7 STEPS TO AUTHENTICATING EVIDENCE

Decide
When
Mark
Show
Identify
Introduce
Use/Argue

ARE YOU INTRODUCING EVIDENCE?

State v. Hall, 57 N.C. App. 561 (1982)
In his second assignment of error the defendant contends it was error not to let him make the closing argument to the jury. He contends he did not put on evidence. If the defendant put on evidence, it was through the offering of a sweatsuit as an exhibit while cross-examining a State's witness. Michael Gerard testified for the State. On cross-examination he said he saw the defendant in the yard of the person whose house was entered at the time of the breaking and entering. Mr. Gerard testified the defendant was wearing an orange sweatsuit. The following colloquy then occurred:

"Q. I believe you testified that the sweatsuit was orange on the top and bottom?
A. Right.

Q. And it had a black stripe down the sleeve?
A. No, I said it might have, I can't remember.

Q. Your memory is that it was a fully an orange sweat-suit?
A. It was a bright color, probably an orange, right.

Q. I hand you two pieces –
Court: One moment, sir. Have them marked for identification.
Q. I am sorry, I hand you what has been marked as Defendant's Exhibit 1 and 2 and ask you to examine it, Mr. Gerard.
A. (Witness complies)

Q. Have you seen those before this day?
A. Yes, these are the ones Mr. Hall was wearing.

Q. And, sir, what color would you say those pants are?

A. They are blue with orange stripes.

Q. And there isn't any black stripes on them at all is there?
A. No, sir."

From this colloquy it is apparent the defendant used an exhibit to cross-examine the State's witness as to the characteristics of the exhibit. The first question posed by this assignment of error is whether by doing so the defendant offered the exhibit into evidence. There have been several cases dealing with this question although we do not believe any are on all fours with the instant case. In *State v. Knight*, 261 N.C. 17, 134 S.E. 2d 101 (1964) our Supreme Court held that when the defendant on cross-examination had the prosecuting witness identify a television interview he had given and then showed the interview for the purpose of impeaching the witness, the defendant offered evidence. *Knight* is distinguishable from the instant case in that the television **interview was shown to the jury** for the purpose of impeaching the witness. In the instant case, the sweatsuit was shown to the witness and the defendant's attorney cross-examined the witness in regard to the sweatsuit in an effort to impeach him. The record shows the sweatsuit was not shown to the jury so that they might determine whether the witness was being truthful. In *State v. Baker*, 34 N.C. App. 434, 238 S.E. 2d 648 (1977) the defendant's counsel, while cross-examining the State's witness, had the witness identify a picture of the defendant and then made a **motion to introduce the picture** in evidence to illustrate the testimony of the witness. The court allowed the motion. This Court held that by offering the picture into evidence, the defendant lost his right to the closing argument. In the instant case, the defendant did not make a motion to offer the sweatsuit into evidence. In *State v. Mitchell*, 17 N.C. App. 1, 193 S.E. 2d 400 (1972) the superior court ruled that before the defendant could use a photograph to illustrate the testimony of a witness who was being cross-examined, he had to offer the picture into evidence. This Court held this was not an abuse of discretion. *Mitchell* differs from this case in that the defendant in this case did not offer the sweatsuit for the purpose of impeachment but attempted to impeach the witness by cross-examining him as to the sweatsuit. In *State v. Rich*, 13 N.C. App. 60, 185 S.E. 2d 288 (1971) this Court held it was not an abuse of discretion for the superior court to refuse to allow the defendant's attorney on cross-examination to use photographs to illustrate the testimony of a witness.

From reading the above cases, we believe the proper test as to whether an object has been put in evidence is whether a party has offered it as substantive evidence or so that the jury may examine it and determine whether it illustrates, corroborates, or impeaches the testimony of a witness. If the party shows it to a witness to refresh his recollection, it has not been offered into evidence. In this case the defendant's attorney showed the sweatsuit to the witness and questioned the witness about it. It was not given to the jury for the purpose of their determination as to whether it impeached the witness. We hold the sweatsuit was not offered into evidence. The defendant should have had the last jury argument.

MEDICAL RECORDS

N.C. Gen. Stat. § 8C-1, Rule 803 Hearsay exceptions; availability of declarant immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(6) Records of Regularly Conducted Activity. -- A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

N.C. Gen. Stat. § 1A-1, Rule 45
Rule 45. Subpoena
(c) *Protection of Persons Subject to Subpoena.* --
(2) For production of public records or hospital medical records. -- Where the subpoena commands any custodian of public records or any custodian of hospital medical records, as defined in G.S. 8-44.1, to appear for the sole purpose of producing certain records in the custodian's custody, the custodian subpoenaed may, in lieu of personal appearance, tender to the court in which the action is pending by registered or certified mail or by personal delivery, on or before the time specified in the subpoena, certified copies of the records requested together with a copy of the subpoena and an affidavit by the custodian testifying that the copies are true and correct copies and that the records were made and kept in the regular course of business, or if no such records are in the custodian's custody, an affidavit to that effect. When the copies of records are personally delivered under this subdivision, a receipt shall be obtained from the person receiving the records. Any original or certified copy of records or an affidavit delivered according to the provisions of this subdivision, unless otherwise objectionable, shall be admissible in any action or proceeding without further certification or authentication. Copies of hospital medical records tendered under this subdivision shall not be open to inspection or copied by any person, except to the parties to the case or proceedings and their attorneys in depositions, until ordered published by the judge at the time of the hearing or trial. Nothing contained herein shall be construed to waive the physician-patient privilege or to require any privileged communication under law to be disclosed.

INTOXILYZER RESULTS

Arresting Officer requests that Client takes the Intoxilyzer?

Did you take Client before a licensed chemical Analyst?

Analyst advised Client of rights orally and in writing pursuant to N.C.G.S. 20-16.2a?

Client signed the rights form?

Analyst's Affidavit signed, sworn to and executed by analyst?
In the presence of notary public?
20-139.1 (e1)

Client's name on analyst affidavit?

Is the Skinny Sheet (DHHS 3908/DHHS 4082) attached to Analyst Affidavit?

Does affidavit reflect that Intoxilyzer was performed by person with current and valid permit for that Intoxilyzer instrument by DEHNR & **Department of Health & Human Services?**
20-139.1(b)(1)

The Intoxilyzer 5000/ Intox EC/IR-II is an automated instrument that prints results of the analysis?
20-139.1(b1)(2)

Does affidavit reflect that a 15 minute observation period was observed?
20-139.1(b)

Does affidavit and Skinny Sheet reflect that preventative maintenance was performed within 125 test or 4 months, whichever comes first?
20-139.1(b)(2)

Does affidavit and Skinny Sheet reflect two consecutive tests within .02 of each other?
20-139.1(b)(3)

Was the D given copy of the results?
20-139.1

What was lower of 2 readings?

FOUNDATION FOR VIDEO TAPES (DWI)

Is it standard procedure to videotape DWI stops?
And that procedure shows events that happened after you activate your blue lights?

The video equipment is activated when you activate your blue lights?
You control the audio portion with a button that's located on your belt?
Your equipment was in good working order on this date?
You would agree that the tape reflects a fair and accurate depiction of events?

The tape can be subpoenaed?
Did you bring a copy of the tape with you today?

Approach, exhibit #---
ID- Who's name is listed on the tape?
That is the defendant, correct?

Your Honor, I would like to play the videotape so the Officer ____ can lay the proper foundation

Is this a tape from your car?
What identifies your car?
What is the date shown?
Is this the date of the incident in question?
Do you appear on this tape?
Does the defendant appear on this tape?

You would agree that this is a fair an accurate depiction of the events in question?

Use as substantive evidence
Use as impeachment

PHONE RECORDS

What is your phone number?
Who is your phone carrier?
Did you receive/make calls from/to ____?
Do you recall the specific dates, times and number of calls?
REFRESH RECOLLECTION OR BEGIN LAYING FOUNDATION
I am showing you what has been marked as Exhibit "A" for identification.
Do you recognize this?
What is it?
Would it aid you in your testimony? OR Is it in fact an accurate account of the calls you received/made on the date in question?

Business Records:

- Are you familiar with Exhibit "A" (business records) for identification?
- Can you identify these documents?
- Were these documents prepared in the ordinary scope of the business of your company?
- Where are these documents stored after they are prepared?
- Where were these documents retrieved from?
- Is it a regular part of your business to keep and maintain records of this type?
- Are these documents of the type that would be kept under your custody or control?

Tape Recordings:

- Have you had the opportunity to hear the voice of Mr. X before?
- How many times have you heard his voice?
- Tell us how you are familiar with Mr. X's voice?
- Have you heard the recording marked as Exhibit "B" for identification?
- Do you recognize the voice?
- To whom does the voice belong?

Photographs:

- I am showing you what has been marked as Exhibit "C" for identification. Do you recognize what is shown in this photograph?
- Are you familiar with the scene (person, product, etc.) portrayed in this photograph?
- How are you familiar with the scene portrayed in the photograph?
- Does the scene portrayed in the photograph fairly and accurately represent the scene as you remember it on (date in question)?

Authenticating a Letter/Signature:

You should ask the following questions in order to establish the foundation for a letter to be admitted into evidence:

- Are you familiar with the signature of Mr. Smith (person who signed letter)?
- How are you familiar with Mr. Smith's signature?
- Show the witness Exhibit "D" for identification.
- Do you recognize the signature at the bottom of this letter?
- Whose signature is it?

Diagrams:

- I am showing you what has been marked as Exhibit "E" for identification. Are you familiar with the area located at this location?
- How are you familiar with this area?
- Based on your familiarity with the area, can you tell us whether the scene depicted in this diagram fairly and accurately represents the area as you recall it on the date in question?

Refreshing Recollection:

- Did you at sometime remember this?
- Did you at anytime prepare a document setting out what happened?
- Would a review of this document assist you in remembering the matters that we are concerned about today?
- I am handing you Exhibit "F" for identification.
- Please review it and tell me if it helps you to remember.
- Does that document refresh your recollection?
- Do you now have an independent recollection of the facts?
- Tell us what happened.