have been met, including "Best Evidence Rule;" application of Hearsay Rule; Rule 403 balancing test (does probative value outweigh unfair prejudice?)**

B. CASES/STATUTES ON AUTHENTICATING VERBAL AND PHYSICAL EVIDENCE

1. Defendant's recorded confession:

State v. Detter, 298 N.C. 604 (1979)To lay a proper foundation for the admission of a defendant's recorded confession or incriminating statement made to police officers, the state must show (1) that the recorded testimony was legally obtained and otherwise competent; (2) that the mechanical device was capable of recording testimony and that it was operating properly at the time the statement was recorded; (3) that the operator was competent and operated the machine properly; (4) the identity of the recorded voices; (5) the accuracy and authenticity of the recording; (6) that defendant's entire statement was recorded and no changes, additions, or deletions have since been made; and (7) the custody and manner in which the recording has been preserved since it was made. Whenever a recorded statement is introduced

into evidence, the seven steps set forth above should be followed to insure proper authentication of that recording.

2. Characteristics of the evidence, in conjunction with circumstances:

State v. Jacobs, 2005 N.C.App.LEXIS 2415 (2005) (UNPUBLISHED) Victim was shot with a .380 caliber firearm. During a consent search of defendant's mobile home, as to which defendant was the sole occupant, police found a box containing various receipts, including receipts for firearms. One receipt described a .380 pistol, including serial number, and had the last name of the defendant ("Jacobs") on it. The gun described in the receipt was never found. Authentic and admissible?

Authentication of documents is governed by N.C. Gen. Stat. § 8C-1, Rule 901 (2003), which provides in relevant part that the requirement that evidence be authenticated "is satisfied by evidence . . . that the matter in question is what its proponent claims." Rule 901(a). Further, the rule lists, as an example of proper authentication, evidence of an item's appearance, contents, or "other distinctive characteristics, taken in conjunction with circumstances." Rule 901(b)(4).

The receipt was relevant in that it tended to make it more likely that defendant had at some point been in possession of a firearm of the same caliber as the murder weapon.

Defendant also argued that admission of the receipt was prejudicial. "Certainly, the evidence was prejudicial to the defendant in the sense that any evidence probative of the State's case is always prejudicial to the defendant. The trial court did not abuse its discretion under the balancing test of Rule 403, however, in concluding in this case that the probative value of the [receipt] evidence outweighed any possible unfair prejudice."

3. Evidence not admitted, but used to refresh recollection:

State v. Gregory, 37 N.C.App. 693 (1978) Defendant contended that the purported transcript of a tape recording was improperly admitted without authentication and evidence was improperly allowed as to its contents. The record revealed that the document was not shown to the jury, but that it was used by the testifying officer Officer to "refresh his recollection." When it appeared that the witness was reading from it, defendant's objection had been sustained.

4. No appeal where no objection at trial:

State v. Terry, 329 N.C. 191 (1991) Mrs. Greene and her husband showed a deputy enlarged photographs of her that had been defaced. Mrs. Greene identified the photographs

as those defendant had given to Mr. Greene. Defendant did not object at trial to any lack of proper authentication. The trial court allowed admission of the photographs.

State v. York, 347 N.C. 79 (1997) Citing Terry, *supra*. the court held that assignments of error based on improper authentication of exhibits introduced at trial will not be heard unless objection was made in a timely manner at trial.

State v. McNeil, 165 N.C.App. 777 (2004) It was not plain error to admit copies of defendant's previous judgments during his habitual felon proceedings because defendant did not challenge the authenticity of the certified judgment sheets or the veracity of the convictions.

II. Identification of Self-Authenticating Documents

A. GENERAL PRINCIPLES:

1. **In applying the self-authenticating provisions of Rule 902, interpret "domestic" to include the United States, together with any of its states, territories or possessions.**
2. **Official signatures on public documents should be *under seal*.**
3. **Although Rule 902 eliminates extrinsic evidence as a condition precedent to admissibility, other admissibility requirements remain, e.g., relevancy, Rule 403 balancing test.**
4. **Opposing party is not foreclosed from disputing authenticity.**
5. **In addition to the documents and records set out in Rule 902, a self-authenticating *statute* may be applicable.**

B. CASES/STATUTES ON SELF-AUTHENTICATION

1. Testimony as to certified documents from another state:

State v. Carroll, 356 N.C.526 (2002), U.S.Sup.Ct. *cert. denied*, 2003 U.S.LEXIS 4928 (U.S., June 23, 2003). In a capital sentencing proceeding, a court clerk testified that the Florida documents were signed and certified in a manner verifying their authenticity. The documents were thus shown to be reliable. Even though the Rules of Evidence do not apply in a capital sentencing proceeding, the Court noted that even if the Rules of Evidence were applied here, the documents could have been properly admitted under Rule 902 concerning self-authenticating documents**.** Additionally, defendant did not object to expert testimony that defendant's fingerprints matched the fingerprints of the defendant in the Florida case. The Court concluded that the State fully established the reliability of the fingerprint card the expert used to conduct her fingerprint comparison.

2. Statutory Self-Authentication: SBI Lab Analysis:

N.C.Gen.Stat. §90-95 (g) and (g1):

(g) Whenever matter is submitted to the North Carolina State Bureau of Investigation Laboratory, the Charlotte, North Carolina, Police Department Laboratory or to the Toxicology Laboratory, Reynolds Health Center, Winston-Salem for chemical analysis to determine if the matter is or contains a controlled substance, ***the report of that analysis certified to upon a form approved by the Attorney General by the person performing the analysis shall be admissible without further authentication*** in all proceedings in the district court and superior court divisions of the General Court of Justice as evidence of the identity, nature, and quantity of the matter analyzed. Provided, however, that a report is admissible in a criminal proceeding in the superior court division or in an adjudicatory hearing in juvenile court in the district court division only if:

(1) The State notifies the defendant at least 15 days before trial of its intention to introduce the report into evidence under this subsection and provides a copy of the report to the defendant, and

(2) The defendant fails to notify the State at least five days before trial that the defendant objects to the introduction of the report into evidence.

Nothing in this subsection precludes the right of any party to call any witness or to introduce any evidence supporting or contradicting the evidence contained in the report.

(g1) Procedure for establishing chain of custody without calling unnecessary witnesses. --

(1) For the purpose of establishing the chain of physical custody or control of evidence consisting of or containing a substance tested or analyzed to determine whether it is a controlled substance, *a statement signed by each successive person in the chain of custody that the person delivered it to the other person indicated on or about the date stated is prima facie evidence that the person had custody and made the delivery as stated, without the necessity of a personal appearance in court by the person signing the statement.*

(2) The statement shall contain a sufficient description of the material or its container so as to distinguish it as the particular item in question and shall state that the material was delivered in essentially the same condition as received. The statement may be placed on the same document as the

report provided for in subsection (g) of this section.

(3) The provisions of this subsection may be utilized by the State only if:

a. The State notifies the defendant at least 15 days before trial of its intention to introduce the statement into evidence under this subsection and provides the defendant with a copy of the statement, and

b. The defendant fails to notify the State at least five days before trial that the defendant objects to the introduction of the statement into evidence.

(4) Nothing in this subsection precludes the right of any party to call any witness or to introduce any evidence supporting or contradicting the evidence contained in the statement.

3. SBI lab results admissible where statutory compliance:

State v. Baldwin, 161 N.C.App. 382(2003). N.C.Gen.Stat. § 90-95(g) (2001) provides that a State Bureau of Investigation laboratory report is admissible in a criminal proceeding without further authentication as evidence of the nature, quality, and amount of the substance analyzed if statutory prerequisites have been met.

4. N.C.Gen.Stat. §90-95(g) is an exception to the Hearsay Rule:

State v. Moore, 2002 N.C.App.LEXIS 1929(2002) (UNPUBLISHED) N.C.G.S. § 90-95(g), specifically provides that a chemical analysis report is admissible without further authentication, the legislature having created *an exception to Rule 801(c)* (the Hearsay Rule,) pertaining to the admissibility of reports of chemical analyses.

5. N.C.Gen.Stat. §90-95(g) not intended as *exclusive* procedure:

State v. Greenlee, 146 N.C.App. 729 (2001) N.C.G.S. § 90-95(g)-(g1) does not represent the *exclusive* procedure for authenticating a report on the chemical analysis of a controlled substance and for establishing chain of custody, and the laboratory report determining that the substance purchased from defendant was cocaine was admissible because: (1) N.C.G.S. § 90-95(g) merely establishes a procedure through which the State may introduce into evidence the laboratory report of a chemical analysis conducted on an alleged controlled substance without further authentication; (2) a forensic chemist testified and authenticated the report, making it irrelevant whether the State complied with the notice requirements set forth in

N.C.G.S. § 90- 95(g); and (3) the State's evidence as to the chain of custody was sufficient.

6. Statutory Self-Authentication: Chemical Analyst's Affidavit in **District Court**:

N.C.Gen.Stat. §20-139.1(e1), applicable only in District Court, provideds, in part:

(e1) Use of Chemical Analyst's Affidavit in District Court. -- An affidavit by a chemical analyst sworn to and properly executed before an official authorized to administer oaths is admissible in evidence without further authentication in any hearing or trial in the District Court Division of the General Court of Justice with respect to the following matters:

(1) The alcohol concentration or concentrations or the presence or absence of an impairing substance of a person given a chemical analysis and who is involved in the hearing or trial.

(2) The time of the collection of the blood, breath, or other bodily fluid or substance sample or samples for the chemical analysis.

(3) The type of chemical analysis administered and the procedures followed.

(4) The type and status of any permit issued by the Department of Health and Human Services that the analyst held on the date the analyst performed the chemical analysis in question.

(5) If the chemical analysis is performed on a breath-testing instrument for which regulations adopted pursuant to subsection (b) require preventive maintenance, the date the most recent preventive maintenance procedures were performed on the breath-testing instrument used, as shown on the maintenance records for that instrument.

7. Motor vehicle collision reports (accident reports) are ***not*** self-authenticating:

§ 20-166.1. Reports and investigations required in event of accident:
(i) Effect of Report. -- A report of an accident made under this section by a person who is not a law enforcement officer is without prejudice, is for the use of the Division, and shall not be used in any manner as evidence, or for any other purpose in any trial, civil or criminal, arising out of the accident. Any other report of an accident made under this section may be used in any manner as evidence, or for any

other purpose, in any trial, civil or criminal, as permitted under the rules of evidence. At the demand of a court, the Division must give the court a properly executed certificate stating that a particular accident report has or has not been filed with the Division solely to prove a compliance with this section.

III. Determining Whether New Technology has been Properly Authenticated

A. GENERAL PRINCIPLES

1. **Read (or at least peruse) the seminal Federal decision regarding the authenticity and admissibility of electronically stored information (ESI): Lorraine v. Markel American Ins. Co., 241 F.R.D. 534 (D.Md. May 4, 2007).**
2. **Engage in Five-part Inquiry: (1) Is the evidence *relevant* under Rule 401?; (2) Has the evidence been *authenticated* in accordance with the standards of Rule 901 (or is it *self-authenticating* under Rule 902)?; (3) Is it *hearsay* under Rule 801? If so, does it fall within an exception under Rule 801, 803, or 804?; (4) Does it comply with the *"Best Evidence Rule"*?; and (5) Does its probative value outweigh unfair prejudice under Rule 403 *balancing test*?**

B. CASES INVOLVING NEW TECHNOLOGY

1. Computer Records; Printouts:

State v. Springer, 283 N.C. 627 (1973) The Court initially noted that N.C.Gen.Stat. § 55-37.1 and N.C.Gen.Stat. "§ 55A-27.1 (now repealed) were designed to give broad legislative approval to the use in evidence of corporate computer records. The Court noted, however, that these statutes did not deal with the special problems of reliability created by the use of computers. The Springer Court therefore construed them as authorizing the admission of corporate computer records under appropriate safeguards deemed sufficient to render them trustworthy. The Court opined that "the rules of evidence governing the admissibility of computerized business records should be consistent with the reality of current business methods and should be adjusted to accommodate the techniques of a modern business world, with adequate safeguards to insure reliability." The specific holding was that printout cards or sheets of business records stored on electronic computing equipment are admissible in evidence, if otherwise relevant and material, if: (1) the computerized entries were made in the regular course of business, (2) at or near the time of the transaction involved, and (3) a proper foundation for such evidence is laid by testimony of a witness who is familiar with the computerized records and the methods

under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy. Computer printout evidence may be refuted to the same extent as business records made in books of account.

Applying the above rule, the Court concluded that the computer printout referred to in the testimony of the special investigator was inadmissible since no foundation was laid for its admission. In fact, the printout itself was not offered in evidence. Instead, the witness was permitted to testify as to the contents of the printout.
The Court determined that this evidence was likewise inadmissible under the best evidence rule.

Our Court of Appeals, applying the Springer rule, reached the opposite result where the printout was actually offered into evidence upon the laying of a proper foundation. See In re West, 60 N.C.App. 388 (1983).

IV. Applying the Original Writing Rule

A. GENERAL PRINCIPLES:

1. **Determine whether the writing is being offered to prove the *content* of the writing.**
2. **If content of the writing is at issue, the original must be produced, unless a statute or the Rules of Evidence provide an exception.**
3. **Exceptions as to admission of *duplicates* are set forth in Rule 1003. ((1) where genuine question of authenticity, or (2) unfair to admit duplicate under the particular circumstances.)**
4. **Exceptions permitting *"other evidence"* of the writings contents are set forth in Rule 1004. ((1) original lost or destroyed, (2) original not obtainable, (3) original in possession of opponent, or (4) the writing is a collateral matter.)**
5. **Rule 1005 excepts from the "original" writing requirement our public records, including data compilations.**
6. **Rule 1007 excepts from the "original" writing requirement a document as to which the opposing party admits that the copy offered in evidence is correct.**

B. CASES APPLYING THE "BEST EVIDENCE RULE"

1. Admission of writing before contents read to jury:

   State v. Walker, 343 N.C. 216 (1996) The "best evidence rule," Rule 1002 of the North Carolina Rules of Evidence, states: "To prove the content of a writing, . . . the original writing . . . is required, except as otherwise provided in these rules or by statute." N.C.G.S. § 8C-1, Rule 1002 (1992). Therefore, the trial court did not err in requiring that the writings be admitted into evidence before Haizlip could read their contents aloud.

2. Rule not applicable where writing used to refresh recollection:

   State v.Ysut Mlo, 335 N.C. 353 (1994) Here, the detective was not attempting to prove the contents of the tape recording or the transcript of the recorded statement given by defendant. Rather, he used the transcript of the recorded statement to *refresh his personal recollection* of defendant's responses to the questions asked. The "best evidence" rule does not apply to a document that serves only to refresh a witness' memory and is not offered into evidence.

3. Duplicate admitted where evidence as to non-production of original:

   Investors Title Ins. v. Herzig, 330 N.C. 681 (1992): Plaintiff introduced a duplicate of a document. The defendant contested the authenticity of the duplicate, arguing that the admitted document was textually inconsistent with the original. The defendant had refused to sign the original, and contended that the duplicate with its signature was neither indicative of an agreement nor authentic. The Supreme Court held that the plaintiff had satisfied the requirements of authenticity by providing evidence sufficient to support a finding by the jury that the document had shown the basis of an agreement. Even though the defendant's testimony was inconsistent as to the signing of various contracts, the credibility of his testimony was for the jury. Defendant then argued that no evidence existed to support the court's findings that plaintiff searched for the original. As contemplated in Rule 1004(2), the trial court
   found that the original could not be obtained by any available judicial process or procedure, thereby placing the duplicate within an exception to the Best Evidence Rule and allowing its admission into evidence. The jury made the final decision of whether the duplicate was convincing evidence.

4. Writing offered to show knowledge of its existence (and not its content):

   State v. Clark, 324 N.C. 146 (1989) The best evidence rule applies only when the *contents* of a writing are in question. Where an insurance policy was offered not to prove contents or terms, but simply to show defendant's knowledge that the policy existed, it was properly admitted. *See* N.C.G.S. § 8C-1, Rule 1004(4) (1988).

5. Original writing generally required where content is at issue:

   State v. Branch, 288 N.C. 514 (1975) The best evidence rule requires the production of the original writing if it is available in preference to other species of evidence *where the contents or terms of that writing are in question.*

6. Rule inapplicable where witness possesses independent knowledge:

   State v. Williams, 2004 N.C.App.LEXIS 2290 (UNPUBLISHED) Defendant argued that the trial court violated the best evidence rule by failing to have the minor child's diary entered into evidence in a sex abuse case. While noting that the best evidence rule applies only when the *'content'* of a writing, recording, or photograph is in question, the Court concluded that if the fact exists independently of such content, it may be proved by other competent evidence, such as oral testimony by one with knowledge, without producing or accounting for nonproduction of the original. In this case, the testifying witness offered a firsthand account of defendant's alleged abuse. Since a witness with personal knowledge testified to facts that exist independently of the diary which recorded those same facts, the best evidence rule does not apply.

7. "Real evidence" admitted where sufficient foundation:

   State v. Williamson, 146 N.C.App. 325 (2001) A pornographic videotape seized from defendant's residence, which one victim testified the victims watched with defendant, was properly authenticated, as real evidence, by having the officer who seized it identify it as the videotape he seized. The Court noted that the videotape was "real" evidence, or an object "offered as having played an actual, direct role in the incident giving rise to the trial." Authentication of real evidence "'can be done only by calling a witness, presenting the exhibit to him and asking him if he recognizes it and, if so, what it is.'" *Id.* (quoting 1 Stansbury's North Carolina Evidence § 26 (Brandis rev. 1973)). Moreover, "as there are no specific rules for determining whether an object has been sufficiently

identified, the trial judge possesses, and must exercise, sound discretion."

8. Best evidence rule inapplicable to "inscribed chattels":

State v. Powell, 61 N.C.App. 124, *disc. review denied*, 308 N.C. 194 (1983) The defendant challenged the testimony of a detective as to the identity of stolen tractors. The court held that the best evidence rule was inapplicable, concluding that the rule did not require that actual tractor serial number inscription to be introduced, and that the witness' oral testimony as to the serial numbers was competent to establish the inscription of the serial numbers on the tractors. Specifically, the Court held that the best evidence rule did not apply to *inscribed chattels.*

V. Ruling on Admissibility and Use of Charts and Summaries

A. GENERAL PRINCIPLES:

1. **Under Rule 1006, where the writings or recordings are voluminous and cannot conveniently be examined in court, a qualified witness may testify to the results of his/her examination of the documents.**
2. **The originals, or duplicates, must be made available to opposing party for examination and/or copying.**
3. **Judge may also require production of the writings or recordings in court.**
4.

B. Cases Regarding Charts/Summaries

1. Video summary admissible where jury informed of editing:

Broadbent v. Allison, 176 N.C.App. 359 (2006) Voluminous videotape recordings were edited and presented in summary form. Jury was informed that the videos had been edited from many hours of tape recorded over a period of several months.

2. Generation of chart during trial governed by Rule 611, not Rule 1006:

Marley v. Graper, 135 N.C.App. 423 (1999) Use of demonstrative evidence (in this instance a chart prepared by plaintiffs during the testimony of the adverse witness) is subject to the discretionary control of the trial judge.

3. Trial judge may exclude a summary not fairly representative of the underlying document:

> **Coman v. Thomas Mfg. Co.**, 105 N.C.App. 88 (1992) Summaries of these trip reports also contained additional information as to the hourly time of departure and arrival of the drivers. This information was based upon speculation by the witness and was not an accurate summarization of the underlying material. The trial court properly excluded the summaries.