

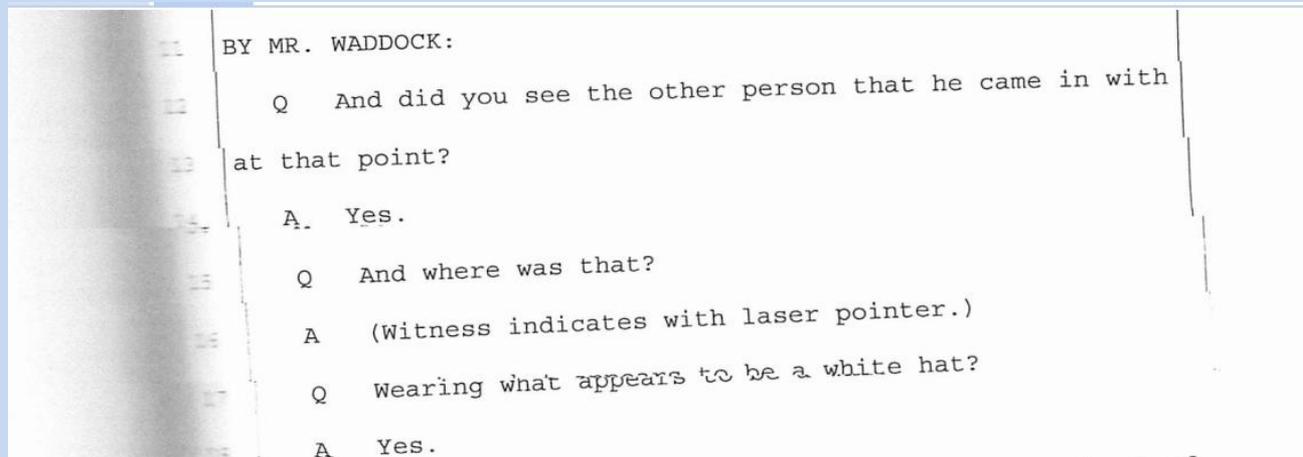
# Electronic Evidence and the Appellate Record

MACDL Post-Conviction Seminar

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# Unclear References

- A variation on a witness making a gesture without counsel saying “let the record reflect ...”
- Having a screenshot of the video marked as an ID exhibit, or at least reflecting the time-stamp on the video will make things more clear.



11 BY MR. WADDOCK:  
12 Q And did you see the other person that he came in with  
13 at that point?  
14 A Yes.  
15 Q And where was that?  
16 A (Witness indicates with laser pointer.)  
17 Q Wearing what appears to be a white hat?  
18 A Yes.

# Unrecorded Audio

- Attorney plays exhibit with audio for the jury, but court reporter/monitor does not transcribe the audio.
- No transcript offered as ID exhibit

15

ATTY. BUCHTA: All set?

16

ATTY. ESPOSITO: Thank you.

17

**(PLAYING STATE'S EXHIBIT 93)**

# Options

- Ask court reporter/monitor to include recordings when transcripts are ordered (or as soon as you get the case if transcripts are not already done.)
- Can you have an outside court reporter make a transcript of it and ask the trial court to make it part of the assembled record.
- Consider R.A.P. 8 Motion asking for amended transcript to include missing material.
- Consider R.A.P 8(c) Motion to resolve disputes about what was said or done in the courtroom.
- Ask the reviewing court, on brief, to look at/listen to the exhibit for themselves.

# Demonstrative Evidence goes into the Jury Room

- *Commonwealth v. Rebell*, 82 Mass. App. Ct. 1108, \*5, 971 N.E.2d 336 (2012) (unpublished) ("the defendant had not properly prepared the video exhibits for trial. The evidence he offered was not in a format that would have permitted the jury to see the recordings in the jury room, as would have been customary and appropriate.")

# Is the Playback Device Clean?

- Was the device clean?
  - *Wright v. Commonwealth*, 2013 WL 845020 (Ky. App. 2013) rev, granted (12/31/13) ("Giving jurors unrestricted and unmonitored access to a party's laptop, outside of the defendant's presence, is highly improper and the likelihood of prejudice very high.")
  - But see *Weber v. State*, 971 A.2d 135 (Del. 2009) (no abuse of discretion for jury to use prosecutor's laptop during deliberations).
- If the device is yours, is it working and easy to use?
- Does the recording require special software that may not be available to appellate counsel and/or reviewing courts?
  - Can it be put into a different format, at least as an ID exhibit?

# Must you look at ALL of the Exhibit?

- If the exhibit contains more than the relevant information, look at all of it to make sure there is nothing that needs to be redacted or explained.
- In *State v. Wright*, 152 Conn. App. 260, cert. granted 314 Conn 941 (2014), homicide investigators seized 11 hours of recordings from four security cameras in a local bar after a shooting. The flash drive containing all 44 hours of video was entered into evidence as a full exhibit, along with a second video – a twenty-minute excerpt compiled from all four cameras, allegedly showing the defendant entering the bar, tracking him through the crowds, and ultimately showing the shooting. The shorter excerpt was played for the jury several times. The State's video expert admitted he had not watched all 44 hours of footage. Because it was a full exhibit, the jury could have watched any or all of the entire video, and based its verdict on things that were never discussed in court.

# Demonstrative Exhibit not Sent to Jury Room

- Is the exhibit testimonial or demonstrative?
- Is the exhibit the storage media or the information on it?
  - Was a **clean** playback device available?
  - Is the exhibit an original or a copy. Has it been duplicated in case of accident?
- Then the jury should get to get to have the exhibit in the jury room along with all the other demonstrative evidence.
- Figure out what to do before the end of the case when evidence is being sent to the jury.
- Explain how having some evidence readily available to the jury, and others that it must come into the courtroom to view harms your client.
- Explain how viewing conditions and acoustics on a small screen in the jury room differ from a large screen in the courtroom.
- Connecticut cases about what goes to the jury.
  - *State v. Jones*, 314 Conn. 410 (2014)
  - *State v. Lanasa*, 141 Conn. App. 685 (2013)
  - *State v. Osborne*, 138 Conn. App. 518 (2012)
- Evidence should not be mute
  - *United States v. Rose*, 522 F.3d 710, 715 (6th Cir. 2008)
  - *United States v. Bizanowicz*, 745 F.2d 120, 123 (1<sup>st</sup> Cir. 1984)
  - *Arlton v. Schraut*, 936 N.E.2d 831, 846 (Ind. App. 2010)
- Playback devices can go to the jury room.
  - *State v. Castellanos*, 935 P.2d 1353, 1356-57 (Wash. 1997) (collecting cases)
  - *State v. Halvorson*, 346 N.W.2d 704, 712 (N.D. 1984) (same).

# What about Guns, Drugs?

- Usually discretion of the trial judge.
- If it is important to your case that the jury be able to handle the evidence, object if it doesn't go into the jury room.
  - Not entrusting the jury with an exhibit may prejudice the defendant by emphasizing its perceived dangerousness. Presumably the exhibit was rendered safe enough to enter into evidence and handle in the courtroom – in most cases it should be able to be made safe enough for the jury to examine during its deliberations.
- No case found to date of jurors acting inappropriately with firearms or drugs.

# Cell Phones!

- *“I hate this evidence. It just opens new vistas of stupidity. We don't need this kind of evidence. Turn it into a chart, charts and graphs. \* \* \* This system was not designed for this technology.”*
  - Trial judge commenting on jury questions about a cell phone exhibit in a homicide case.

# It is all fair game!

- If the cell phone is admitted without restriction, the jury can take it with them into the jury room. They can turn it on. And anything they find in it is fair game for deliberations. See *Hape v. State*, 903 N.E.2d 977, 988 (Ind. App. 2009)
  - the text messages at issue here are part and parcel of the cellular telephone in which they were stored, just as pages in a book belong to the book by their very nature, and thus they are intrinsic to the telephone.\* \* \*Further, we decline to characterize the simple act of turning on a cellular telephone as an experiment that might yield extraneous information. Turning on a device that is made to be turned on constitutes a permissible examination of the evidence before the jury.
- Worse, if the jury finds and examines a cell phone found in a backpack or other container introduced as a full exhibit, it may be fair game. In *State v. Nord*, 2015 WL 4064032 (Wash.App. 2015), neither party was apparently aware that a backpack, admitted into evidence without restriction, contained a cell phone. The Court assumed without deciding that the cell phone was extrinsic evidence, but found any error harmless in light of the strength of the prosecution's case and the lack of any evidence about what the jury found on the cell phone.

# Even if you think the cell phone doesn't work!

- *People v. Garrison*, 303 P.3d 117, 125 (Colo. App. 2012) (the text messages were stored in the cell phone, which was admitted into evidence without any qualification or limitation. \* \* \* by turning on the cell phone to discover the text messages, the jury used the cell phone as it was intended to be used and discovered information within the scope and purview of the evidence).
- *Jackson v. United States*, 97 A.3d 80, 82-83 (D.C. App. 2014) (neither party had examined cell phone before submitting it into evidence because the battery was dead).
- This is especially true if the cell phone is your client's who will be presumed to be familiar with its contents. *Solano v. Lewis*, 2014 WL 1630685 (C.D.Cal. 2014).

# Limit the Evidence

- You may want to agree only to have the physical cell phone admitted, and not the data contained therein.
  - Consider relevance, materiality, and whether the information is more prejudicial than probative.
  - Consider whether the cell phone could receive new calls or texts if it is activated.
  - Consider whether jurors could inadvertently change or delete information. Is there a backup?
  - If you are not sure whether the cell phone can be activated, ask to have the battery physically removed before agreeing to its admission and/or for a limiting instruction telling the jury that the phone has been admitted for a specific purpose and that they should not try to charge the battery or otherwise access the phone's contents and may not consider them if inadvertently accessed.
- Can the prosecution use screen shots or printouts instead?
  - Will reviewing courts be able to access the device – 2, 3, 5, 10 years from now?
- Will clerks let you take screen shots for post-conviction review?

# What is the Evidence being Offered?

- If your opponent seeks to separately admit texts or other evidence on the phone, then the messages need to be properly authenticated. In *Hape*, the cell phones were admitted for the purpose of showing that Hape possessed them. If the State had offered the text messages, the purpose would have been to show that Hape communicated with certain individuals or to reveal the content of his communications – a different evidentiary purpose. The Court held that the jury’s exposure to the messages was, at worst, harmless error because of the strength of the State’s case.
  - *Hape v. State*, 903 N.E.2d 977, 990-91 (Ind. App. 2009). See also *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 546 (D.Md.2007) (Federal Rule of Evidence 901(b)(4) used to authenticate electronic data, including text messages); *Dickens v. State*, 175 Md.App. 231, 927 A.2d 32, 37 (2007) (reviewing whether text messages saved on a cellular telephone were properly authenticated); *State v. Taylor*, 178 N.C.App. 395, 632 S.E.2d 218, 230–31 (2006) (reviewing whether the State properly authenticated text messages).

# Be Wary of Cell Phone Exhibits

- Examine the physical device carefully to make sure there is no unexpected incriminating information on it.
  - Is there a backup or report of its contents?
- Check for deleted or normally hidden information that might be restorable by a tech-savvy juror.
- Do not assume that the phone is inoperable or accept the prosecutor's representations about it.
  - Ask its custodian to try charging it (or try it yourself if you can).
- Ask for specific limiting instructions and/or for the phone to be disabled before it goes into the jury room.
- If you are blind-sided by jurors accessing a cell phone during deliberations, ask the trial court to question them to find out what they found.
  - Figure out whether it is prejudicial to your case and make an appropriate record.
  - Move for mistrial, and when that is denied, ask for strong limiting or curative instructions.