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AUTHENTICITY AND ADMISSIBILITY OF SOCIAL MEDIA WEBSITE PRINTOUTS

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ABSTRACT

Social media posts and photographs are increasingly denied admission as evidence in criminal trials. Courts often cite issues with authentication when refusing to admit social media evidence. Cases and academic writings separate recent case law into two approaches: The Maryland Approach and the Texas Approach. The first method is often seen as overly skeptical of social media evidence, setting the bar too high for admissibility. The second approach is viewed as more lenient, declaring that any reasonable evidence should be admitted in order for a jury to weigh its sufficiency. This Brief addresses the supposed differences between the two sets of cases and suggests that courts are not actually employing two distinct approaches. The Maryland Approach courts are not holding social media content to a higher standard than the Texas Approach courts, but are merely responding to a lack of evidence connecting the proffered content to the purported author.

INTRODUCTION

Sarah and Megan, both thirteen years old, had been friends for most of their lives. They went to the same school, were always spending time at the other's house, and even traveled with each other's family for vacations. As sometimes happens when getting older, however, Megan transferred from the public school to a Catholic school and the two girls had a "falling out." Sometime thereafter, Sarah became worried that Megan might be spreading rumors about her old friend to her new social group. Sarah's mother shared her daughter's concerns, and conceived of a scheme to humiliate Megan.

Sarah's mother set up a fictitious MySpace account under the name "Josh Evans." "Josh" was sixteen years old, attractive, and new to the neighborhood. She then used the new account to draw Megan into conversation online. About two weeks later, Sarah's mother had Josh tell Megan that he no longer liked her and that the world would be a better

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place without Megan in it. Distraught, the thirteen-year-old hung herself in her bedroom closet that night.[1]

The circumstances leading to Megan's death demonstrate the relative ease with which anyone can create a fictional persona online, sometimes with horrific consequences. In the world of social media, it is particularly easy for users to create fake accounts, access and manipulate another's account, and then change or delete the material at a later date. The electronic nature of social media evidence presents many new legal challenges, leaving case law regarding this type of evidence murky at best. The requirement of authentication is therefore especially vital for social media evidence to ensure that the offered material is what it appears to be. The proponent should not only offer evidence that the printout accurately reflects the online webpage, but also that it was created by the purported author. Only then can the evidence be properly presented to a jury.

I. THE PREVALENCE OF SOCIAL MEDIA

Social media is defined as "forms of electronic communications . . . through which users create online communities to share information, ideas, personal messages, and other content."[2] Social media sites are "sophisticated tools of communication where the user voluntarily provides information that the user wants to share with others."[3] These web-based applications allow users to create a personal profile, often containing a photograph of the user along with name, location, and the ability to "post" statements for others to view.[4] Social network sites range from social communities such as Facebook and MySpace to the professional network LinkedIn.[5]

The popularity of social media sites cannot be overstated. As one District Judge and legal scholar wrote: "Social media is ubiquitous, and it

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[1] All background information comes from *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009).

[2] *Social Media,* MERRIAM-WEBSTER.COM, http://www.merriamwebster.com/dictionary/social%20media (last visited Sept. 24, 2015).

[3] Indep. Newspapers, Inc. v. Brodie, 966 A.2d 432, 437 n.3 (Md. 2009).

[4] Parker v. State, 85 A.3d 682, 685 (Del. 2014).

[5] U.S. JUD. CONF. COMM. ON CODES OF CONDUCT, RESOURCE PACKET FOR DEVELOPING GUIDELINES ON USE OF SOCIAL MEDIA BY JUDICIAL EMPLOYEES 9 (2010), http://www.uscourts.gov/uscourts/RulesAndPolicies/conduct/SocialMediaLayout.pdf.

is here to stay."[6] At the beginning of 2014, eighty-nine percent of 18-29 year olds with Internet access used social networking sites.[7] Facebook boasts 1.35 billion monthly active users as of September 30, 2014.[8] This equates to one out of every 5.5 people in the world.[9] The influential website has become a constant in many users' lives, with sixty-three percent of users reportedly accessing the site at least once a day.[10]

Given the great prevalence of social media today, it is not surprising that online content has made its way into courtrooms. After creating a profile, users will frequently post items such as text, pictures, or videos to their profile page. Often, these posts include relevant evidence for a trial.[11] Social media is offered in trials to show, among other things, a party's state of mind, intent, or motives.[12] Parties may wish to submit social media as evidence of communication between users, inculpatory or exculpatory photographs, or even party admissions.[13] Attorneys and judges are dealing with social media evidence more and more as the Internet and technology continue to advance.

II. DETERMINING AUTHENTICITY OF EVIDENCE IN GENERAL

Under the Federal Rules of Evidence, "[R]elevant evidence is admissible" unless otherwise provided and "[i]rrelevant evidence is not admissible."[14] This seemingly straightforward rule is complicated by subsequent limitations on what qualifies as "relevant." At the most basic level, a party who wishes to admit evidence must first ask, "Does this evidence have 'any tendency to make a fact more or less probable than it would be without the evidence?'"[15] If she can answer affirmatively, then that evidence has passed the first hurdle of relevance.

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[6] Paul W. Grimm, Lisa Yurwit Bergstrom & Melissa M. O'Toole-Loureiro, *Authentication of Social Media Evidence*, 36 AM. J. TRIAL ADVOC. 433, 437 (2013).

[7] PEW RESEARCH INTERNET PROJECT, SOCIAL MEDIA UPDATE 2013 (Dec. 30, 2013), http://www.pewinternet.org/2013/12/30/social-media-update-2013/#.

[8] FACEBOOK NEWSROOM, http://newsroom.fb.com/company-info/ (last visited Nov. 8, 2014).

[9] *See* U.S. Census Bureau, *U.S. and World Population Clock*, CENSUS.GOV http://www.census.gov/popclock/ (last visited Nov. 10, 2014) (listing world population of 7.21 billion people).

[10] PEW RESEARCH INTERNET PROJECT, *supra* note 7.

[11] Parker v. State, 85 A.3d 682, 685 (Del. 2014).

[12] Grimm, *supra* note 6, at 438.

[13] *Id.*

[14] FED. R. EVID. 402.

[15] FED. R. EVID. 401(a).

Any tangible or demonstrative exhibits must then be authenticated in order to be relevant.[16] The proponent offering the piece of writing must produce evidence "sufficient to support a finding that the item is what the proponent claims it is."[17] For an exhibit such as a social media post, this would typically involve demonstrating that the writing has a connection to a specific person, through authorship or some other relation.[18]

It is easy to appreciate the importance of authentication when considering a document such as a letter. Suppose an attorney offers a letter at trial which she claims was written by the defendant. She declares that the letter perfectly demonstrates the defendant's state of mind at the time he wrote it. This would be very persuasive to the jury. The attorney's assertion can only be true, however, if the defendant actually did author the letter. If another person wrote it, then the jury has learned nothing new about the defendant's state of mind, and the letter is irrelevant. Authentication ensures that before the jury hears any evidence, the proponent has connected it to the trial in a way that ensures the evidence is actually what she claims it to be.

In Rule 901, the Federal Rules of Evidence offer multiple ways in which proponents can authenticate a particular item. The simplest technique is providing testimony from a witness who has knowledge that the evidence is what it claims to be.[19] Another method involves pointing to distinctive characteristics of the evidence that can authenticate the item.[20] For example, an email may state facts that only one person could know, or use a language pattern known to match a particular person.[21] The proponent may also demonstrate that the evidence was created by a process or system which produces accurate results.[22] Thus, an X-ray machine is assumed to create an authentic portrayal of the bones it has scanned.[23] These examples are not an exclusive list of authentication methods.[24] An attorney may use any number of methods to fulfill the authentication requirement.

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[16] MCCORMICK ON EVIDENCE § 221 (Kenneth S. Broun et al. eds., 7th ed. 2014).
[17] FED. R. EVID. 901(a).
[18] MCCORMICK ON EVIDENCE, *supra* note 16.
[19] FED. R. EVID. 901(b)(1).
[20] FED. R. EVID. 901(b)(4).
[21] FED. R. EVID. 901 advisory committee's note.
[22] FED. R. EVID. 901(b)(9).
[23] FED. R. EVID. 901 advisory committee's note.
[24] *See id.* ("The examples are not intended as an exclusive enumeration of allowable methods but are meant to guide and suggest, leaving room for growth and development in this area of the law.").

Preliminary questions about the admissibility of evidence are decided by the trial judge.[25] This means that the court's role is to serve as a "gatekeeper" in deciding whether the proponent has offered evidence sufficient to meet the 901 authentication requirement.[26] He does not need to be satisfied that the evidence is actually what it purports to be,[27] only that it is reasonably possible for a jury to find that it is authentic.[28] After the court determines that the proponent has successfully met this threshold requirement, it is for the trier-of-fact to appraise the credibility and weight of the proffered evidence.[29] The jury must decide whether the item is what it seems to be.[30]

III. DETERMINING AUTHENTICITY OF SOCIAL MEDIA EVIDENCE

The state of the law regarding social media evidence admissibility is murky at best. Courts and academic writings have split the case law into two approaches. These can best be referred to as "The Maryland Approach" and "The Texas Approach."[31]

According to analysts, Maryland Approach courts are skeptical of social media evidence, finding the odds too great that someone other than the alleged author of the evidence was the actual creator.[32] The proponent must therefore affirmatively disprove the existence of a different creator in order for the evidence to be admissible.[33]

Courts following the Texas Approach are seen as more lenient in determining what amount of evidence a "reasonable juror" would need to be persuaded that the alleged creator did create the evidence.[34] The burden of production then transfers to the objecting party to demonstrate

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[25] FED. R. EVID. 104(a).
[26] United States v. Vidacak, 553 F.3d 344, 349 (4th Cir. 2009).
[27] United States v. Safavian, 435 F. Supp. 2d 36, 38 (D.C. Cir. 2006).
[28] *Vidacak*, 553 F.3d at 349.
[29] FED. R. EVID. 104.
[30] In the event of a bench trial, the judge will act as trier-of-fact rather than a jury.
[31] I have adopted the terms "The Maryland Approach" and "The Texas Approach," first used in *Parker v. State*, 85 A.3d 682 (Del. 2014), as convenient titles for the two perceived methods.
[32] Grimm, *supra* note 6, at 455.
[33] *Id.*
[34] *See, e.g.,* United States v. Vayner, 769 F.3d 125 (2d Cir. 2014); State v. Assi, No. 1 CA-CR 10-0900, 2012 WL 3580488 (Ariz. Ct. App. Aug. 21, 2012); People v. Valdez, 135 Cal. Rptr. 3d 628 (Ct. App. 2011); People v. Clevenstine, 891 N.Y.S.2d 511 (N.Y. App. Div. 2009); Tienda v. State, 358 S.W.3d 633 (Tex. Crim. App. 2012); Manuel v. State, 357 S.W.3d 66 (Tex. Ct. App. 2011).

that the evidence was created or manipulated by a third party.[35] This second approach is viewed as "better reasoned" because it allows for proper interplay among the many rules that govern admissibility, including 901.[36]

A. The Maryland Approach

This first approach's seemingly higher standard for social media authentication is best exemplified by the Maryland Court of Appeals' decision in *Griffin v. State*.[37] The defendant in *Griffin* was charged with second-degree murder, first degree assault, and use of a handgun in commission of a felony.[38] The State offered printouts from a MySpace profile belonging to the defendant's girlfriend, Jessica Barber, to demonstrate that Barber had allegedly threatened one of the State's witnesses.[39] The page contained the statement: "FREE BOOZY [(the nickname for the defendant)]!!!! JUST REMEMBER SNITCHES GET STITCHES!! U KNOW WHO YOU ARE!!"[40] The printout displayed the name of the profile as "Sistahsouljah," and described details of the profile owner's life such as a birthday of 10/02/1983 and location of Port Deposit.[41] A photograph of Griffin and Barber embracing was also included.[42]

Rather than using Barber to authenticate the pages, the State attempted to use an investigator's testimony.[43] The lead investigator for the case, Sergeant John Cook, downloaded the information from MySpace.[44] Cook testified that he knew it was Barber's profile due to the photograph of her and Boozy, a reference to the children, and her birth date listed on the form.[45] Defense counsel objected because "the State could not sufficiently establish a 'connection' between the profile and posting and Ms. Barber."[46] The printouts were admitted and Griffin was convicted.

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[35] *See Tienda*, 538 S.W.3d at 642–47.
[36] Grimm, *supra* note 6, at 456.
[37] Griffin v. State, 19 A.3d 415 (Md. App. 2011).
[38] Griffin v. State, 995 A.2d 791, 794 (Md. Ct. Spec. App. 2010).
[39] *Griffin*, 19 A.3d at 418.
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.* at 348–50.
[45] *Id.* at 418.
[46] *Id.* at 348.

Griffin appealed the decision, asserting that the printouts were not properly authenticated and therefore inadmissible.[47] The Maryland Court of Special Appeals upheld the verdict. After another appeal request, the Maryland Court of Appeals accepted the case to decide whether the MySpace printout was representative of a profile created by Barber, and also whether she had posted the "SNITCHES GET STICHES" warning.[48]

The appellate court noted that very few courts in any jurisdiction had an opportunity to consider the authentication of pages printed from a social media site.[49] It stated that "[t]he potential for fabricating or tampering with electronically stored information on a social networking site" posed "significant challenges" when considering authenticity of site printouts.[50] The court nonetheless maintained that Rule 901 governed authentication.[51] This rule states that circumstantial evidence "such as appearance, contents, substance, internal patterns, location, *or other distinctive characteristics*" can be offered as evidence that the article is what it claims to be.[52] The court reversed and remanded, holding that a birthdate, location, reference to the defendant's nickname, and a photograph of the couple were not sufficiently "distinctive characteristics" to authenticate a MySpace printout.[53] When explaining its decision, it cited a concern that "someone other than the alleged author may have accessed the account and posted the message in question."[54]

In *State v. Eleck*, the defendant appealed his conviction of assault in the first degree by means of a dangerous instrument.[55] Eleck claimed on appeal that the trial court improperly excluded evidence that had been properly authenticated.[56] At a party with about twenty intoxicated teenagers in attendance, the defendant engaged two party guests in a

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[47] *Id.* at 417.
[48] *Id.* at 419–20.
[49] *Id.* at 422.
[50] *Id.*
[51] *Id.* (citing the state law which is materially similar to Federal Rule of Evidence 901).
[52] *Id.* (emphasis added).
[53] *Id.* at 423–24.
[54] *Id.* at 423 (quoting Griffin v. State, 995 A.2d 791, 805 (Md. Ct. Spec. App. 2010)).
[55] State v. Eleck, 23 A.3d 818, 819 (Conn. App. Ct. 2011).
[56] *Id.*

physical altercation.[57] When the combatants were separated, Eleck's two opponents both discovered that they had suffered stab wounds.[58]

At his trial, Eleck offered printouts of Facebook messages allegedly received from a State's witness, another attendant of the party.[59] The defendant personally testified as to the authenticity of the printouts, stating that the user name belonged to the witness, the profile contained photographs of the witness, and that he had downloaded and printed the messages himself.[60] The State's witness admitted that the profile was hers, but claimed that her account had been hacked and she had not sent the messages in question.[61]

The appellate court affirmed the trial court's decision not to admit the evidence,[62] determining that even unique user names and passwords are not enough to eliminate the possibility of hackers.[63] The court explained that authenticating that a message came from a specific account is not sufficient evidence that it was authored by the account owner.[64] The messages themselves did not "reflect distinct information that only [the witness] would have possessed regarding the defendant or the character of their relationship."[65] The authorship had not been sufficiently authenticated.

Similarly, in *Commonwealth v. Williams*, an appellate court found that the prosecution had failed to offer adequate foundation as to the authorship of MySpace messages.[66] In this case, the defendant was convicted of murder in the first degree of one victim and assault with intent to commit murder of another victim.[67] At trial, the girlfriend of one of the victims testified about MySpace messages she received from the defendant's brother, warning her not to testify at trial.[68] The testimony was admitted without objection, but the defendant later unsuccessfully submitted motions to strike the testimony and declare a mistrial.[69]

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[57] *Id.*
[58] *Id.*
[59] *Id.* at 820.
[60] *Id.*
[61] *Id.*
[62] *Id.* at 825.
[63] *Id.* at 822.
[64] *Id.*
[65] *Id.* at 824.
[66] Commonwealth v. Williams, 926 N.E.2d 1162, 1173 (Mass. 2010).
[67] *Id.* at 1165.
[68] *Id.* at 1172.
[69] *Id.* at 1171.

When reviewing the authentication issue, the appellate court compared the MySpace messages to a phone call: "[A] witness' testimony that he or she has received an incoming call from a person claiming to be 'A,' without more, is insufficient evidence to admit the call as a conversation with 'A.'"[70] Although the foundational testimony had established that "the messages were sent by someone with access to [the defendant's] MySpace Web page," there was no evidence regarding "the person who actually sent the message."[71] The court referenced a lack of evidence concerning how secure MySpace is, how a person accesses the page, and whether passwords or codes are used.[72] Allowing the jury to hear this testimony would create a high potential for prejudice, and the court ruled that the content of the messages should not have been admitted.[73]

B. The Texas Approach

Many courts have followed what has been termed the more lenient "Texas Approach."[74] This approach is best exemplified by *Tienda v. State*. After being convicted of murder, Tienda appealed the decision, claiming that the trial court should not have admitted evidence from MySpace pages alleged to be managed by the defendant.[75] The Fifth Circuit Court of Appeals affirmed the conviction, as did the Court of Criminal Appeals.[76]

The victim was traveling home from a nightclub when his car unexpectedly came under gunfire from a caravan of three or four cars on the same road.[77] Tienda, the appellant, was a passenger in one of the caravan's cars.[78] The Court admitted several MySpace accounts into evidence allegedly belonging to the appellant.[79] Each account was linked to email addresses including Tienda's name or nickname, had a profile name matching either Tienda's name or nickname, listed Tienda's

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[70] *Id.* at 1172 (citing Commonwealth v. Hartford, 194 N.E.2d 401 (Mass. 1963)).
[71] *Id.* at 1172–73.
[72] *Id.* at 1172.
[73] *Id.* at 1173.
[74] *See, e.g.,* United States v. Vayner, 769 F.3d 125 (2d Cir. 2014); State v. Assi, No. 1 CA-CR 10-0900, 2012 WL 3580488 (Ariz. Ct. App. Aug. 21, 2012); People v. Valdez, 135 Cal. Rptr. 3d 628 (Ct. App. 2011); People v. Clevenstine, 891 N.Y.S.2d 511 (N.Y. App. Div. 2009); Tienda v. State, 358 S.W.3d 633 (Tex. Crim. App. 2012); Manuel v. State, 357 S.W.3d 66 (Tex. Ct. App. 2011).
[75] *Tienda*, 358 S.W.3d at 634.
[76] *Id.* at 634.
[77] *Id.*
[78] *Id.*
[79] *Id.* at 634–35.

hometown as the location, and contained photographs of a man who "resembled" Tienda.[80] The accounts contained postings such as, "You aint BLASTIN You aint Lastin"[81] and "EVERYONE WUZ BUSTIN AND THEY ONLY TOLD ON ME."[82]

In affirming the intermediate appellate and trial courts, the Court of Criminal Appeals compared the current case to *Griffin*, stating that "there [were] far more circumstantial indicia of authenticity in this case than in *Griffin*."[83] The combination of photographs, references to particular situations, and messages sent from accounts bearing the appellant's name—"taken as a whole with all of the individual particular details considered in combination"—was deemed sufficient for a reasonable jury to believe that Tienda created and maintained the profiles.[84]

In *People v. Clevenstine*,[85] the defendant was convicted of five counts of rape and six other charges such as sexual abuse and endangering the welfare of a child.[86] Clevenstine challenged that a computer disk with MySpace and Facebook messages between him and the victims had not been properly authenticated.[87] Both victims had testified that the defendant had messaged them through social media sites.[88] The State Police investigator had retrieved the conversations directly from the victims' hard drives.[89] A legal compliance officer from Facebook testified that the messages did originate from the purported accounts.[90] The defendant's wife also testified that she had seen the same sexually explicit messages on her husband's MySpace account on their home computer.[91] While the court recognized that the defendant's claim that someone else accessed his MySpace account was possible, "the likelihood of such a scenario presented a factual issue for the jury."[92]

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[80] *Id.* at 634–36.
[81] *Id.* at 635.
[82] *Id.* at 636.
[83] *Id.* at 647.
[84] *Id.* at 645.
[85] 891 N.Y.D.2d 511 (N.Y. App. Div. 2009).
[86] *Id.* at 513.
[87] *Id.* at 514.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*

IV. ARE THE TWO APPROACHES ACTUALLY DIFFERENT?

In just the past two years, the distinction between the Maryland Approach and the Texas Approach has been widening. The most likely source for the separation is Honorable Paul W. Grimm's 2013 article, *Authentication of Social Media Evidence*.[93] In this *American Journal of Trial Advocacy* article, Grimm clearly draws a line between what he sees as two separate approaches to social media authentication. The first approach involves courts setting "an unnecessarily high bar for the admissibility of social media evidence."[94] The second utilizes a different method, "determining the admissibility of social media evidence based on whether there was sufficient evidence of authenticity for a reasonable jury to conclude that the evidence was authentic."[95] This distinction has been reiterated often in the past two years.

Courts and attorneys have cited directly to Grimm's article in case opinions and briefs. A 2014 case, *Parker v. State*,[96] references the article before separating past cases into "The Maryland Approach" and "The Texas Approach."[97] It portrays *Griffin* and *Tienda* respectively as the prime examples of each method,[98] just as in Grimm's article.[99] The appellee's brief for *Harris v. State*,[100] quotes Grimm's article several times when asserting that *Griffin* set an "unnecessarily high bar" for authentication of social media evidence.[101] The appellant's brief in the currently pending case, *Sublet v. State*,[102] similarly references the article while claiming that a court was "inappropriately strict" in its interpretation of evidence law.[103] In citing Grimm, judges and attorneys are adopting the distinction between unnecessarily strict courts and those that are more lenient.

The distinction is also being reinforced in secondary sources. The *Practical Law* section of Westlaw informs litigators that most courts

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[93] Grimm, *supra* note 6.
[94] *Id.* at 441.
[95] *Id.*
[96] 85 A.3d 682 (Del. 2014).
[97] *Id.*
[98] *See id.* at 686 (stating that the higher standard for social media evidence "is best exemplified by . . . *Griffin v. State*" and the "alternative line of cases" is best represented by *Tienda*).
[99] *See* Grimm, *supra* note 6, at 441, 449 (using *Griffin* and *Tienda* as the first cases to describe each approach).
[100] No. 42, slip op. (Md. Apr. 23, 2015).
[101] *Id.* at *31.
[102] No. 59 (Md. Apr. 23, 2015).
[103] *Id.* at *24 n.20.

employ a practice of admitting evidence "if the party demonstrates to the trial judge that a jury could reasonably find that the proffered evidence is authentic."[104] It then explains that other courts recommend a "higher standard."[105] It once again provides *Tienda* and *Griffin* as the two paradigms.[106] Another 2014 article, *The Pitfalls and Perils of Social Media in Litigation*, compares more lenient cases to those in which a "greater degree of authentication" is required.[107]

Dividing the case law into two such distinct categories ignores the similar reasoning behind the courts' decisions and fails to take into account rules that govern admissibility other than those in the Federal Rules of Evidence.

The state of case law as it pertains to social media evidence has evolved considerably in the past decade and a half. In 1999, one court deciding whether to admit printouts of a webpage declared, "There is no way Plaintiff can overcome the presumption that the information he discovered on the Internet is inherently untrustworthy. . . . *[A]ny evidence procured off the Internet is adequate for almost nothing*."[108] While courts sometimes still display a distrust of social media evidence,[109] they no longer discount it as completely useless. Courts and legal scholars have generally agreed that although rapidly developing technology may present new challenges, the existing rules of evidence regarding authenticity are "adequate to the task."[110]

Social media evidence is most often offered as evidence at trial as printouts of webpages. Determining admissibility of these printouts involves two steps: (1) "Printouts of web pages must first be

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[104] Norman C. Simon & Samantha V. Ettari, *Social Media: What Every Litigator Needs to Know*, PRACTICAL LAW, (to access this article, log in to Westlaw Next; follow "Practical Law"; follow "Litigation"; search for "social media" in search bar; follow hyperlink for appropriate article) (last visited Sept. 27, 2015).
[105] *Id.*
[106] *Id.*
[107] PAUL RAGUSA & LAUREN EMERSON, THE PITFALLS AND PERILS OF SOCIAL MEDIA IN LITIGATION (2014), *available at* Westlaw 2014 WL 5465789.
[108] St. Clair v. Johnny's Oyster & Shrimp, Inc., 76 F. Supp. 2d 773, 774–75 (S.D. Tex. 1999) (emphasis added).
[109] *See, e.g.*, People v. Beckley, 110 Cal. Rptr. 3d 362, 366–67 (Ct. App. 2010) (stating that even unskilled, inexperienced users can utilize Photoshop to change photographs to produce false pictures) and State v. Eleck, 23 A.3d 818, 822 (Conn. App. Ct. 2011) (stating that "electronic communication . . . could be generated by someone other than the named sender").
[110] Steven Good, *The Admissibility of Electronic Evidence*, 29 REV. LITIG. 1, 7 (Fall 2009).

authenticated as accurately reflecting the content and image of a specific webpage on the computer," and then (2) in order to be relevant, the printout "must be authenticated as having been posted by that source."[111] The judge acts as a gatekeeper in determining whether the party offering the evidence has fulfilled this requirement of relevance.[112]

The cases listed as following the Maryland Approach are examples of proponents fulfilling the first requirement, but failing to satisfy or even address the second. These courts are not holding social media evidence to a higher standard than any other; they are recognizing that an important condition for admissibility has not been met.

The clearest example of this is the case listed as the exemplar Maryland Approach case, *Griffin v. State*. The oft-quoted holding states:

> The potential for abuse and manipulation of a social networking site by someone other than its purported creator and/or user leads to our conclusion that a printout of an image from such a site requires a greater degree of authentication than merely identifying the date of birth of the creator and her visage in a photograph on the site in order to reflect that [the purported creator] was its creator and the author of the [relevant] language.[113]

While Grimm seems to focus on the first half of this statement, attributing the court's holding to an overly suspicious view of social media content, it is actually the second half that explains the decision. While an investigator's testimony demonstrated that the printouts were in fact downloaded from MySpace, the State failed to connect the statements to the purported creator. Unless they were posted by the alleged source, the warnings were not relevant to the case. The appellate court therefore correctly concluded that the printouts had been improperly admitted during the trial.

Tienda v. State, often presented in articles and opinions as the opposite of *Griffin*, explicitly compared its own situation to that of the Maryland case.[114] It held that a greater amount of circumstantial evidence supported a finding that "the MySpace pages belonged to the appellant *and that he created and maintained them*."[115] The difference between *Griffin* and *Tienda* was not a heightened admissibility standard. The difference was that only in the latter case did the advocate both

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[111] MCCORMICK ON EVIDENCE, supra note 16, at § 227.
[112] FED. R. EVID. 104(b).
[113] Griffin v. State, 19 A.3d 415, 424 (Md. App. 2011).
[114] Tienda v. State, 358 S.W.3d 633, 647 (Tex. Crim. App. 2012).
[115] *Id.* at 645 (emphasis added).

authenticate the webpage *and* connect that page to the purported author/maintainer.

This failure to show authorship also occurred in *State v. Eleck*. The State's witness acknowledged that the Facebook account was hers.[116] This sufficiently authenticated the printout as representative of her account. The State could not, however, show that she sent the messages. The witness asserted that her account had been hacked,[117] and the court concluded that there was nothing inherent in the messages that identified her as the author.[118] Because the State was not able to authenticate the messages as being connected to the purported source, the MySpace statements were not relevant to the case and therefore inadmissible as evidence.

Similarly, MySpace messages offered in *Commonwealth v. Williams* were also ruled inadmissible. The court acknowledged the two-prong requirement for admitting communications by comparing the web messages to a phone call. A witness can state that she had a conversation, but for that conversation to be relevant it still must be shown that it was with the purported other person. The court found that although the foundational testimony had established that the person who sent the messages had access to the webpage, there was no evidence of who that person actually was. The court did not subscribe to any standard higher than that required of other evidence. The proponent simply failed to fulfill the requirements for admitting webpage printouts.

People v. Clavenstine is a case comparable to *Williams* while still following the more lenient Texas Approach. Here, the proponent offered MySpace messages taken directly from the victims' hard drives,[119] fulfilling the first requirement. The defendant's wife also testified that she had seen the messages on her husband's computer.[120] The messages were appropriately connected not only to the account, but also to the author himself. With both requirements satisfied, the evidence was admitted.

Numerous other cases that seemingly follow the Maryland Approach share this same element of failing to demonstrate connection to the purported author. In *Commonwealth v. Wallick*,[121] the proponent authenticated a photograph as coming from a MySpace page, but failed

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[116] State v. Eleck, 23 A.3d 818, 820 (Conn. App. Ct. 2011).
[117] *Id.*
[118] *Id.* at 824.
[119] People v. Clevenstine, 891 N.Y.S.2d 511, 514 (N.Y. App. Div. 2009).
[120] *Id.*
[121] No. CP-67-CR-5884-2010 (Pa. Ct. Com. Pl. Oct. 2011).

to show who created/maintained the page.[122] An expert in *People v. Beckley* testified that a MySpace photograph was not forged, but no evidence was offered that the picture was what it purported to be—a girl flashing an alleged gang sign.[123] Even if the court in *United States v. Jackson* agreed that postings about white supremacist groups did appear on the web, it still noted a lack of evidence regarding whether the posts actually were posted by the groups.[124]

CONCLUSION

Courts using the Maryland Approach are not placing an excessively high bar on social media evidence, or even following a stricter standard than the Texas Approach cases. They are simply recognizing that evidence must be relevant before it may be presented to the jury. In the case of website printouts, this means showing that the content reflects a certain webpage *and* that it was posted by the purported source. Opinions and articles drawing a distinct line between "Maryland" and "Texas" approaches are actually just pointing out the cases in which the second requirement was not fulfilled. Viewing the differing opinions as two opposite approaches not only creates an artificial distinction, but also increases the probability that future courts will misinterpret the admissibility standards and create an actual divergence in analysis.

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[122] Grimm, *supra* note 6, at 445 (quoting Commonwealth v. Wallick, No. CP-67-CR-5884-2010 (Pa. Ct. Com. Pl. Oct. 2011), slip. op. at 10–11).
[123] 110 Cal. Rptr. 3d 362, 365–67 (Ct. App. 2010).
[124] United States v. Jackson, 208 F.3d 633, 638 (7th Cir. 2000).

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 14-1798

_____

UNITED STATES OF AMERICA

v.

TONY JEFFERSON BROWNE,

Appellant

_____

On Appeal from the District Court
of the Virgin Islands
(D.C. No. 3-13-cr-00037-001)
District Judge: Curtis V. Gomez

_____

Argued December 10, 2015

BEFORE: FISHER, KRAUSE, and ROTH, *Circuit Judges*

(Filed: August 25, 2016)

_____

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OPINION OF THE COURT

Krause, *Circuit Judge*.

The advent of social media has presented the courts with new challenges in the prosecution of criminal offenses, including in the way data is authenticated under the Federal Rules of Evidence—a prerequisite to admissibility at trial. Appellant Tony Jefferson Browne was convicted of child pornography and sexual offenses with minors based in part on records of "chats" exchanged over Facebook and now contests his conviction on the ground that these records were not properly authenticated with evidence of his authorship. Although we disagree with the Government's assertion that,

pursuant to Rule 902(11), the contents of these communications were "self-authenticating" as business records accompanied by a certificate from the website's records custodian, we will nonetheless affirm because the trial record reflects more than sufficient extrinsic evidence to link Browne to the chats and thereby satisfy the Government's authentication burden under a conventional Rule 901 analysis.

I. Background

A. Facts

Facebook is a social networking website that requires users to provide a name and email address to establish an account. Account holders can, among other things, add other users to their "friends" list and communicate with them through Facebook chats, or messages.

Under the Facebook account name "Billy Button," Browne began exchanging messages with 18-year-old Nicole Dalmida in November 2011. They met in person a few months later and then exchanged sexually explicit photographs of themselves through Facebook chats. Browne then threatened to publish Dalmida's photos online unless Dalmida engaged in oral sex and promised to delete the photos only if she provided him the password to her Facebook account.

Using Dalmida's account, Browne made contact with four of Dalmida's "Facebook friends," all minors—T.P. (12 years old), A.M. (15 years old), J.B. (15 years old) and J.S. (17 years old)—and solicited explicit photos from them by a variety of means. Once he had the minors' photos, he

repeated the pattern he had established with Dalmida, threatening all of them with the public exposure of their images unless they agreed to engage in various sexual acts and sent additional explicit photos of themselves to his Button Facebook account or to his phone number ("the 998 number"). He arranged to meet with three of the minors and sexually assaulted one.

On receiving information from the Virgin Islands Police Department, agents from the Department of Homeland Security (DHS) interviewed Dalmida and three of the minors. In June 2013, DHS arrested Browne and executed a search warrant on his residence. Among the items seized was a cell phone that matched the 998 number and from which text messages and photos of the minors were recovered. During questioning and at trial, Browne admitted the 998 number and phone belonged to him. DHS executed a search warrant on the Button Facebook account, which Browne also admitted belonged to him, and Facebook provided five sets of chats and a certificate of authenticity executed by its records custodian.

B. Proceedings

At trial, over defense counsel's objections, the District Court admitted the five Facebook chat logs and certificate of authenticity into evidence. Four of the chats involved communications between the Billy Button account and, respectively, Dalmida, J.B., J.S. and T.P. [1] The fifth chat did

[1] The Government did not seek to admit into evidence any Facebook messages sent from the Button account to the remaining minor victim, A.M., but photos of A.M. were

not involve Button's account and took place between Dalmida and J.B., on the subject of Browne's sexual assault of J.B. The certificate stated, in accordance with Rule 902(11) of the Federal Rules of Evidence, that the records that Facebook had produced for the named accounts met the business records requirements of Rule 803(6)(A)–(C). Tracking the language of Rule 803(6), the custodian certified that the records "were made and kept by the automated systems of Facebook in the course of regularly conducted activity as a regular practice of Facebook . . . [and] were made at or near the time the information was transmitted by the Facebook user." App. 403; *see* Fed. R. Evid. 803(6).

Relevant to this appeal, seven witnesses testified for the Government: Dalmida and the four minors, and two Special Agents from DHS. Dalmida and the four minors provided extensive testimony about their communications with Button. According to that testimony, using Dalmida's Facebook account, Browne sent explicit photos of Dalmida to T.P. and A.M. and requested photos in return, and using his own Facebook account, he contacted J.S. and offered to pay her for sexually explicit photos of herself. The testimony and chat logs also established that Browne used Dalmida's account to instruct J.B. to add him as a friend on Facebook, after which he used his own account to send her explicit photos of himself and asked her to do the same.

All four minors testified that after receiving requests for explicit photos, they complied by sending Facebook messages to the Button account or by texting images to the

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among those recovered from the phone seized from Browne's home and admitted into evidence.

998 number, and that they subsequently received threats that their photos would be published online if they did not comply with the sender's sexual demands. And on the stand, Dalmida and each of the four minors identified various Government exhibits as photos they took of themselves and sent to the Button account or the 998 number.

Dalmida and three of the minors (all but T.P.) also testified to meeting Browne in person and identified Browne in open court as the man they had met after making meeting arrangements through messages to the Button account or the 998 number. Two of the minors who met Browne in person testified that they were forced to do more than send additional explicit photographs. A.M. explained that after receiving instructions to text her photos to the 998 number, she received messages from the Button account demanding sexual intercourse and threatening her with the exposure of her images if she refused. After sending her the images, presumably to prove they were in his possession, the individual using the 998 number repeated his threat and instructed her to "play with [her]self" on a video chat site so he could watch. Fearful he would follow through on his threat, she complied. Another minor, J.B., testified that after she arranged to meet Browne through the Button account, Browne sexually assaulted her and recorded the encounter. She also confirmed that she exchanged Facebook messages with Dalmida describing the incident shortly after it occurred.

Special Agents Blyden and Carter testified to details of Browne's arrest and the forensics examination of the items seized from Browne's residence. Special Agent Blyden recounted Browne's post-arrest statements that he knew and had exchanged "nude photos" with Dalmida, that he admitted to knowing three of the minors (all but A.M.), and that he had

paid minor J.S. for nude photos of herself. Special Agent Blyden also identified the Facebook chat conversations as records she had received from Facebook and testified that Facebook had provided the accompanying certificate. Special Agent Carter, the forensics agent, testified to the items recovered from Browne's home, including the phone associated with the 998 number, and identified sexually explicit photos of Dalmida and three of the minors (all but J.B.) as images that were recovered from the phone.[2]

The defense put only Browne on the stand. Browne testified that his Facebook name was Billy Button, and that he knew Dalmida and minors J.S. and J.B. and had corresponded with them on Facebook. He denied knowing or communicating with minor T.P., contradicting Special Agent Blyden's testimony that he had admitted to this after his arrest, and did not state whether he knew A.M. Browne also denied sending any photos to the victims or requesting photos from them. As to the incriminating data discovered on the phone with the 998 number, he testified that he loaned the phone to Dalmida in December of 2012 and intermittently between January and March 2013, and that he also loaned the phone to a cousin at an unspecified time.[3] At one point

[2] At trial, however, J.B. identified several Government exhibits as photos she had sent to Button's Facebook account or the 998 number.

[3] Dalmida testified that she never had Browne's phone in her possession, and Special Agent Blyden testified that during the investigation Dalmida denied ever receiving a phone from Browne.

during his testimony, he confirmed he owned a second phone and number ("the 344 number").

Browne was convicted by a jury after a two-day trial.[4] He now appeals his conviction on the ground that the Facebook records were not properly authenticated and should not have been admitted into evidence.

II. Jurisdiction

[4] The jury convicted Browne on twelve counts, including the production of child pornography in violation of 18 U.S.C. § 2251(a) (Counts 1–4); the coercion and enticement of a minor to engage in sexual activity in violation of 18 U.S.C. § 2422(b) (Count 8); the receipt of child pornography in violation of 18 U.S.C. § 2252(a)(2) (Counts 9–12); and the transfer of obscene material to minors under age 16, in violation of 18 U.S.C. § 1470 (Count 17, 19–20). The jury acquitted Browne on three counts for coercion and enticement, in violation of 18 U.S.C. § 2422(b) (Counts 5–7), and on the count of aggravated first degree rape in violation of 14 V.I.C. § 1700(c) (Count 22). Before the jury rendered its verdict, the defense successfully moved to dismiss a charge of extortion using interstate commerce, in violation of 18 U.S.C. 875(d) (Count 21), and the Government successfully moved to dismiss one of the counts for the transfer of obscene material to minors under age 16 (Count 18) and all charges for possession of child pornography under 18 U.S.C. 2252(a)(4)(B) (Counts 13–16) in light of the fact that possessing child pornography is a lesser-included offense of the receipt of child pornography, *United States v. Miller*, 527 F.3d 54, 71–72 (3d Cir. 2008).

The District Court had jurisdiction under 18 U.S.C. § 3231 and 48 U.S.C. § 1612(c), and we have jurisdiction under 28 U.S.C. § 1291. We review the District Court's decision regarding the authentication of evidence for abuse of discretion, *United States v. Turner*, 718 F.3d 226, 232 (3d Cir. 2013), and exercise plenary review over its interpretation of the Federal Rules of Evidence, *United States v. Console*, 13 F.3d 641, 656 (3d Cir. 1993).

III. Discussion

Browne argues that the Facebook records were not properly authenticated because the Government failed to establish that he was the person who authored the communications. More specifically, Browne contends that no witness identified the Facebook chat logs on the stand; nothing in the contents of the messages was uniquely known to Browne; and Browne was not the only individual with access to the Button account or the 998 number. The Government, for its part, argues the Facebook records are business records that were properly authenticated pursuant to Rule 902(11) of the Federal Rules of Evidence by way of a certificate from Facebook's records custodian.

The proper authentication of social media records is an issue of first impression in this Court. In view of Browne's challenge to the authentication and admissibility of the chat logs, our analysis proceeds in three steps. First, as with non-digital records, we assess whether the communications at issue are, in their entirety, business records that may be "self-authenticated" by way of a certificate from a records custodian under Rule 902(11) of the Federal Rules of Evidence. Second, because we conclude that they are not, we consider whether the Government nonetheless provided

sufficient extrinsic evidence to authenticate the records under a traditional Rule 901 analysis. And, finally, we address whether the chat logs, although properly authenticated, should have been excluded as inadmissible hearsay, as well as whether their admission was harmless.

A. Self-authentication

To satisfy the requirement under Rule 901(a) of the Federal Rules of Evidence that all evidence be authenticated or identified prior to admission, the proponent of the evidence must offer "evidence sufficient to support a finding that the item is what the proponent claims it is." Rule 901(b), in turn, sets forth a non-exhaustive list of appropriate methods of authentication, including not only "[t]estimony that an item is what it is claimed to be," Fed. R. Evid. 901(b)(1), but also "appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances," Fed. R. Evid. 901(b)(4), and "[e]vidence describing a process or system and showing that it produces an accurate result," Fed. R. Evid. 901(b)(9).

The central dispute in this case is complicated, however, by the Government's contention that it authenticated the Facebook chat logs by way of Rule 902, under which extrinsic evidence is not required for certain documents that bear sufficient indicia of reliability as to be "self-authenticating." Specifically, the Government relies on Rule 902(11), which provides that "records of a regularly conducted activity" that fall into the hearsay exception under Rule 803(6)—more commonly known as the "business records exception"—may be authenticated by way of a certificate from the records custodian, as long as the proponent of the evidence gives the adverse party reasonable

notice and makes the record and certificate available for inspection in advance of trial. Fed. R. Evid. 902(11).[5]

The viability of the Government's position turns on whether Facebook chat logs are the kinds of documents that are properly understood as records of a regularly conducted activity under Rule 803(6), such that they qualify for self-authentication under Rule 902(11). We conclude that they

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[5] Rule 803(6) allows for the admission of "[a] record of an act, event, condition, opinion, or diagnosis" containing hearsay if: "(A) the record was made at or near the time by—or from information transmitted by—someone with knowledge; (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; (C) making the record was a regular practice of that activity; (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness." Fed. R. Evid. 803(6). Rule 902(11), in turn, was adopted by amendment in 2000 to allow records of regularly conducted activity to be authenticated by certificate rather than by live testimony and provides that the proponent of a business record who meets certain notice requirements need not provide extrinsic evidence of authentication if the record meets the requirements of Rule 803(6)(A) through (C) "as shown by a certification of the custodian or another qualified person," Fed. R. Evid. 902(11); *see* Fed. R. Evid. 902 advisory committee's note (2000).

are not, and that any argument to the contrary misconceives the relationship between authentication and relevance, as well as the purpose of the business records exception to the hearsay rule.

First, to be admissible, evidence must be relevant, which means "its existence simply has some '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.'" *United States v. Jones*, 566 F.3d 353, 364 (3d Cir. 2009) (quoting Fed. R. Evid. 401). Because evidence can have this tendency only if it is what the proponent claims it is, i.e., if it is authentic, *United States v. Rawlins*, 606 F.3d 73, 82 (3d Cir. 2010), "Rule 901(a) treats preliminary questions of authentication and identification as matters of conditional relevance according to the standards of Rule 104(b)," *United States v. Reilly*, 33 F.3d 1396, 1404 (3d Cir. 1994) (quoting Jack B. Weinstein & Margaret A. Berger, 5 Weinstein's Evidence ¶ 901(a)[01] at 901–15 (1993)).[6] Rule 104(b), in turn, provides that "[w]hen the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist." Fed. R. Evid.

[6] Put differently, "[a]uthenticity is elemental to relevance." *Rawlins*, 606 F.3d at 82; *see* Fed. R. Evid. 901(a) advisory committee's note (1972) ("This requirement of showing authenticity or identity [under Rule 901(a)] falls in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104(b).").

104(b). We have determined that to meet the Rule 104(b) standard of sufficiency, the proponent of the evidence must show that "the jury could reasonably find th[ose] facts . . . by a preponderance of the evidence." *United States v. Bergrin*, 682 F.3d 261, 278 (3d Cir. 2012) (quoting *Huddleston v. United States*, 485 U.S. 681, 690 (1998)) (alterations in original); *see also United States v. Khorozian*, 333 F.3d 498, 506 (3d Cir. 2003) ("Authentication does not conclusively establish the genuineness of an item; it is a foundation that a jury may reject.").

Here, the relevance of the Facebook records hinges on the fact of authorship. To authenticate the messages, the Government was therefore required to introduce enough evidence such that the jury could reasonably find, by a preponderance of the evidence, that Browne and the victims authored the Facebook messages at issue. The records custodian here, however, attested only that the communications took place as alleged between the named Facebook accounts. Thus, accepting the Government's contention that it fulfilled its authentication obligation simply by submitting such an attestation would amount to holding that social media evidence need not be subjected to a "relevance" assessment prior to admission. Our sister Circuits have rejected this proposition in both the digital and non-digital contexts, as do we. *See United States v. Vayner*, 769 F.3d 125, 132 (2d Cir. 2014) (holding that a social media profile page was not properly authenticated where the government offered evidence only that the webpage existed and not that it belonged to the defendant); *United States v. Southard*, 700 F.2d 1, 23 (1st Cir. 1983) (observing that self-authentication "does not eliminate the requirement of relevancy" and requiring testimony linking the codefendant,

who had a common name, to the driver's license and work permit issued under that name).

The Government's theory of self-authentication also fails for a second reason: it is predicated on a misunderstanding of the business records exception itself. Rule 803(6) is designed to capture records that are likely accurate and reliable in content, as demonstrated by the trustworthiness of the underlying sources of information and the process by which and purposes for which that information is recorded.[7] *See E. C. Ernst, Inc. v. Koppers Co.*, 626 F.2d 324, 330–31 (3d Cir. 1980) (holding that pricing sheets satisfied Rule 803(6) because, among other things, "the sheets were checked for accuracy"); *see also United States v. Gurr*, 471 F.3d 144, 152 (D.C. Cir. 2006) ("Because the regularity of making the record is evidence of its accuracy, statements by 'outsiders' are not admissible for their truth under Fed. R. Evid. 803(6)."); Fed. R. Evid. 803 advisory committee's note (1972) ("The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits

[7] When we stated in *United States v. Console* that "Rule 803(6) does not require that the person transmitting the recorded information be under a business duty to provide accurate information," 13 F.3d 641, 657 (3d Cir. 1993), we were observing that accuracy need not be guaranteed, but in no way suggested that accuracy is irrelevant. On the contrary, we went on to state: "[I]t is sufficient if it is shown that . . . [the] standard practice was *to verify the information provided*, or that the information transmitted met the requirements of another hearsay exception." *Id.* at 657–58 (citations omitted) (alterations in original) (emphasis added).

of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation.").

Here, Facebook does not purport to verify or rely on the substantive contents of the communications in the course of its business. At most, the records custodian employed by the social media platform can attest to the accuracy of only certain aspects of the communications exchanged over that platform, that is, confirmation that the depicted communications took place between certain Facebook accounts, on particular dates, or at particular times. This is no more sufficient to confirm the accuracy or reliability of the contents of the Facebook chats than a postal receipt would be to attest to the accuracy or reliability of the contents of the enclosed mailed letter. *See United States v. Jackson*, 208 F.3d 633, 637–38 (7th Cir. 2000) (holding that Internet Service Providers' ability to retrieve information that their customers posted online did not turn the posts that appeared on the website of a white supremacist group into the ISP's business records under Rule 803(6)); *cf. In re U.S. for Historical Cell Site Data*, 724 F.3d 600, 611 (5th Cir. 2013) (for Fourth Amendment purposes, defining business records as "records of transactions to which the record-keeper is a party," in contradistinction to "[c]ommunications content, such as the contents of letters, phone calls, and emails, which are not directed to a business, but simply sent via that business").

We have made a similar determination in the banking context. In *United States v. Furst*, 886 F.2d 558 (3d Cir. 1989), we held that the district court erred in admitting bank records as business records under Rule 803(6), even though the records verified the dates and amounts of certain deposits

and receipts, because "significant" other portions of these documents had not been independently verified, and the records custodians lacked "knowledge as to the accuracy of the information on which the [bank] documents was based or as to the knowledge of the persons who prepared the records." *Id.* at 572.

If the Government here had sought to authenticate only the timestamps on the Facebook chats, the fact that the chats took place between particular Facebook accounts, and similarly technical information verified by Facebook "in the course of a regularly conducted activity," the records might be more readily analogized to bank records or phone records conventionally authenticated and admitted under Rules 902(11) and 803(6). *See id.* at 573 (concluding that the district court erred in admitting bank statements in the bank's possession under Rule 803(6) "to the extent the statements contained any data other than confirmations of transactions" with the bank). We need not address the tenability of this narrow proposition here, however, as the Government's interest lies in establishing the admissibility of the chat logs in full. It suffices for us to conclude that, considered in their entirety, the Facebook records are not business records under Rule 803(6) and thus cannot be authenticated by way of Rule 902(11). In fact, the Government's position would mean that all electronic information whose storage or transmission could be verified by a third-party service provider would be exempt from the hearsay rules—a novel proposition indeed, and one we are unwilling to espouse.

B. Authentication by way of extrinsic evidence

Our conclusion that the Facebook chat logs were not properly authenticated under Rule 902(11) does not end our inquiry, for we may consider whether the Government has presented sufficient extrinsic evidence to authenticate the chat logs under Rule 901(a). *See Vatyan v. Mukasey*, 508 F.3d 1179, 1184 (9th Cir. 2007); *United States v. Dockins*, 986 F.2d 888, 895 (5th Cir. 1993). To answer this question, we look to what the rule means in the social media context and how it applies to the facts here.

Conventionally, authorship may be established for authentication purposes by way of a wide range of extrinsic evidence. *See* Fed. R. Evid. 901(b). In *United States v. McGlory*, 968 F.2d 309 (3d Cir. 1992), for example, we rejected a defendant's challenge to the authentication of notes that he had allegedly handwritten because, despite being unable to fully establish authorship through a handwriting expert, the prosecution had provided "sufficient evidence from which the jury could find that [the defendant] authored the notes." *Id.* at 329. The notes had been seized from the trash outside the defendant's known residences; some of the notes were torn from a notebook found inside his residences; some notes were found in the same garbage bag as other identifying information; and certain notes were written on note paper from hotels where the defendant stayed during the alleged conspiracy. *Id.* at 328–29.

Similarly, in *United States v. Reilly*, 33 F.3d 1396 (3d Cir. 1994), when considering whether the government's evidence "support[ed] the conclusion that the radiotelegrams are what the government claims they are, namely radiotelegrams to and from the *Khian Sea*, many of which

were sent or received by [the defendant]," we determined that the government had met its authentication burden by way of not only direct testimony from individuals who identified the radiotelegrams but also "multiple pieces of circumstantial evidence." *Id.* at 1405–06. This included testimony explaining how the witness who produced the radiotelegrams had come to possess them, the physical appearance of the radiotelegrams, and evidence that the radiotelegrams were sent to the defendant's office or telex number. *Id.* at 1406.

We hold today that it is no less proper to consider a wide range of evidence for the authentication of social media records than it is for more traditional documentary evidence. The authentication of electronically stored information in general requires consideration of the ways in which such data can be manipulated or corrupted, *see generally Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007), and the authentication of social media evidence in particular presents some special challenges because of the great ease with which a social media account may be falsified or a legitimate account may be accessed by an imposter, *cf. Griffin v. State*, 19 A.3d 415, 424 (Md. 2011) (analyzing state analogue to Rule 901). But the authentication rules do not lose their logical and legal force as a result. *See Tienda v. State*, 358 S.W.3d 633, 638–39 (Tex. Crim. App. 2012) (describing the legal consensus as to the applicability of traditional evidentiary rules to electronic communications and identifying the many forms of circumstantial evidence that have been used to authenticate email printouts, internet chat room conversations, and cellular text messages); *see also Parker v. State*, 85 A.3d 682, 687 (Del. 2014) (analyzing state evidentiary rules and concluding that "[a]lthough we are mindful of the concern that social media evidence could be

falsified, the existing [rules] provide an appropriate framework for determining admissibility."); *Burgess v. State*, 742 S.E.2d 464, 467 (Ga. 2013) ("Documents from electronic sources such as the printouts from a website like MySpace are subject to the same [state] rules of authentication as other more traditional documentary evidence and may be authenticated through circumstantial evidence."). Depending on the circumstances of the case, a variety of factors could help support or diminish the proponent's claims as to the authenticity of a document allegedly derived from a social media website, and the Rules of Evidence provide the courts with the appropriate framework within which to conduct that analysis.

Those Courts of Appeals that have considered the issue have reached the same conclusion. In *United States v. Barnes*, 803 F.3d 209 (5th Cir. 2015), the Fifth Circuit held that the government laid a sufficient foundation to support the admission of the defendant's Facebook messages under Rule 901 where a witness testified that she had seen the defendant using Facebook and that she recognized his Facebook account as well as his style of communicating as reflected in the disputed messages. *Id.* at 217. In *United States v. Hassan*, 742 F.3d 104 (4th Cir. 2014), the Fourth Circuit held that the government properly linked the Facebook pages at issue to the defendants by using internet protocol addresses to trace the Facebook pages and accounts to the defendants' mailing and email addresses.[8] *Id.* at 133. And in *Vayner*, the Second

[8] The Fourth Circuit also ruled that those Facebook pages were properly authenticated under Rule 902(11). *Hassan*, 742 F.3d at 133–34. For the reasons already stated

Circuit held that the government failed to adequately authenticate what it alleged was a printout of the defendant's profile page from a Russian social networking site where it offered no evidence to show that the defendant had created the page. 769 F.3d at 131. In all of these cases, the courts considered a variety of extrinsic evidence to determine whether the government had met its authentication burden under Rule 901—each reiterating, in the course of that analysis, that conclusive proof of authenticity is not required and that the jury, not the court, is the ultimate arbiter of whether an item of evidence is what its proponent claims it to be. *Barnes*, 803 F.3d at 217; *Vayner*, 769 F.3d at 131; *Hassan*, 742 F.3d at 133.

Applying the same approach here, we conclude the Government provided more than adequate extrinsic evidence to support that the disputed Facebook records reflected online conversations that took place between Browne, Dalmida, and three of the four minors, such that "the jury could reasonably find" the authenticity of the records "by a preponderance of the evidence." *Bergrin*, 682 F.3d at 278.

First, although the four witnesses who participated in the Facebook chats at issue—Dalmida and three of the minors—did not directly identify the records at trial, each offered detailed testimony about the exchanges that she had over Facebook. This testimony was consistent with the content of the four chat logs that the Government introduced into evidence. Dalmida and two of the minors whose chat logs are at issue further testified that after conversing with the

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above, we do not agree with this portion of the court's authentication holding.

Button Facebook account or the 998 number that they received through communications with Button, they met in person with Button—whom they were able to identify in open court as Browne. This constitutes powerful evidence not only establishing the accuracy of the chat logs but also linking them to Browne. *See United States v. Tank*, 200 F.3d 627, 630–31 (9th Cir. 2000) (holding government made a prima face showing of authenticity under Rule 901(a) in part because several co-conspirators testified that the defendant was the person who showed up to a meeting that they had arranged with the person who used that screen name).

Second, as reflected in the trial testimony of both Browne and Special Agent Blyden, Browne made significant concessions that served to link him to the Facebook conversations. Most notably, Browne testified that he owned the "Billy Button" Facebook account on which the search warrant had been executed and that he knew and had conversed on Facebook with Dalmida and two of the minors. *See, e g.*, *Tank*, 200 F.3d at 630–31 (holding government met authentication burden where, among other things, defendant admitted that screenname used in disputed text messages belonged to him). Browne also testified that he owned the phone that was seized from his residence—the same phone from which DHS recovered certain images that the victims identified on the stand as those they sent in response to commands from either the Button or Dalmida Facebook account or the 998 number. *Cf. United States v. Simpson*, 152 F.3d 1241, 1249–50 (10th Cir. 1998) (rejecting the defendant's claim that the trial court erred in admitting a printout of an alleged chat room discussion between the defendant and an undercover officer where, among other things, the pages seized from the defendant's home contained

identifying information that the undercover officer had given the individual in the chat room). And Browne admitted that he owned a second phone with the 344 number, which is significant because, although Browne attempted to distance himself from the incriminating phone with the 998 number with the unsupported contention that he loaned it to other individuals at various points in the relevant time period, one of the challenged Facebook conversations shows that "Button" also provided the 344 number to minor J.S. on two occasions while trying to elicit sexual acts and photos. In addition, in Browne's post-arrest statements, which were introduced at trial, he provided the passwords to the Button Facebook account and to the phone with the 998 number and admitted to exchanging nude photos with Dalmida, paying J.S. for nude photos, going to J.B.'s home, and knowing a third minor, T.P., whom he referenced by Facebook account name.

Third, contrary to Browne's contention that "there is no biographical information in the [Facebook] records that links [him] to the documents," Appellant's Br. at 17, the personal information that Browne confirmed on the stand was consistent with the personal details that "Button" interspersed throughout his Facebook conversations with Dalmida and three of the minors. For example, Browne testified that his address was 2031 Estate Lovenlund, that he was a plumber, and that he had a fiancée. The Facebook messages sent by "Button" are, in turn, replete with references to the fact that the sender was located or resided at Lovenlund. "Button" also stated to one minor, "I'm a plumber." App. 503. The chats reflect that somewhere on his Facebook profile, Button represented himself as being engaged. And in one of the

disputed Facebook chats, Button informed a minor that his name was "Tony . . . Browne."[9] App. 519.

Lastly, the Government not only provided ample evidence linking Browne to the Button Facebook account but also supported the accuracy of the chat logs by obtaining them directly from Facebook and introducing a certificate attesting to their maintenance by the company's automated systems. To the extent that certified records straight from the third-party service provider are less likely to be subject to manipulation or inadvertent distortion than, for instance, printouts of website screenshots, the method by which the Government procured the records in this case constitutes yet more circumstantial evidence that the records are what the Government claims.

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[9] Browne argues that none of these biographical details constituted "information that only [he] could be expected to know," Appellant's Br. at 19, but we need not determine that, by itself, the information could suffice to authenticate the chat logs to conclude that they have some authentication value when considered in combination with all of the other available evidence. *See Simpson*, 152 F.3d at 1244 (computer printout of alleged chat room discussions properly authenticated not only by physical evidence recovered from defendant's home but also in light of the fact that the individual participating in the chat gave the undercover officer the defendant's first initial and last name and street address); *Bloom v. Com.*, 554 S.E.2d 84, 86–87 (Va. 2001) (defendant was sufficiently identified as individual who made statements over instant message where detailed biographical information provided online matched that of the defendant).

In short, this is not a case where the records proponent has put forth tenuous evidence attributing to an individual social media or online activity that very well could have been conducted or fabricated by a third party. *See, e.g.*, *Vayner*, 769 F.3d at 131; *see also Smith v. State*, 136 So.3d 424, 433 (Miss. 2014) (holding that name and photo on Facebook printout were not sufficient to link communication to alleged author); *Griffin*, 19 A.3d at 423 (holding that the trial court abused its discretion in admitting MySpace website evidence because the state both failed to explain how it had obtained the challenged records and failed to adequately link the records to the defendant's girlfriend). Far from it. This record reflects abundant evidence linking Browne and the testifying victims to the chats conducted through the Button Facebook account and reflected in the logs procured from Facebook. The Facebook records were thus duly authenticated.

Browne makes much of the fact that the Government failed to ask the testifying witnesses point-blank to identify the disputed Facebook chats. As we explained, however, in *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916 (3d Cir. 1985), where we reversed the district court's determination that certain records could not be admitted into evidence unless they were introduced by a testifying witness, circumstantial evidence can suffice to authenticate a document. *Id.* at 928; *see also* Fed. R. Evid. 903 ("A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity."). Although a witness with personal knowledge may authenticate a document by testifying that the document is what the evidence proponent claims it to be, this is merely one possible means of authentication and not, as

Browne would have it, an exclusive requirement. *See* Fed. R. Evid. 901(b)(1); *Simpson*, 152 F.3d at 1249–50 (rejecting the defendant's contention that statements from a chat room discussion could not be attributed to him where the government could not identify that they "were in his handwriting, his writing style, or his voice," as "[t]he specific examples of authentication referred to by [the defendant] . . . are not intended as an exclusive enumeration of allowable methods of authentication").

In sum, Browne's authentication challenge collapses under the veritable mountain of evidence linking Browne to Billy Button and the incriminating chats.

C. Admissibility

Having concluded that the Facebook records were properly authenticated by way of extrinsic evidence, we turn to Browne's more general argument that the records were inadmissible. Evidence that is properly authenticated may nonetheless be inadmissible hearsay if it contains out-of-court statements, written or oral, that are offered for the truth of the matter asserted and do not fall under any exception enumerated under Federal Rule of Evidence 802. *McGlory*, 968 F.2d at 331.

Here, the Government offered more than sufficient evidence to authenticate four of the five Facebook records as chats that Browne himself participated in by way of the Button account, and these four records were properly admitted as admissions by a party opponent under Rule 801(d)(2)(A). *See id.* at 334 & n.17 (observing that handwritten notes were admissible as admissions by a party opponent if the prosecution established defendant's

authorship by a preponderance of the evidence); *see also United States v. Brinson*, 772 F.3d 1314, 1320 (10th Cir. 2014) (same conclusion regarding Facebook messages); *United States v. Siddiqui*, 235 F.3d 1318, 1323 (11th Cir. 2000) (same conclusion regarding authenticated email).[10] Not so for the fifth.

We agree with Browne that the single chat in which Browne did not participate and which took place between Dalmida and J.B. regarding Button's "almost rape[]" of J.B. was inadmissible hearsay. App. 483. Notwithstanding the other reasons the Government may have sought to admit it, the record functioned at least in part to prove the truth of the matter asserted, that is, that Browne sexually assaulted J.B. and subsequently threatened her with video evidence of the

[10] As for the statements in the chat logs that the victims made to Browne, under our precedent they were not hearsay because they were not offered into evidence to prove the truth of the matter asserted; rather, they were introduced to put Browne's statements "into perspective and make them intelligible to the jury and recognizable as admissions." *United States v. Hendricks*, 395 F.3d 173, 184 (3d Cir. 2005) (quoting *United States v. McDowell*, 918 F.2d 1004, 1007 (1st Cir. 1990)); *see also McDowell*, 918 F.2d at 1007–08 ("[The defendant's] part of the conversations was plainly not hearsay. Nor can a defendant, having made admissions, keep from the jury other segments of the discussion reasonably required to place those admissions into context . . . . Moreover, because [the informant's] statements were introduced only to establish that they were uttered and to give context to what [the defendant] was saying, they were not hearsay at all.").

assault. *See McGlory*, 968 F.2d at 332 ("This Court . . . has disfavored the admission of statements which are not technically admitted for the truth of the matter asserted, whenever the matter asserted, without regard to its truth value, implies that the defendant is guilty of the crime charged.").[11]

[11] As with authentication, we do not foreclose the possibility that the chat log might have warranted a different hearsay analysis had the Government sought the admission of only limited portions of it. In *United States v. Turner*, 718 F.3d 226 (3d Cir. 2013), for example, where we assessed the admissibility of certain bank records, we held that the district court did not clearly err in applying the residual hearsay exception, which permits a district court to admit an out-of-court statement not covered by Rules 803 or 804 where, among other things, "the statement has equivalent circumstantial guarantees of trustworthiness." *Id.* at 233 (quoting Fed. R. Evid. 807). But the Government here does not contend that this hearsay exception or any others enumerated in Rule 803 are applicable to this chat log. And with good reason. For instance, although the log reflects that the chat participants made a number of emotionally charged statements, it purports to describe an event that occurred the previous day and thus was not admissible under the present sense impression or excited utterance exception to the hearsay rule. Fed. R. Evid. 803(1)–(2); *see United States v. Green*, 556 F.3d 151, 156 (3d Cir. 2009); *United States v. Brown*, 254 F.3d 454, 458 (3d Cir. 2001). And nothing in the record or the Government's brief suggests the chat log was introduced to show Dalmida or J.B.'s "then-existing state of

Although we conclude that the District Court erred in admitting this chat log, we do not perceive grounds for reversal. Reversal is not warranted if it is "highly probable that the error did not contribute to the judgment." *United States v. Brown*, 765 F.3d 278, 295 (3d Cir. 2014) (quoting *United States v. Cunningham*, 694 F.3d 372, 391–92 (3d Cir. 2012)). This "high probability" standard for non-constitutional harmless error determinations "requires that the court possess a sure conviction that the error did not prejudice the defendant." *United States v. Franz*, 772 F.3d 134, 151 (3d Cir. 2014) (quoting *Cunningham*, 694 F.3d at 392).

We are confident there was no prejudice here. As detailed above, the Government set forth abundant evidence that not only served to tie Browne and the victims to the chat logs but also supported Browne's guilt on all of the counts for which he was convicted irrespective of those records. Indeed, the two individuals who made the hearsay statements reflected in the fifth chat log, Dalmida and J.B., testified at length to the very details included in that Facebook chat log. Because there was overwhelming, properly admitted evidence supporting Browne's conviction on every count, and the sole improperly admitted Facebook record was "at most, duplicative of [the witnesses'] admissible testimony," *United States v. Kapp*, 781 F.2d 1008, 1014 (3d Cir. 1986), the erroneous admission was harmless and Browne's convictions must be sustained. *See Barnes*, 803 F.3d at 218 (concluding that any potential error in admitting disputed Facebook messages was harmless, as "the content of the messages was

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mind," Fed. R. Evid. 803(3). *See United States v. Donley*, 878 F.2d 735, 737 (3d Cir. 1989).

largely duplicative" of witness testimony and "given the overwhelming evidence of [the defendant's] guilt").

* * *

For the foregoing reasons, we will affirm the judgment of the District Court.

[Cite as *State v. Gibson*, 2015-Ohio-1679.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Appellee

v.

Traquawn Gibson

Appellant

Court of Appeals Nos. L-13-1222
L-13-1223

Trial Court Nos. CR0201301232
CR0201301115

DECISION AND JUDGMENT

Decided: May 1, 2015

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney,
for appellee.

Lawrence A. Gold, for appellant.

* * * * *

JENSEN, J.

{¶ 1} Appellant, Traquawn Gibson, appeals his convictions, challenging the trial court's denial of his motion to sever, rulings regarding the admissibility of Facebook and SoundCloud evidence, the sufficiency of the evidence on a charge of participation in a criminal gang, and the imposition of financial sanctions without consideration of his ability to pay. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} On the evening of October 18, 2012, Limmie Reynolds was sitting in his car with his best friend, Deonta Allen, smoking marijuana. The car was parked on the 1900 block of Fernwood Avenue in Toledo, Lucas County, Ohio.

{¶ 3} A few minutes past 10:00 p.m., three young men approached Limmie's car from the rear. They wanted to purchase some marijuana, but Limmie told them he did not have any to sell. Limmie recognized two of the men—Stephaun Gaston and Kevin Martin—but did not know the third man.

{¶ 4} Seconds later, Limmie's car door opened. The man Limmie did not know put a gun in his face. The man said, "on Kent, give it up." Limmie and Deonta jumped out of the car and began to run. Limmie was shot through the torso, yet managed to run for help. Deonta was shot through the torso and collapsed before he reached the back steps of a nearby home.

{¶ 5} When first responders arrived, they transported Limmie to the hospital. He was treated for a torn lung and broken ribs. Deonta was pronounced dead at the scene; a bullet had passed through the right ventricle of his heart.

{¶ 6} The next morning, Toledo Police detectives interviewed Limmie at the hospital. Limmie identified two suspects by name and suggested that "the people that committed the crime were from the Moody Manor." That evening, Limmie was shown a full-face photo array of possible suspects but was not able to identify the man with the gun. A photograph of appellant was included in the photo array.

{¶ 7} Within a week or two of the shooting, Limmie's brother, Delewan, indicated that "some of the people that were involved" had Facebook accounts. Thereafter, Detective Bart Beavers searched on-line and found public Facebook profiles pages associated with Martin and Gaston.

{¶ 8} Meanwhile, on November 19, 2012, Crejonnia Bell ("C.J.") was hanging out with her friend Sharde Johnson when she received a phone call from appellant. He wanted to see her. Reluctantly, C.J. went to find him. According to Sharde, C.J. had recently ended a 6-7 month relationship with appellant.

{¶ 9} Sometime between 9:30 and 10:00 p.m., residents of West Weber Street saw a man in a grey sweat suit arguing with a woman—later identified as C.J.—on West Weber Street. Moments later, the man pulled out a gun and began shooting. The woman ran onto the front porch of 32 West Weber. The gunman followed. After firing several shots, the gunman shot himself in the leg. The gunman began pounding on the door and exclaimed, "they're shooting at us out here." When the door opened, the woman either crawled in or was drug into the house. The gunman followed. Moments later the gunman came back outside and yelled, "did anyone see which way they ran?"

{¶ 10} When police officers arrived, appellant was inside the house, standing shirtless by the couch. He was wearing grey sweatpants. When officers asked appellant to explain what happened, appellant explained that while he and C.J. were standing out in the street, "someone came from between the houses and started shooting." Appellant was not able to describe the shooter or provide any information as to where the shooter may

have gone after firing several shots. Officers found appellant's white t-shirt and grey sweatshirt hanging on a chair in the dining room; there was a significant amount of gunshot residue on both. When asked, appellant admitted that he was wearing the clothing during the attack.

{¶ 11} When paramedics arrived, C.J. was alive, but mostly unresponsive. As they began working on her, she regained consciousness. C.J. was able to describe her symptoms to medical personal but either could not, or simply would not, identify the shooter. Hours after her arrival at the hospital, C.J. died from multiple gunshot wounds to the head and torso.

{¶ 12} When the police interviewed the crowd that gathered outside of 32 West Weber Street, residents described what they had witnessed and identified appellant as the shooter. Escorted by a uniformed officer, appellant was transported to the hospital and treated for a gunshot wound to his leg. Just before 5:00 a.m., appellant was released from the hospital and escorted to the police station for questioning.

{¶ 13} When questioned by Detective Kermit Quinn, appellant denied shooting C.J., but admitted his affiliation with the Moody Manor Bloods. Detective Quinn observed several holes and what appeared to be gunshot residue on appellant's white t-shirt. Appellant was taken into custody.

{¶ 14} On January 18, 2013, in Lucas C.P. No. CR0201301115, appellant was indicted on one count of aggravated murder with a firearm specification, in violation of

R.C. 2903.01(A) and (F) and 2941.145, for the shooting death of C.J. Bell (the "West Weber indictment").

{¶ 15} On February 7, 2013, in Lucas C.P. No. CR0201301232, appellant was indicted on one count of murder with a firearm specification in violation of R.C. 2903.02(B), 2929.02, and 2941.145, for the shooting death of Deonta Allen; one count of felonious assault with a firearm specification in violation of R.C. 2903.11(A)(2) and 2941.145; one count of aggravated robbery with a firearm specification in violation of R.C. 2911.01(A)(1) and 2941.145; and one count of participating in a criminal gang in violation of R.C. 2923.42(A) and (B) (the "Fernwood indictment").

{¶ 16} On February 14, 2013, the trial court joined the Fernwood and West Weber indictments to be tried together pursuant to Crim.R. 13 and 8(A). The trial court denied appellant's motion to sever and the matter proceeded to trial by jury.

{¶ 17} At the conclusion of the trial, the jury found appellant guilty of aggravated murder and the attached firearm specification, as charged in the West Weber indictment. Appellant was ordered to serve a term of life in prison, without the possibility of parole. In regard to the crimes charged in the Fernwood indictment, the jury found appellant guilty of murder while committing aggravated robbery and the attached firearm specification; felonious assault and the attached firearm specification; aggravated robbery and the attached firearm specification; and participating in a criminal gang. As to the murder charge, appellant was ordered to serve a term of life in prison with a possibility of parole after 15 years. As to the charge of felonious assault, appellant was ordered to

serve a term of eight years in prison. As to the charge of aggravated robbery, appellant was ordered to serve a term of 11 years in prison. In regard to the participating in a criminal gang charge, appellant was ordered to serve a term of eight years in prison. The sentences imposed under the Fernwood indictment were ordered to be served consecutively to one another and consecutive to the sentence imposed under the West Weber indictment. All of the firearm specifications in the case merged for a single mandatory and consecutive term of three years in prison.

{¶ 18} It is from these judgments that appellant has filed timely notices of appeal, and the cases have been consolidated for purposes of appeal. Appellant asserts four assignments of error for our review.

First Assignment of Error

{¶ 19} In his first assignment of error, appellant states:

> The trial court abused its discretion by denying Appellant's motion to sever, thereby depriving Appellant of a fair trial in violation of his constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 10 and 16 of the Ohio Constitution.

For the reasons that follow, we find the trial court did not abuse its discretion in denying appellant's pre-trial and renewed motions to sever.

{¶ 20} Preliminarily, we note that appellant does not challenge the propriety of the initial joinder under Crim.R. 13 and 8(A). Rather, his argument addresses the trial

court's denial of his motion to sever under the theory of prejudicial joinder under Crim.R. 14. Thus, we decide this matter under the assumption that the two indictments were properly joined as offenses based on two transactions connected together. *See State v. Torres*, 66 Ohio St.2d 340, 342, 421 N.E.2d 1288 (1981) (appellant who asserted trial court abused its discretion by refusing to grant separate trials under Crim.R. 14 implicitly conceded that the two indictments were properly joined under Crim.R. 13).

{¶ 21} On March 18, 2013, appellant filed a motion to sever the joined indictments.[1] He argued there was no common scheme or plan that would constitute a course of criminal conduct and that trying the indictments together would "present an unbelievably prejudicial effect." In response, the state argued that the indictments were properly joined because the offenses are "based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." Specifically, the state asserted that appellant murdered C.J. because she had just broken off a relationship with appellant and that she "had information and was witness to" the crimes alleged in the Fernwood indictment. At a pre-trial hearing on the motion to sever, the state asserted:

> At trial three separate witnesses would be presented by the State of Ohio that would give testimony and evidence that [appellant] murdered C.J.

[1] The trial court did not issue a written order reflecting a joinder of the indictments under Crim.R. 13 and 8(A). However, from the context of the record as a whole, it appears the trial court granted, over objection, the state's oral motion for joinder of the Fernwood and West Weber indictments on February 14, 2013.

> Bell * * *. And the evidence through those witnesses would be presented that C.J. Bell was murdered because she was a witness to the murder that occurred on October 18th that was committed by [appellant] * * *.
>
> One witness would testify specifically about statements made by our – by C.J., who is the murder victim on the second murder, regarding this first murder on Fernwood and what she knew about that. Two additional witnesses would testify about statements made by [appellant] that she had to be killed because she knew too much and was leaving him.

Upon consideration of the state's representations, the trial court denied appellant's pre-trial motion to sever.

{¶ 22} At this juncture, it is important to note that the state filed certifications of nondisclosure for seven witnesses under Crim.R. 16(D).[2] A Crim.R. 16(F)[3] hearing was held, in camera, before a second Lucas County Court of Common Pleas judge on the afternoon of March 25, 2013 (hours after the trial court denied appellant's motion to sever). During the hearing, the state indicated that C.J. had driven appellant "from the scene [of the first shooting] back to where he was residing, and that he had talked to her

[2] Crim.R. 16(D) provides, "If the prosecuting attorney does not disclose material or portions of materials under [Crim.R. 16], the prosecuting attorney shall certify to the court that the prosecuting attorney is not disclosing material or portions of material otherwise subject to disclosure" and the reasons therefore.

[3] Crim.R. 16(F) provides, "Upon motion of the defendant, the trial court shall review the prosecuting attorney's decision of nondisclosure or designation of 'counsel only' material for abuse of discretion during an *in camera* hearing conducted seven days prior to trial, with counsel participating."

about it." The state further indicated, "[a] couple of these witnesses will give specific information about the connection there and about the fact that C.J. Bell was murdered because of the information she had about the first murder." In turn, Detective Kermit Quinn revealed the identity of the certified witnesses and their anticipated testimony. At the time of the hearing, four of the six witnesses resided on West Weber Street. The other three each had information that would tie crimes charged in the two indictments together: one was an inmate in the county jail, one is a family member of C.J., and the last is a member of a different subsection of the Moody Manor Bloods. The jail inmate was told by appellant that "he had to kill her because she had information on [the] first murder, that she was a witness, and that she basically had to be taken care of." C.J.'s family member had information about what C.J. had seen and about her fear of appellant. The Moody Manor Blood had heard appellant make statements about killing C.J. because of the murder that appellant and "his boys" had committed on Fernwood a month prior to C.J.'s death. The state indicated that all seven witnesses were fearful because of the nature of the crimes and appellant's affiliation with the Moody Manor Bloods. At the close of the hearing, the judge found no abuse of discretion by the prosecuting attorney relative to the certification of the witnesses. He ordered that their identities remain sealed until disclosed at trial. A transcript of the Crim.R. 16(F) hearing was provided to the trial court days before the trial commenced.

{¶ 23} None of the witnesses the state had identified, in camera, as being able to tie the two murder scenes together testified at trial. Thus, at the close of the state's case,

appellant renewed his motion to sever. The following discussion took place outside the presence of the jury.

> [TRIAL COUNSEL]: We are renewing our motion to sever and I filed it in March and I'm referring back to that. And I think we arrived at a point where we have two totally different murder scenes unconnected by anything significant and I think it's prejudicial joinder, Your Honor.
>
> THE COURT: All right. Explain so we can understand this, what the prejudice would be then if someone were charged with two separate aggravated robberies [occurring within] one month of a period of time[,] more often then [sic] not they are joined for trial. What is unique?
>
> [TRIAL COUNSEL]: If there is a common design or some modus operandi, whatever, I don't believe it's here. I looked at some law last night. They showed that a knifing on a person using a knife in two separate occasions was not enough. We do have two different weapons here, one is .9 millimeter, one is a .45, and they are totally different characteristics. I mean we have a shooting of a girlfriend, alleged shooting of a girlfriend, and another would be kind of an aggravated robbery shooting with different sites, excuse me, different parts of the city, and I don't think they have any connection at all and I think it's prejudicial to join them together.
>
> * * *

[THE STATE]: Before we respond on the merits, Your Honor, we want to indicate one thing. At the outset about the initial decision to pursue joinder and that is that the state made the decision to join these two cases in large part based on the purported testimony of a witness who when called to the stand yesterday, September 25th, refused to testify or cooperate with the state. Thank you.

* * *

Your Honor, the state had met with that witness the Friday before the beginning of trial. He was brought up, he was conveyed from the penitentiary and he did indicate his willingness to testify for the state. We discussed that testimony with him. He was completely on board until he arrived at the doors of the courtroom yesterday. However, Your Honor, there are additional facts in evidence that do join these two cases together. One of those facts, Your Honor, is the timing involved. These murders were committed within a month of each other. They were both committed with semiautomatic firearms. There's testimony that the defendant was wearing the same exact outfit at both murders.

* * *

It could be concluded that was somewhat of a uniform for him, Your Honor. Additionally, the defendant's own statements made on November 18th, the day that CJ Bell was killed, two fire fighters at separate

> times when they were assisting in his treatment stated that he was a suspect in another murder that had been committed and that he believed this to be retaliation for him having been involved in that murder. There is some evidence regarding the phone calls made and the text messages made on October 18th, both right before and right after the murder of Deonta Allen and the shooting of Limmie Reynolds that puts CJ Bell and [appellant] together using each other's phones and contacting each other which leads to strong inferences that she had knowledge about this murder. And additionally, Your Honor, there was testimony that on November 18th, the day she was killed, she was afraid to see [appellant] and did not want to see him on that day.

{¶ 24} Under Crim.R. 13, a "trial court may order two or more indictments * * * to be tried together, if the offenses * * * could have been joined in a single indictment." Under Crim.R. 8(A), two or more offenses may be joined in one indictment if they are (1) of the same or similar character, or (2) are based on the same act or transaction, or (3) are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or (4) are part of a course of criminal conduct. *See also* R.C. 2941.04.

{¶ 25} "Because joinder of indictments for a single trial is favored for judicial economy, the defendant bears the burden of claiming prejudice to prevent the joinder and providing sufficient information for the trial court to weigh the right to a fair trial against

the benefits of joinder." *State v. Newman*, 6th Dist. Erie Nos. E-11-065, E-11-066, 2013-Ohio-414, ¶ 17, citing Crim.R. 14; *Torres*, 66 Ohio St.2d 340, 421 N.E.2d 1288 (1981), syllabus; and *State v. Schaim*, 65 Ohio St.3d 51, 59, 600 N.E.2d 661 (1992). "Whether to try two cases separately or jointly is within the discretion of the trial court." *State v. Bradley*, 6th Dist. Erie No. E-13-013, 2015-Ohio-395, ¶ 9, citing *State v. Thompson*, 127 Ohio App.3d 511, 523, 713 N.E.2d 456 (8th Dist.1998). An abuse of discretion is demonstrated where the trial court's attitude in reaching its decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 26} To prevail on a claim that the trial court erred in denying a motion to sever, an appellant has the burden of demonstrating three facts. *State v. Schaim*, 65 Ohio St.3d 51, 59, 600 N.E.2d 661 (1991). "He must affirmatively demonstrate (1) that his rights were prejudiced, (2) that at the time of the motion to sever he provided the trial court with sufficient information so that it could weigh the considerations favoring joinder against the defendant's right to a fair trial, and (3) that given the information provided to the court, it abused its discretion in refusing to separate the charges for trial." *Id.*, citing *Torres* at syllabus. *See also State v. Garber*, 6th Dist. No. F-85-12, 1986 WL 15251, *2 (Dec. 24, 1986). "If a motion to sever is made at the outset of a trial, it must be renewed at the close of the state's case or at the conclusion of all of the evidence so that a Crim.R. 14 analysis may be conducted in light of all the evidence presented at trial." *State v.*

Rojas, 6th Dist. Lucas No. L-11-1276, 2013-Ohio-1835, ¶ 34, citing *State v. Hoffman*, 9th Dist. Summit No. 26084, 2013-Ohio-1021, ¶ 8.

{¶ 27} Here, appellant asserts the trial court abused its discretion when it failed to take into consideration the "highly prejudicial nature of the evidence that would be presented to the jury on two separate and unrelated accusations of murder." However, appellant fails to affirmatively demonstrate how he was prejudiced by the trial court's denial of his motion to sever. Moreover, appellant fails to explain how he would have defended differently had the indictments been severed. *See State v. Lott*, 51 Ohio St.3d 160, 165, 555 N.E.2d 293 (1990).

{¶ 28} This court has previously held that "joinder is not prejudicial when the jury is believed capable of separating the proof as to each charge because the evidence of each of the crimes is simple and direct, or the evidence of one offense is admissible in the trial of the other as "other acts" evidence under Evid.R. 404(B)." *State v. Townsend*, 6th Dist. No. L-00-1290, 2002 WL 538032, *7 (Apr. 12, 2002) (citations omitted). "These two tests are disjunctive and need not be satisfied together to negate a claim of prejudicial joinder." *State v. Cameron*, 10th Dist. No. 09AP-56, 2009-Ohio-6479, ¶ 35, citing *State v. Mills*, 62 Ohio St.3d 357, 362, 582 N.E.2d 972 (1992).

{¶ 29} At trial, evidence of the crimes charged in the Fernwood and West Weber indictments involved separate witnesses, separate victims, and separate evidence. Appellant does not point to any portion of the record that would suggest confusion,

overlap of testimony, or commingling of the victims, offenses, or charges. *See State v. Robinson*, 6th Dist. No. L-09-1001, 2010-Ohio-4713, ¶ 52.

{¶ 30} Further, the trial court cautioned the jury immediately prior to deliberations to consider each count and the evidence applicable to each count separately and to state its findings as to each count uninfluenced by its verdict on any other counts. "Absent evidence to the contrary, we indulge the presumption that the jury followed the instructions of the trial court." *State v. Brewer*, 2d Dist. Montgomery No. 15166, 1996 WL 78376, *5 (Feb. 23, 1996), citing *State v. Ferguson*, 5 Ohio St.3d 160, 163, 450 N.E.2d 265 (1983).

{¶ 31} Upon review of the in-camera hearing, we conclude that had the state's three witnesses testified, as anticipated, the crimes charged in the two indictments would have been "connected" under Crim.R. 8(A). Accordingly, at the time the trial court denied the pre-trial motion to sever—albeit based solely on the state's representations—it did not abuse its discretion. At the end of the state's case, there was not sufficient evidence to "connect" the crimes under Crim.R. 8(A). However, the evidence introduced by the state to support the crimes alleged in the two indictments was simple, direct, and capable of being separated. *See State v. Lewis*, 6th Dist. Nos. L-09-1224, L-09-1225, 2010-Ohio-4202, ¶ 33 ("Ohio appellate courts routinely find no prejudicial joinder where the evidence is presented in an orderly fashion as to the separate offenses or victims without significant overlap or conflation of proof."). Thus, the trial court did not abuse

its discretion in denying appellant's renewed motion to sever. Accordingly, appellant's first assignment of error is not well-taken.

Second Assignment of Error

{¶ 32} In his second assignment of error, appellant states:

> The trial court erred in allowing the introduction of prejudicial evidence by the state without the establishment of a proper foundation.

Appellant argues that printouts from Facebook and an audio recording downloaded from SoundCloud were introduced without establishing a proper foundation as to relevance, authenticity and authorship.

{¶ 33} At trial, the state presented, over objection, three exhibits purporting to represent printouts from appellant's public Facebook profile page. It also presented two exhibits purporting to represent printouts from public Facebook profile pages belonging to Kevin Martin and Stephaun Gaston. After careful consideration, and for the reasons set forth below, we find that the printouts presented by the state were relevant to the participation in a criminal gang charge under Evid.R. 401 and 104(B) and sufficiently authenticated under Evid.R. 901(A) and 104(A). Thus, the trial court did not abuse its discretion when it allowed the evidence to be presented to the jury. The trial court abused its discretion, however, when it allowed an audio recording downloaded from SoundCloud to be played for the jury. Nonetheless, admission of this evidence was harmless error. Appellant's second assignment of error is not well-taken.

A. What is Facebook?

{¶ 34} Facebook has been described as "a widely-used social-networking website * * * that allows users to connect and communicate with each other." *Ehling v. Monmouth-Ocean Hosp. Service. Corp.*, 961 F.Supp.2d 659, 662 (D.N.J.2013). "Every Facebook user must create a Profile Page, which is a webpage that is intended to convey information about the user." *Id.* An individual's "Profile Page can include the user's contact information; pictures; biographical information, such as the user's birthday, hometown, educational background, work history, family members, and relationship status; and lists of places, musicians, movies, books, businesses, and products that the user likes." *Id.* In addition to a profile page, each user has a "News Feed." *Id.* "The News Feed aggregates information that has recently been shared by the user's Facebook friends." Facebook pages are public, by default. *Id.* "However, Facebook has customizable privacy settings that allow users to restrict access to their Facebook content." *Id.*

{¶ 35} Facebook users often "post content—which can include text, pictures, or videos—to that user's profile page" delivering it to the user's subscribers. *Parker v. State*, 85 A.3d 682, 686 (Del.2014). These posts often include information relevant to a criminal prosecution: "party admissions, inculpatory or exculpatory photos, or online communication between users." *Id.* Authentication concerns arise in regard to printouts from Facebook "because anyone can create a fictitious account and masquerade under another person's name or can gain access to another's account by obtaining the user's

username and password," and, consequently, "[t]he potential for fabricating or tampering with electronically stored information on a social networking sight" is high. *Griffin v. State*, 419 Md. 343, 19 A.3d 415, 421 (2011). *See also Campbell v. State*, 382 S.W.3d 545, 550 (Tex.App.2012) ("Facebook presents an authentication concern * * * because anyone can establish a fictitious profile under any name, the person viewing the profile has no way of knowing whether the profile is legitimate."); *Smith v. State*, 136 So.3d 424, 433 (Miss.2014) (in regard to Facebook, authentication concerns arise "because anyone can create a fictitious account and masquerade under another person's name.").

B. What is SoundCloud?

{¶ 36} "SoundCloud" is an online social networking service and audio streaming platform that allows users to "share, like, annotate and comment on tracks, and embed a copy of the SoundCloud media player on their own website, blog or Facebook page." The London School of Economics and Political Science, LSE on SoundCloud, http://www.lse.ac.uk/newsAndMedia/videoAndAudio/SoundCloud.aspx (accessed Apr. 1, 2015). *See also* Whiteboard, *Soundcloud co-founder Eric Wahlforss: "How we built SoundCloud"* (Apr. 24, 2013), http://www.whiteboardmag.com/soundcloud-co-founder-eric-wahlforss-berlin-how-we-built-soundcloud/ (accessed Apr. 1, 2015). When a user registers for a free SoundCloud account, he or she can record and publish up to 120 minutes of audio content. Educational Technology and Mobile Learning, *Teachers' Guide to the Use of SoundCloud in Class* (July 19, 2014), http://www.educatorstechnology.com/2014/07/teachers-guide-to-use-of-soundcloud-in.html, (accessed Apr. 1, 2015).

C. Evidentiary Hurdles of Admitting Electronically Stored Information

{¶ 37} The appropriate way to authenticate electrically stored information (ESI) from social networking websites is a matter of first impression for this court. However, for the past several years, courts from other jurisdictions, have addressed the unique issues posed in attempting to introduce various forms of ESI into evidence.

{¶ 38} One of the earliest and most comprehensive cases addressing the evidentiary hurdles of admitting ESI is *Lorraine v. Markel American Insurance Co*., 241 F.R.D. 534 (D.Md.2007). In *Lorraine*, the court identifies and discusses all of the issues a court may need to consider in determining admissibility of ESI under the Federal Rules of Evidence. While the opinion goes into great detail regarding the "evidentiary hurdles," it summarizes its finding as follows:

> Whenever ESI is offered as evidence, either at trial or in summary judgment, the following evidence rules must be considered: (1) is the ESI relevant as determined by Rule 401 (does it have any tendency to make some fact that is of consequence to the litigation more or less probable than it otherwise would be); (2) if relevant under 401, is it authentic as required by Rule 901(a) (can the proponent show that the ESI is what it purports to be); (3) if the ESI is offered for its substantive truth, is it hearsay as defined by Rule 801, and if so, is it covered by an applicable exception (Rules 803, 804, and 807); (4) is the form of the ESI that is being offered as evidence an original or duplicate under the original writing rule, or if not, is there

> admissible secondary evidence to prove the content of the ESI (Rules 101-108); and (5) is the probative value of the ESI substantially outweighed by the danger of unfair prejudice or one of the other factors identified by Rule 403, such that it should be excluded despite its relevance. Preliminarily, the process by which the admissibility of ESI is determined is governed by Rule 104, which addresses the relationship between the judge and the jury with regard to preliminary fact finding associated with the admissibility of evidence. Because Rule 104 governs the very process of determining admissibility of ESI, it must be considered first. *Id.* at 538.

{¶ 39} Since *Lorraine*, several courts have evaluated the admissibility of evidence from social media networking websites under the Federal Rules and comparable state rules, with mixed results. *See, e.g., People v. Beckley*, 185 Cal.App.4th 509, 541, 110 Cal.Rptr.3d 362 (2010) (recognizing ease of altering digital photographs and requiring expert testimony to authenticate photographs taken from appellant's MySpace account); *Griffin v. State*, 419 Md. 343, 19 A.3d 415 (Md.2011) (circumstantial evidence of MySpace user's nickname, birthdate and a photograph of the user "in an embrace" with the defendant, not sufficient "distinctive characteristics" for authentication, "given that someone other than [defendant's girlfriend] could have not only created the site, but also posted the comment at issue"), *Tienda v. State*, 358 S.W.3d 633 (Tex.Crim.App.2012) (internal content of MySpace website posting, including photographs, comments, and music, was sufficient circumstantial evidence to establish a prima facie case such that a

reasonable juror could have found that the social media page was created and maintained by appellant); *People v. Lenihan*, 911 N.Y.S.2d 588 (N.Y. Sup.Ct.2010) (photographs downloaded from MySpace by victim's mother were not properly authenticated in light of the ability to "photo shop"); *Smith v. State*, 136 So.3d 424, 433 (Miss.2014) (name and photograph on Facebook printout not sufficient to link communication to the purported author); *State v. Eleck*, 130 Conn.App. 632, 23 A.3d 818, 823 (2011); *Parker v. State*, 85 A.3d 682, 688 (Del.2014) (once the trial court determines there is evidence sufficient to support a finding that the Facebook evidence is what its proponent claims it to be, the jury will decide whether to accept or reject the evidence); *People v. Glover*, ___ P.3d ___, 2015 WL 795690 (Colo.App.2015) (account name, phone number, photographs, and content of messages sufficient under Rule 901(b) to conclude Facebook account belonged to appellant and that he sent the messages contained therein). While these cases present widely disparate outcomes, they all utilize traditional means to authenticate ESI from social networking websites.

{¶ 40} The author of the *Lorraine* decision, the Honorable Paul W. Grimm[4], has collaborated on a number of articles detailing the admissibility of ESI. *See* Hon. Paul W. Grimm, et al., *Back to the Future: Lorraine v. Markel American Insurance Co. and New Findings on the Admissibility of Electronically Stored Information*, 42 Akron L. Rev. 357

[4] The Honorable Paul W. Grimm is the Chief United States Magistrate Judge for the United States District Court for the District of Maryland.

(2009) ("*Grimm I*"). *See also* Hon. Paul W. Grimm, et al., *Authentication of Social Media Evidence*, 36 Am.J. Trial Advoc. 433 (2013) ("*Grimm II*").

{¶ 41} In *Grimm II*, the authors discuss the two lines of cases that have emerged in recent years. *Id.* at 441. "One line of cases sets an unnecessarily high bar for the admissibility of social media evidence by not admitting the exhibit unless the court definitively determines that the evidence is authentic." *Id.* *See also Griffin v. State*, 19 A.3d 415 (Md.2011); *Commonwealth v. Wallick*, No. CP-67-CR-5884-2010 (Pa.Ct.Com.Pl. Oct.2011); and *People v. Beckley*, 110 Cal.Rptr.3d 362 (Ct.App.2010). "Another line of cases takes a different tact, determining the admissibility of social media evidence based on whether there was sufficient evidence of authenticity for a reasonable jury to conclude that the evidence was authentic." *Grimm II* at 441. *See Tienda v. State*, 358 S.W.3d 633 (Tex.Crim.App.2012); *State v. Assi*, No. 1 CA-CR 10-0900, 2012 WL 3580488 (Ariz.Ct.App. Aug. 21, 2012); *People v. Valdez*, 135 Cal.Rptr.3d 628 (Ct.App.2011); and *People v. Clevenstine*, 891 N.Y.S.2d 511 (N.Y.App.Div.2009). In *Grimm II*, the authors suggest that the approach taken in the second line of cases more appropriately considers the necessary interplay between Rules 901 and 104(a) and (b) of the Federal Rules of Evidence. *Grimm II* at 455. The authors conclude:

> It is clear that the best approach for authenticating and admitting social media evidence is to follow Rules 104(a) and (b). Following such an approach, courts consider evidence from all sources (even if not from a live witness) – including documents, whether electronic or hard copy – on a

continuum. That is, clearly authentic evidence is admitted, clearly inauthentic evidence is excluded, and everything in between is conditionally relevant and admitted for the jury to make the final determination of authenticity. *Id.* at 465.

D. Ohio Law

{¶ 42} In Ohio, preliminary questions of admissibility are governed by Evid.R. 104[5]. This rule provides, in relevant part, as follows:

> (A) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (B). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> (B) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

{¶ 43} Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less

[5] Evid.R. 104 is identical to the Federal Rule counterpart discussed in *Grimm I*. The Federal Rule counterpart discussed in *Grimm II* was amended, effective December 1, 2011.

probable than it would be without the evidence." Evid.R. 401. Relevant evidence is admissible under Evid.R. 402.

{¶ 44} The authenticity requirement is satisfied by "evidence sufficient to support a finding that the matter in question is what the proponent claims." Evid.R. 901(A). "Evid. R. 901(B) and 902 establish methods by which a document may be authenticated by extrinsic evidence or by which it may be self-authenticated so extrinsic evidence is not required because the document possesses on its face indicia of authenticity which are sufficient to support the finding that the document is what it purports to be." *State v. Smith*, 63 Ohio App.3d 71, 74, 577 N.E.2d 1152 (11th Dist.1989).

{¶ 45} Previously, we described the Evid.R. 901(A) authentication requirement in a per curium opinion as follows:

> "[T]he showing of authenticity is not on a par with more technical evidentiary rules, such as hearsay exceptions, governing admissibility. Rather, there need be only a prima facie showing, to the court of authenticity, not a full argument on admissibility." Thus, once a prima facie showing has been made to the court that a document is what its proponent claims, it should be admitted. At that point the burden of going forward with respect to authentication shifts to the opponent to rebut the prima facie showing by presenting evidence to the trier of fact which would raise questions as to the genuineness of the document. The required prima facie showing of authentication need not consist of a preponderance of the

> evidence. Rather, all that is required is substantial evidence from which the trier of fact might conclude that a document is authentic. * * * "[I]t is the [trier of fact] who will ultimately determine the authenticity of the evidence, not the court." The only requirement is that there has been substantial evidence from which [the trier of fact] could infer that the document was authentic. *Hartford Insurance Co. v. Parker*, 6th Dist. No. L-82-181, 1982 WL 6662, *7 (Dec. 3, 1982), quoting *Zenith Radio Corp. v. Matsushita Elec. Indus. C*o., 505 Fed.Supp. 1190, 1219 (E.D.Penn.1980).

{¶ 46} "The evidence necessary to support a finding that the document is what a party claims it to be has a very low threshold, which is less demanding than the preponderance of the evidence." *State v. White*, 4th Dist. Scioto No. 03CA2926, 2004-Ohio-6005, ¶ 61, quoting *Burns v. May*, 133 Ohio App.3d 351, 355, 728 N.E.2d 19 (12th Dist.1999). "Circumstantial evidence, as well as direct, may be used to show authenticity." *State v. Paster*, 2014-Ohio-3231, 15 N.E.3d 1252, ¶ 32 (8th Dist.), quoting *State v. Pruitt*, 8th Dist. Cuyahoga No. 98080, 2012-Ohio-5418, ¶ 10.

{¶ 47} Our interpretation of the authentication requirement in *Hartford Insurance Co., supra,* is in line with *Lorraine* in that "because authentication is essentially a question of conditional relevancy, the jury ultimately resolves whether evidence admitted for its consideration is that which the proponent claims." *Lorraine*, 241 F.R.D. at 539, quoting *United States v. Branch*, 970 F.2d 1368, 1370 (4th Cir.1992). Thus, we believe the less stringent approach to authentication of social media outlined in *Grimm II* is the

proper approach here. In other words, a trial court "need not find that the evidence is necessarily what the proponent claims, but only that there was sufficient evidence that the jury might ultimately do so." *Lorraine* at 542, quoting *United States v. Safavian*, 435 F.Supp.2d 36, 38 (D.D.C. 2006). As stated above, once the prima facie threshold is met, "the burden of going forward with respect to authentication shifts to the opponent to rebut the prima facie showing by presenting evidence to the trier of fact which would raise questions as to the genuineness of the document." *Hartford Insurance Co.* at *7, quoting *Zenith*, 505 Fed.Supp. at 1219.

E. Admissibility of Printouts from Public Facebook Profile Pages

{¶ 48} We turn now to the admissibility of printouts from the Facebook profile pages purporting to belong to appellant, Martin, and Gaston. We note that under this assignment of error our discussion is limited to the trial court's rulings relating to the authenticity of the printouts and the state's use of the images contained thereon to identify the appellant as the perpetrator and then demonstrate appellant's association with known gang members. The subject Facebook profile pages contain few words beyond those discussed below. Thus, our discussion and analysis applies only to the very narrow use of public Facebook profile pages as they were utilized in this matter.

{¶ 49} In his brief, appellant asserts that neither Detective William Noon nor Detective Bart Beavers had sufficient personal knowledge about the ownership and control of the Facebook profile pages to meet the threshold admissibility requirements set forth in Evid.R. 901(B)(1). Courts have interpreted this subsection of the rule to allow

"'any competent witness who has knowledge that a matter is what its proponent claims may testify to such pertinent facts, thereby establishing, in whole or in part, the foundation for identification.'" *Secy. of Veterans Affairs v. Leonhardt*, 3d Dist. Crawford No. 3-14-04, 2015-Ohio-931, ¶ 43, quoting *TPI Asset Mgt. v. Conrad-Eiford*, 193 Ohio App.3d 38, 950 N.E.2d 1018, 2011-Ohio-1405, ¶ 15 (2d Dist.). In response, the state asserts that printouts from the public Facebook profile pages were properly authenticated under Evid.R. 901(B)(4). This subsection of the rule explains that "[a]ppearance, contents, substance, internal patterns or other distinctive characteristics, taken in conjunction with the circumstances" conform with the authentication requirement. *Id.* We believe that a combination of both personal knowledge of the appearance and substance of the public Facebook profile pages, taken in conjunction with the following direct and circumstantial evidence was sufficient to meet the threshold admissibility requirement set forth in Evid.R. 901(B)(1).

{¶ 50} Detective Beavers testified that it was clear from Limmie's first interview that the individuals involved in the Fernwood shooting were from the Moody Manor apartment complex. Within 24 hours of the shooting, Limmie picked both Stephaun Gaston and Kevin Martin out of a photo array. Within a few weeks of the shooting, Detective Beavers learned from one of Limmie's family members that Gaston and Martin had Facebook accounts. Detective Beavers explained:

> There's a search mechanism on Facebook that allows you to put in different search terms, for example, if somebody's name you can search by

> last name, by first name, by combination of first and last name, or in this case the majority of them had Young Money that was part of their name, so if I punch in Young Money I could see anybody that would have used that combination of letters that would have maybe been in the Toledo area. So I did kind of a variety of searches to come up with that.

{¶ 51} When Detective Beavers searched for the two individuals identified by Limmie, he was able to locate Facebook profile pages of individuals claiming residence in Toledo and utilizing terminology associated with the Young Money subsection of the Moody Manor Bloods. Detective Beavers explained that when he searched for Gaston aka "Oozie," he found a public Facebook profile page utilizing the username "Oozie Montana YungSavage Mayor." When he searched for Martin aka "Kfifty," Detective Beavers found the public Facebook profile page utilizing the username "Kfifty Youngmoney Boss."

{¶ 52} On November 1, 2012, Detective Beavers created printouts of the Facebook profile pages. At trial, Detective Beavers indicated that other than minor formatting issues, state's exhibit Nos. 111 and 112 accurately reflected the Facebook profile pages he viewed on his computer screen and attributed to Gaston and Martin, respectively.

{¶ 53} On December 18, 2012, Limmie contacted Detective Beavers indicating he had been on Facebook and found the man who held a gun to his face. According to Detective Beavers, Limmie indicated that "[h]e had actually seen pictures of Traquawn

Gibson and that he saw the lips and the lips that were seen on Facebook were the lips of the individual that had the gun that shot him and Deonta Allen that night." Once again, Limmie was shown a photo array of possible suspects by a blind administrator. This time, however, the top half of the suspects' faces were covered up. When asked if any of the modified photos resembled the man who held a gun to his face, Limmie picked out a photo of appellant.

{¶ 54} Detective Beavers testified that on February 5, 2013, he created printouts of the "Traquawn Gibson YoungMoney" Facebook profile page. Detective Beavers further testified that state's exhibit Nos. 113, 114, and 115 accurately reflect the Facebook profile page he viewed on his computer screen and that he attributed to appellant.

{¶ 55} Detective William Noon is a certified gang specialist on the Toledo Police Gang Task Force. He testified that there are 18 documented street gangs in Toledo, one of which is known as the Moody Manor Bloods. Detective Noon explained, "the Moody Manor is a low income housing project right here in Central Toledo and it's called the Moody Manors so [the members] call themselves the Moody Manor Bloods."

{¶ 56} Detective Noon indicated that during his decade on the task force, he has dealt with the Moody Manor Bloods "hundreds of times." The factions or subgroups within the Moody Manor Bloods call themselves "Kent Head," "Young Money," or "Manor Boyz."

{¶ 57} Detective Noon testified that appellant's street name is "Hot Boy" and that appellant is a member of the Young Money subgroup of the Moody Manor Bloods.

Detective Noon indicated that through his work on the Gang Task Force he had been aware of appellant for at least three years. While performing surveillance as a gang task force investigator, Detective Noon observed appellant with known Moody Manor Blood members, i.e., Keshawn Jennings, Antwaine Jones and James Moore, in a park across the street from the Moody Manor apartment complex.

{¶ 58} Detective Noon testified that the Gang Task Force database includes information on all known and suspected gang members in the area. According to information compiled in the database, appellant admitted his membership to the Moody Manor Bloods on at least two separate occasions to Toledo police officers. Detective Noon further indicated that on one occasion appellant "was stopped wearing a tribute shirt to Montrese Moore who was a Moody Manor Blood that was killed."

{¶ 59} Detective Noon testified that Facebook is an important investigative tool because it shows the associations and nicknames of known and suspected gang members. State's exhibit No. 114 is a printout of a color photograph depicting ten young black men in what appears to be the stands of a sporting event. The printout is dated November 1, 2012, and was taken from the "Traquawn Gibson Young Money" Facebook profile page. Detective Noon identified appellant sitting with known gang members, some of whom are displaying Moody Manor gang signs.

{¶ 60} State's exhibit No. 115 is a screenshot of artwork taken from the "Traquawn Gibson Young Money" Facebook profile page. When questioned by the state, Detective Noon provided the following testimony about the exhibit:

Q. Could you tell us what you are seeing in that exhibit?

A. That's I would call it a monicker for the Moody Manor Boyz.

Q. What do you mean by a monicker?

A. It just shows his affiliation with the Moody Manor or I should say it has names that I'm familiar with nicknames of street gang members from the Moody Manors and talks about their block, 2200 block Kent, V block Sherman which is all the streets that's around the Moody Manors.

* * *

Q. In your investigation and your specialization with the gang task force, what does that moniker, which gang does that represent?

A. It has a Y and M and stands for Young Money and it says 2200 so it would stand for 2200 block of Kent, Moody Manor Bloods and the Young Money Group.

Q. And I believe you testified before that [appellant] his street name is Hot Boy; is that correct?

A. That's correct.

Q. Is that nickname contained within that graphic you are seeing?

A. Yes.

Q. Okay. And you also told us about Kfifty, is his street name depicted in that graphic you are seeing?

A. Kfifty is in this, yes.

Q. Do you recognize any of the other street names contained in that graphic?

A. Yeah, Pete is Pete Mohammed, he's a Moody Manor Blood. Dee gotti is Deshaun Gott. D-Crisp is Darious Crisp, Monster is Dewaun Wilson. It says Flocka which is David Adams, Tay gotti is Deonta Gott. I'm not sure of a couple of the other ones though.

{¶ 61} In regard to the printout from the "Oozie Montana YungSavage Mayor" Facebook profile page, Detective Noon identified a photograph depicting Stephaun Gaston. When asked whether the profile name had any gang significance, Detective Noon stated:

Oozie is his street nickname. That is what he goes by. And Young Savage is something they claim to be. I mean there's – you hear Young Money, you'll hear that I'm a young savage which means he's a young guy and it refers to being a younger gang member.

{¶ 62} In regard to the printout from the "Kfifty Youngmoney Boss" Facebook profile page, Detective Noon identified a photograph of four men. He identified one of the men as Kevin Martin. When asked whether the Facebook profile page had any gang significance, Detective Noon stated:

I see where it says Young Money which is a subset of the Moody Manors or that is what we believe to be and we also see what my

interpretation is they are making and forming an M with their fingers * * *

and so they are showing it stands for the M's in Moody Manor.

{¶ 63} In regard to state's exhibit No. 113, a printout from the "Traquawn Gibson YoungMoney" Facebook profile page, Detective Noon identified a photograph of appellant.

{¶ 64} On cross-examination Detective Noon indicated that he did not "know for fact" who created the above mentioned Facebook pages or what computer was used to create them. He further admitted that he did not "know for sure" whether appellant had any control over the Facebook pages associated with the profile named "Traquawn Gibson YoungMoney" or whether Stephaun Gaston and Kevin Martin had any control over the Facebook pages associated with the profile names "Oozie Montana YungSavage Mayor" and "Kfifty Youngmoney Boss."

{¶ 65} At trial, Limmie explained that "on Kent" is a phrase utilized by members of the bloods street gang. When appellant said, "on Kent, give it up" to him on October 18, 2012, Limmie knew he was being robbed by a Moody Manor Blood.

{¶ 66} Detective Noon testified that the phrase, "on Kent" is significant because only the Moody Manor Bloods use the phrase. He indicated that the phrase "is used for several different things. It could be said as on Kent as in this is who is doing whatever is being done at the time. I'm on Kent which I'm claiming to be a Moody Manor Blood or it could mean that's the truth, on Kent, I'm telling you the truth."

{¶ 67} In regard to the shooting at 32 West Weber Street, Eric Pinkham, a paramedic on the scene, testified that while he was assisting appellant to the life squad, appellant began "talking out loud." Pinkham testified:

> He seemed – he said he blamed his gangster lifestyle for what happened to I guess it was his girlfriend and that her parents were going to blame him I think and it was about some other shooting, there was some other shooting that he was involved with that something retaliation, I was confused.

{¶ 68} Detective Kermit Quinn testified that hours after C.J.'s shooting, appellant admitted his association with the Moody Manor Boys.

{¶ 69} Finally, according to Detective Beavers, the internal content of the subject Facebook pages had been made private under the privacy settings utilized by the owners of the accounts. Thus, only a limited amount of "public" content was available to him. This information is relevant to the authenticity of the accounts because it demonstrates that the accounts' creators asserted control over the internal content of the websites. Further, that the owners utilized unique usernames and chose to display certain photographs on the publicly accessible portions of the accounts suggests that the owners did not consider the pictures misleading or falsified. Together, these factors tend to support the genuineness of the postings.

{¶ 70} Considering all of the evidence cited above—including, but not limited, to the unique street names, gang terminology, photos, artwork, and gang signs utilized on

the subject public Facebook profile pages in conjunction with both direct and circumstantial evidence of the proposed owners' gang affiliation—we find that substantial evidence was submitted from which a reasonable juror could conclude that the various Facebook profile pages were attributable to appellant, Gaston, and Martin. Thus, the trial court did not abuse its discretion in admitting the evidence.

F. Admissibility of SoundCloud Soundtrack

{¶ 71} We turn now to the admissibility of the audio recording downloaded from SoundCloud.

{¶ 72} In his testimony before the jury, Detective Noon indicated that during his investigation into the Fernwood shooting, he became familiar with a song entitled "Wooty Woo La La La" a recording of which he found on SoundCloud. When asked to explain SoundCloud, Detective Noon indicated:

> Sound Cloud is a website that is new to me within the last year, year and half where we're finding a lot of gang related music on and I don't know if it's uploaded and how they upload it or you have to be a member of Sound Cloud but it's a free site that you can go to and listen to music.

{¶ 73} Detective Noon indicated that when he became aware of the song, he searched "Google" which took him to SoundCloud. He explained what he saw when he reached the song on SoundCloud: "It show up – it shows up the song and it will say who it's made by and I don't know the exact names but I know there's a Trappin G and Juan B, Young Money to Little Head. I know that's most of the terms that are in that."

{¶ 74} When asked why the song was significant, Detective Noon provided the following testimony:

A. We were able to listen to the song, only some of the lyrics, and it mentions [appellant] in there, Hot Boy, and it mentions the word fuck Tay as in as far as Mr. Allen who was deceased at the time.

Q. Okay. Does it mention any names of streets in that song at all?

A. It mentions some names of streets, I know Kent is mentioned and I believe it mentions Fernwood too.

Q. And you stated that the street name of Hot Boy is mentioned in that song as well?

A. It does say Hot Boy, yes

Q. Okay. Song mentions killing crabs; is that right?

A. That's correct.

Q. Okay. * * * can you tell us what crabs are, what that signifies?

A. * * * If you're a Crip and someone calls you a crab it's very disrespectful to a Crips gang member. * * * .

{¶ 75} Over trial counsel's objection, the state was allowed to introduce a recorded copy of the song "Wooty Woo La La La." The trial court delivered the following limiting instruction before the song was played in open court:

I want to instruct you that this tape which is identified as Exhibit Number 116 is played in reference to your consideration as it relates to

> Count 4 of the charge and that count is referred to as participating in a criminal gang. It cannot be used for any purpose to identify the defendant as the perpetrator as to Count 1 which is the charge of murder as it relates to the victim Deonta Allen.

{¶ 76} Detective Noon testified that while he did have an opportunity to listen to the song he did not "have the occasion to speak to any known Moody Manor Bloods gang members" about it. On cross-examination Detective Noon indicated that he did not know when the song was written or when it was uploaded to the SoundCloud webpage.

{¶ 77} Two significant "evidentiary hurdles" are triggered by this evidence: authenticity and hearsay. As to the latter, it is clear that the song is being offered for its substantive truth, in other words, the song was introduced because its lyrics are significant to the gang's involvement in the shootings alleged in the Fernwood indictment. Thus, it is hearsay as defined by Evid.R. 801 and does not appear to be covered by an applicable exception. As to authenticity, we find that the state failed to present substantial evidence from which a reasonable juror could conclude that the song was attributable to a member of the Moody Manor Bloods. Pursuant to the above, we find that the trial court abused its discretion when it allowed the song into evidence. Any error, however, in its admission was harmless. We find no reasonable probability that the outcome of the trial would have been different had the song been excluded.

Third Assignment of Error

{¶ 78} In his third assignment of error, appellant states:

> The trial court erred to the prejudice of Appellant in overruling Appellant's Rule 29 motion for acquittal on the charge of participation in a criminal gang.

We disagree.

{¶ 79} Civ.R. 29(A) provides:

> The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

{¶ 80} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally adequate to support a jury verdict as to all elements of the crime. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). The proper analysis under a sufficiency of the evidence standard is "'whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.'" *State v. Williams*, 74 Ohio St.3d 569, 576, 660 N.E.2d 724 (1996), quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. In order to

affirm the denial of a Crim.R. 29 motion, we need only find that there was legally sufficient evidence to sustain the guilty verdict. *Thompkins* at 386.

{¶ 81} Appellant asserts that his conviction for participation in a criminal gang activity is based upon insufficient evidence because "no causal relationship or connection between the charges and Appellant's involvement with the Manor Boyz was established * * * and any connection with the Manor Boyz was through evidence improperly introduced as discussed in Appellant's Second Assignment of Error."

{¶ 82} R.C. 2923.42(A) provides:

> No person who actively participates in a criminal gang, with knowledge that the criminal gang engages in or has engaged in a pattern of criminal gang activity, shall purposely promote, further, or assist any criminal conduct, as defined in division (C) of section 2923.41 of the Revised Code.

{¶ 83} R.C. 2923.41(C) defines "criminal conduct" as "the commission of, an attempt to commit, a conspiracy to commit, attempt to commit, conspire to commit, or be in complicity in the commission of an offense listed in division (B)(1)(a), (b), or (c) of this section * * *." The offenses listed in R.C. 2923.41(B)(1) are "(a) [a] felony * * * (b) [a]n offense of violence * * * [and] (c) [a] violation of section 2907.04, 2909.06, 2911.211, 2917.04, 2919.23, or 2919.24 of the Revised Code, section 2921.04 or 2923.16 of the Revised Code, section 2925.03 of the Revised Code if the offense is trafficking in marihuana, or section 2927.12 of the Revised Code."

{¶ 84} In addition to the admissible evidence discussed in appellant's second assignment of error, it is important to note that the jury found appellant guilty of the murder of Deonta Allen, felonious assault, and aggravated robbery. Pursuant to R.C. 2901.01(A)(9), murder (2903.02); felonious assault (2903.11); and aggravated robbery (2911.01) are offenses of violence. According to testimony presented at trial, appellant committed these crimes in the presence of known gang members, i.e., Stephaun Gaston and Kevin Martin, while uttering a phrase specific to the Moody Manor Bloods, i.e., "on Kent."

{¶ 85} Furthermore, when asked whether he had ever been involved in the prosecution of known Moody Manor Bloods for crimes of violence, Detective Noon indicted that he was involved in 40-50 prosecutions involving "[m]urder, felonious assault, aggravated assault, [and] breaking into habitations." Over objections, the trial court allowed the state to produce certified judgment entries in criminal cases involving three known Moody Manor Bloods: Keshawn Jennings, Antwaine Jones[6], and Stephaun Gaston[7].

[6] In certified judgment entries dated August 5, 2013, the trial court found co-defendants Keshawn Jennings and Antwaine Jones guilty of aggravated murder, murder, attempted murder, improperly discharging a firearm at or into a habitation, and four counts of felonious assault. *See State v. Jennings*, Lucas C.P. No. CR0201202661 (Aug. 15, 2013), *State v. Jones*, Lucas C.P. No. CR0201202661 (Aug. 15, 2013).

[7] In a certified judgment entry dated March 21, 2013, the trial court found Stephaun Gaston guilty of attempted burglary. *See State v. Gaston*, Lucas C.P. No. CR0201202855. Detective Noon testified that Gaston's conviction involved Scott High School and that appellant was a co-defendant in that case.

{¶ 86} Reviewing the evidence in a light most favorable to the state, any rational trier of fact could have found the essential elements of participation in a criminal gang proven beyond a reasonable doubt. There was sufficient, admissible evidence from which the jury could conclude that appellant, while he was an active member of the Moody Manor Bloods, which he knew engaged in a pattern of criminal conduct, purposely committed criminal conduct. Thus, his conviction for participating in a criminal gang in violation of R.C. 2923.42(A) was supported by sufficient evidence. Appellant's third assignment of error is not well-taken.

Fourth Assignment of Error

{¶ 87} In his fourth assignment of error, appellant states:

> The trial court abused its discretion and erred to the prejudice of Appellant at sentencing by imposing financial sanctions without consideration of Appellant's ability to pay.

Appellant argues that the trial court erred in ordering him to pay court costs without first ascertaining his ability to pay such costs.

{¶ 88} Regarding costs of prosecution, R.C. 2947.23(A)(1)(a) provides: "In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution, including any costs under section 2947.231 of the Revised Code, and render a judgment against the defendant for such costs." This section "requires a sentencing court to impose the costs of prosecution against all convicted defendants." *State v. Wright*, 6th Dist. Wood No. WD-11-079, 2013-Ohio-1273, ¶ 5,

citing *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 917 N.E.2d 393, ¶ 8; *see also State v. Dupuis*, 6th Dist. Lucas No. L-12-1035, 2013-Ohio-2128, ¶ 13 ("Pursuant to R.C. 2947.23, the trial court is required to impose 'the costs of prosecution' on all convicted defendants, including those who are determined to be indigent for purposes of obtaining appointed defense counsel at trial."). Given the trial court's *obligation* to impose costs of prosecution under R.C. 2947.23, this court has held that "[t]he trial court is not required to hold a hearing or otherwise determine an offender's ability to pay before ordering him to pay costs." *State v. Reigsecker*, 6th Dist. Fulton No. F-03-022, 2004-Ohio-3808, ¶ 10, citing *State v. Fisher*, 12th Dist. Butler No. CA98-09-190, 2002-Ohio-2069.

{¶ 89} In light of the foregoing, we find that the trial court did not err by ordering appellant to pay the costs of prosecution. Appellant's fourth assignment of error is not well-taken.

Conclusion

{¶ 90} Based on the foregoing, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE

SPOLIATION OF EVIDENCE

FEDERAL APPLICATION

REMEDIES

- ASSESSING ATTORNEY FEES AND COSTS
- PRECLUDING EVIDENCE
- JURY INSTRUCTION (PERMISSIVE OR MANDATORY)
- GRANT OF SUMMARY JUDGMENT
- DISMISSAL OF THE CASE[1]

STANDARD FOR RELIEF

- A Federal Court in this circuit should apply federal law in determining whether spoliation sanctions are appropriate.[2]
- A party seeking sanctions based on the destruction of evidence must establish (1) that the party having control over the evidence had an **obligation to preserve** it at the time it was destroyed; (2) that the records were destroyed "with a **culpable state of mind**"; and (3) that the destroyed evidence was "**relevant**" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.[3]

  1) An **obligation to preserve** may arise when a party should have known that the evidence may be relevant to future litigation, but if there was no notice of pending litigation, the destruction of evidence does not point to consciousness of a weak case. [4]

  2) "The **culpable state of mind** factor is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to breach a duty to preserve it, or negligently."[5]

  3) To establish **relevance** under *Beaven*, the moving party must make "some showing indicating that the destroyed evidence would have been relevant to the contested issue."[6]

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[1] "Thus, a district court could impose many different kinds of sanctions for spoliated evidence, including dismissing a case, granting summary judgment, or instructing a jury that it may infer a fact based on lost or destroyed evidence." *Adkins*, 554 F.3d at 653 (citing *Vodusek*, 71 F.3d at 156).

[2] *Id.* at 652.

[3] *Beaven v. U.S. Dep't of Justice*, 622 F.3d 540, 553 (6th Cir. 2010) (citing *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002)

[4] *Id*. at 554.

[5] *Id*.

[6] *Yoder & Frey Auctioneers, Inc. v. EquipmentFacts, LLC*, 774 F.3d 1065.

COURT'S ACTION

It is within a district court's inherent power to exercise broad discretion in imposing sanctions based on spoliated evidence.[7]

A proper spoliation sanction should serve both fairness and punitive functions, but its severity should correspond to the district court's finding after a fact-intensive inquiry into a party's degree of fault under the circumstances. A party's degree of fault may range from innocence through the degrees of negligence to intentionality.[8]

The harsh sanctions of dismissal or ordering default judgment may be warranted upon a finding of bad faith.[9]

HEIGHTENED STANDARD FOR ELECTRONICALLY STORED INFORMATION

Fed. R. Civ. P. 37(e)(2) advisory committee's note to 2015 amendment explains that adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have.

STATE APPLICATION

REMEDIES

- INDEPENDENT TORT ACTION[10]
- SANCTIONS (ATTORNEY'S FEES AND COSTS, EXCLUDING EVIDENCE, ADVERSE INSTRUCTION, DISMISSAL AND GRANTING SUMMARY JUDGMENT)[11]

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[7] *Adkins* at 650.
[8] *Id.* at 652-53 (quoting *Welsh v. United States*, 844 F.2d 1239, 1246, (6th Cir. 1988).
[9] *Crown Battery Mfg. Co. v. Club Car, Inc.*, 2016 U.S. Dist. LEXIS 60776.
[10] "The Ohio Supreme Court has recognized that an independent tort cause of action exists for interference with or destruction of evidence, otherwise known as spoliation." *McGovern v. Kroger Co.*, 2015 Ohio Misc. LEXIS 8353 (Ohio C.P. Feb. 25, 2015).
[11] "A motion for sanctions for spoliation of the evidence is properly filed under Civ.R. 37." *Heinrichs v. 356 Registry*, 2015 Ohio Misc. LEXIS 7467 (Ohio C.P. Feb. 17, 2015).

STANDARD FOR RELIEF

INDEPENDENT TORT ACTION:

1) Pending or probable litigation involving the plaintiff,
2) Knowledge on the part of defendant that litigation exists or is probable,
3) W*illful* destruction of evidence by defendant designed to disrupt the plaintiff's case,
4) Disruption of the plaintiff's case, and
5) Damages proximately caused by the defendant's acts.[12]

SANCTIONS:

1) The evidence is relevant;
2) The offending party's expert had an opportunity to examine the unaltered evidence; and
3) That, even though the offending party was put on notice of impending litigation, this evidence was intentionally or negligently destroyed or altered without providing an opportunity for inspection by the proponent.[13]

COURT'S ACTION

If the court does find that spoliation of evidence did occur because the offending party failed to preserve the evidence, then the court must impose a sanction that is proportionate to the seriousness of the infraction under the facts of this particular case. [14]

The intent of the offending party, the level of prejudice, and the reasonableness of the offending party's action must all be balanced in fashioning a just remedy. [15]

WHEN TO BRING THE ACTION

In *Smith v. Howard Johnson* Co., 67 Ohio St. 3d 28, The Ohio Supreme Court held that a claim may be brought at the same time as the primary action.[16]

In clarifying *Smith*, The Ohio Supreme Court held that claims for spoliation of evidence may be brought after the primary action has been concluded only when evidence of spoliation is not discovered until after the conclusion of the primary action.[17]

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[12] *Patriot Water Treatment, LLC v. Ohio Dep't. of Natural Resources,* loth Dist. No. 13AP-370, 2013-Ohio-5398, ¶16.
[13] *Simeone v. Girard City Bd. of Educ.,* 171 Ohio App.3d 633, 2007-Ohio-1775, 872 N.E.2d 344, ¶¶69-711 (11 th Dist.).
[14] *Id*.
[15] *American States Ins. Co. v. Tokai-Seiki (H.K.), Ltd.*, 94 Ohio Misc. 2d 172.
[16] *Smith v. Howard Johnson Co*., 67 Ohio St. 3d 28, 615 N.E.2d 1037, 1993 Ohio LEXIS 1562, 1993-Ohio-229 (Ohio 1993).
[17] *Davis v. Wal-Mart Stores, Inc*., 93 Ohio St. 3d 488, 756 N.E.2d 657, 2001 Ohio LEXIS 2771, 2001-Ohio-1593 (Ohio 2001).

Federal Rules of Civil Procedure

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

- **(a) Motion for an Order Compelling Disclosure or Discovery.**
  - **(1)** *In General.* On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.
  - **(2)** *Appropriate Court.* A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.
  - **(3)** *Specific Motions.*
    - **(A)** To Compel Disclosure. If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.
    - **(B)** To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:
      - **(i)** a deponent fails to answer a question asked under Rule 30 or 31;
      - **(ii)** a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);
      - **(iii)** a party fails to answer an interrogatory submitted under Rule 33; or
      - **(iv)** a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.
    - **(C)** Related to a Deposition. When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.
  - **(4)** *Evasive or Incomplete Disclosure, Answer, or Response.* For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.
  - **(5)** *Payment of Expenses; Protective Orders.*
    - **(A)** If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing). If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:
      - **(i)** the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
      - **(ii)** the opposing party's nondisclosure, response, or objection was substantially justified; or
      - **(iii)** other circumstances make an award of expenses unjust.
    - **(B)** If the Motion Is Denied. If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

        - **(C)** If the Motion Is Granted in Part and Denied in Part. If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.
- **(b) Failure to Comply with a Court Order.**
    - **(1)** *Sanctions Sought in the District Where the Deposition Is Taken.* If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.
    - **(2)** *Sanctions Sought in the District Where the Action Is Pending.*
        - **(A)** For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:
            - **(i)** directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
            - **(ii)** prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
            - **(iii)** striking pleadings in whole or in part;
            - **(iv)** staying further proceedings until the order is obeyed;
            - **(v)** dismissing the action or proceeding in whole or in part;
            - **(vi)** rendering a default judgment against the disobedient party; or
            - **(vii)** treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.
        - **(B)** For Not Producing a Person for Examination. If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)–(vi), unless the disobedient party shows that it cannot produce the other person.
        - **(C)** Payment of Expenses. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.
- **(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.**
    - **(1)** *Failure to Disclose or Supplement.* If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
        - **(A)** may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
        - **(B)** may inform the jury of the party's failure; and
        - **(C)** may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)–(vi).
    - **(2)** *Failure to Admit.* If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

        - **(A)** the request was held objectionable under Rule 36(a);
        - **(B)** the admission sought was of no substantial importance;
        - **(C)** the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or
        - **(D)** there was other good reason for the failure to admit.
- **(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.**
    - **(1)** *In General.*
        - **(A)** Motion; Grounds for Sanctions. The court where the action is pending may, on motion, order sanctions if:
            - **(i)** a party or a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or
            - **(ii)** a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.
        - **(B)** Certification. A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.
    - **(2)** *Unacceptable Excuse for Failing to Act.* A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).
    - **(3)** *Types of Sanctions.* Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)–(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.
- **(e) Failure to Preserve Electronically Stored Information.** If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
    - **(1)** upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
    - **(2)** only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
        - **(A)** presume that the lost information was unfavorable to the party;
        - **(B)** instruct the jury that it may or must presume the information was unfavorable to the party; or
        - **(C)** dismiss the action or enter a default judgment.
- **(f) Failure to Participate in Framing a Discovery Plan.** If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

Ohio Civ. R. 37

Rule 37. Failure to make discovery; Sanctions

- **(A) Motion for an order compelling discovery.**
  - **(1) In general.** On notice to other parties and all affected persons, a party may move for an order compelling discovery. The motion shall include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make discovery in an effort to obtain it without court action.
  - **(2) Appropriate court.** A motion for an order to a party or a deponent shall be made to the court where the action is pending.
  - **(3) Specific motions.**
    - **(a) To compel a discovery response.** A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:
      - **(i)** A deponent fails to answer a question asked under Civ.R. 30 or Civ.R. 31;
      - **(ii)** A corporation or other entity fails to make a designation under Civ.R. 30(B)(5) or Civ.R. 31(A);
      - **(iii)** A party fails to answer an interrogatory submitted under Civ.R. 33;
      - **(iv)** A party fails to respond that inspection will be permitted--or fails to permit inspection--as requested under Civ.R. 34.
    - **(b) Related to a deposition.** When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.
  - **(4) Evasive or incomplete answer or response.** For purposes of division (A) of this rule, an evasive or incomplete answer or response shall be treated as a failure to answer or respond.
  - **(5) Payment of expenses; Protective orders.**
    - **(a) If the motion is granted.** If the motion is granted, the court shall, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court shall not order this payment if:
      - **(i)** The movant filed the motion before attempting in good faith to obtain the discovery without court action;
      - **(ii)** The opposing party's response or objection was substantially justified; or
      - **(iii)** Other circumstances make an award of expenses unjust.
    - **(b) If the motion is denied.** If the motion is denied, the court may issue any protective order authorized under Civ.R. 26(C) and shall, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court shall not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.
    - **(c) If the motion is granted in part and denied in part.** If the motion is granted in part and denied in part, the court may issue any protective order authorized under Civ.R. 26(C) and may, after giving an opportunity to be heard, apportion reasonable expenses for the motion.
- **(B) Failure to comply with order; Sanctions.**

- **(1) For not obeying a discovery order.** If a party or a party's officer, director, or managing agent or a witness designated under Civ.R. 30(B)(5) or Civ.R. 31(A) fails to obey an order to provide or permit discovery, including an order made under Civ.R. 35 or Civ.R. 37(A), the court may issue further just orders. They may include the following:
  - **(a)** Directing that the matters embraced in the order or other designated facts shall be taken as established for purposes of the action as the prevailing party claims;
  - **(b)** Prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
  - **(c)** Striking pleadings in whole or in part;
  - **(d)** Staying further proceedings until the order is obeyed dismissing;
  - **(e)** Dismissing the action or proceeding in whole or in part;
  - **(f)** Rendering a default judgment against the disobedient party; or
  - **(g)** Treating as contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;
- **(2) For not producing a person for examination.** If a party fails to comply with an order under Civ.R. 35(A) requiring it to produce another person for examination, the court may issue any of the orders listed in Civ.R. 37(B)(1), unless the disobedient party shows that it cannot produce the other person.
- **(3) Payment of expenses.** Instead of or in addition to the orders above, the court shall order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

- **(C) Failure to supplement an earlier response or to admit.**
  - **(1) Failure to supplement.** If a party fails to provide information or identify a witness as required by Civ.R. 26(E), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
    - **(a)** may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
    - **(b)** may inform the jury of the party's failure; and
    - **(c)** may impose other appropriate sanctions, including any of the orders listed in Civ.R. 37(B)(1)(a) through (f).
  - **(2) Failure to admit.** If a party fails to admit what is requested under Civ.R. 36, and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court shall so order unless:
    - **(a)** The request was held objectionable under Civ.R. 36(A);
    - **(b)** The admission sought was of no substantial importance;
    - **(c)** The party failing to admit had a reasonable ground to believe that it might prevail on the matter; or
    - **(d)** There was other good reason for the failure to admit.
- **(D) Party's failure to attend its own deposition, serve answers to interrogatories, or respond to a request for inspection.**
  - **(1) In general.**
    - **(a) Motion; Grounds for sanctions.** The court may, on motion, order sanctions if:
      - **(i)** A party or a party's officer, director, or a managing agent or a person designated under Civ.R. 30(B)(5) or Civ.R. 31(A) fails, after being served with a proper notice, to appear for that person's deposition; or

        - **(ii)** A party, after being properly served with interrogatories under Civ.R. 33 or a request for inspection under Civ.R. 34, fails to serve its answers, objections, or written response.
    - **(b) Certification.** A motion for sanctions for failing to answer or respond shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.
  - **(2) Unacceptable excuse for failing to act.** A failure described in Civ.R. 37(D)(1)(a) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Civ.R. 26(C).
  - **(3) Types of sanctions.** Sanctions may include any of the orders listed in Civ.R. 37(B)(1)(a) through (f). Instead of or in addition to these sanctions, the court shall require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.
- **(E) Failure to provide electronically stored information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system. The court may consider the following factors in determining whether to impose sanctions under this division:
  - **(1)** Whether and when any obligation to preserve the information was triggered;
  - **(2)** Whether the information was lost as a result of the routine alteration or deletion of information that attends the ordinary use of the system in issue;
  - **(3)** Whether the party intervened in a timely fashion to prevent the loss of information;
  - **(4)** Any steps taken to comply with any court order or party agreement requiring preservation of specific information;
  - **(5)** Any other facts relevant to its determination under this division.

COURTROOM BASICS

INNS OF COURT
Benjamin Cardozo Team
April 17, 2012

Tonight we consider simple courtroom fundamentals
(or… *how not screwing up the easy things can make your life, your trial and your judge, happier*.)

Outline:

1. Impeaching a Witness
2. Refreshing Recollection – Fascinating Fast talk
3. Offer of Proof
4. Timeline - Summaries
5. Making a scene
6. Marking Exhibits
7. Diagram Exhibits
8. Business Records – Computer reports
9. Courtroom Decorum – vagaries and whims
10. Juror Challenge

1. Impeaching a witness

Knowing how to impeach a witness at trial is a necessary skill for any trial lawyer. You may remember the following phrase from your trial advocacy instructor: commit, credit, confront - the three Cs. First, you commit the witness to his statement on the stand that contradicts his sworn testimony. Then you credit the source of the statement, generally a deposition. And then you confront the witness with his own words. And then you stop. That's it.

Q: You say _____?
A: Yes.
Q: Are you sure?
A: Yes.
Q: You remember giving a deposition in this case?
A: Yes.
Q: You gave the deposition on _____?
A: Yes.
Q: At the deposition, you answered questions about this case?
A: Yes.
Q: And before you answered questions at your deposition, you raised your right hand and you swore to tell the truth?
A: Yes.
Q: Like you did today?
A: Yes.
Q: And you did tell the truth at your deposition?
A: Yes.
Q: I'm going to read from your deposition. Here's a copy so that you can read along. I'm reading from page ___ starting at line ____. Do you see where I will be reading from?
A: Yes.
Read the question and answer verbatim
Q: Did I read it right?
A: Yes.

2. Refreshing Recollection and Fast talk

Refreshing Recollection

I. 3 Common Mistakes When Attempting to Refresh Recollection
   a) Failure to have document marked as exhibit & show to opposing counsel (mark it even though you don't offer it into evidence)
   b) Failure to retrieve document after the witness has read it. (get the document back before you continue to ask witness questions)
   c) Failure to ask the witness "Do you recall or do you remember?"

II. Preparing your witness
   a) Explain to your witness that there is nothing wrong with failing to remember and reading a document to refresh recollection

b) Explain key words “do you remember?” “do you recall?” (better to state that they don’t remember then to give the wrong answer b/c then you can’t refresh recollection as witness has already answered the question).

III. FRE 612: Remember that anything used to refresh recollection, both while or before testifying, must be available to opposing counsel for use during cross-examination.

Fascinating Fast Talking

Always remember that it is important that everyone in the courtroom can hear and understand you. This goes for the judge, your client, opposing counsel and especially the Court Reporter!!! Slow down as you want to make a clear and accurate record.

3. Offer of Proof

The mechanics of making an offer of proof are straight-forward. The proponent simply needs to demonstrate the nature of the evidence with enough specificity so that the trial court, and ultimately the appellate court, can determine its admissibility. There are both formal and informal offers of proof both of which occur outside the presence of the jury.

The traditional way of making an offer of proof is the "formal" offer, in which counsel offers the proposed evidence or testimony by placing a witness on the stand, outside the jury's presence, and asking him questions to elicit with particularity what the witness would testify to if permitted to do so.

Alternatively, counsel may ask the trial court for permission to make representations regarding the proffered testimony. If counsel so requests, the court may--within its discretion--allow counsel to make such an informal offer of proof.

A trial court may deem an informal offer of proof sufficient if counsel informs the court, with particularity, (1) what the offered evidence is or what the expected testimony will be, (2) by whom it will be presented, and (3) its purpose. However, an informal offer is inadequate if counsel (1) "merely summarizes the witness' testimony in a conclusory manner" or (2) offers unsupported speculation as to what the witness would say. In deciding whether to permit an informal offer of proof, the court will ask itself the following questions: (1) Are counsel's representations accurate and complete? and (2) Would a better record be made by requiring counsel to make a formal offer of proof, even though doing so might be inconvenient and require more time?

Some judges will only allow formal offers of proof. While this approach is less convenient, a question-and-answer format is generally considered to be the best method. It is mandatory if the other side demands it.

The Nebraska Supreme Court has determined that even where no formal offer of proof is made they may consider the substance of the proposed testimony if the record otherwise is sufficient. *Deuth v. Ratigan*, 256 Neb. 419 (1999).

See Neb. Rev. Stat. § 27-103 re: Rulings on evidence; effect of erroneous ruling; objection; offer of proof; record of offer and ruling; hearing of jury; plain error.

The better trial practice is always to make an offer of proof when evidence is excluded. *Haines v. Mensen*, 233 Neb. 543, 446 N.W.2d 716 (1989).

Where a ruling excluding evidence is made, an offer of proof is generally a prerequisite to review on appeal unless it is apparent from the context within which the question was asked that the answer would have been material and competent. *Hulse v. Schelkopf*, 220 Neb. 617, 371 N.W.2d 673 (1985).

4. Summaries and time lines.

1. Introduction: A summary of voluminous material is specifically addressed by the rules of evidence. Commentators agree that it would often be impractical to require and entire mass of documents or entries to be inspected by the trier of fact or detailed by witnesses to them.

2. Applicable statues: A summary may be admissible under Neb. Rev. Stat. § 27-1006, which provides:

> The contents of voluminous writings, recordings, or photographs, which cannot conveniently be examined in court, may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The judge may order that they be produced in court.

3. References: "The purpose of Rule 1006 is to allow the use of summaries when the volume of documents being summarized is so large as to make their use impractical or impossible . . . [Citation omitted.] Thus, rule 1006 was designed to ameliorate a situation where a trier of fact would be confronted by reams of records or dozens upon dozens of documents to be digested for resolution of an issue. "Evidential use of . . . summaries rests within the sound discretion of the trial judge, whose action in allowing their use may not be disturbed by an appellate court except for an abuse of discretion." [Citations omitted.]" *Crowder v. Aurora Co-operative Elevator Co*., 223 Neb. 704, 717-718 (Neb. 1986)

4. Practice tips: *Crowder* also details the foundational requirements for a summary:

> 1. Reasonably identify the existing and underlying documents summarized, including identification of the ultimate source of documentary information contained in the proposed summary.
>
> 2. Show that the original documents or duplicates underlying the proposed summary and the data contained in those underlying documents are otherwise admissible evidence.
>
> 3. Have served a copy of the proposed summary on the opposing party, sufficiently in advance of intended use of the summary, and have provided the opposing party with a reasonable time and place for examination of the available documents underlying such summary.
>
> 4. Establish that the documents underlying the summary are voluminous.

A factual foundation, demonstrating a fulfillment of each of the four factors set forth above, is a condition precedent to admissibility of a written summary.

5. Making a scene - Maps and diagrams.

1. Introduction: The use of maps, diagrams, photos, experiments, video and other visual depictions for illustration or clarification are a bit different than the use of summaries of voluminous evidence (discussed in 7. below). While generally referred to as "an aid to the trier of fact" this evidence generally falls within the category of "demonstrative evidence".

2. Applicable statutes: Neb. Rev. Stat. § 27-401. Rule 401. 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.

3. References: Demonstrative exhibits are admissible if they (1) supplement the witness' spoken description of the transpired event, (2) clarify some issue in the case, and (3) are more probative than prejudicial. Demonstrative exhibits are inadmissible when they do not illustrate or make clearer some issue in the case; that is, where they are irrelevant, or where the exhibit's character is such that its probative value is substantially outweighed by the danger of unfair prejudice. *Benzel v. Keller Indus., Inc*., 253 Neb. 20, 567 N.W.2d 552 (1997).

The admission of demonstrative evidence is within the discretion of the trial court, and a judgment will not be reversed on account of the admission or rejection of such evidence unless there has been a clear abuse of discretion. *Am. Cent. City, Inc. v. Joint Antelope Valley Auth. (JAVA)*, 281 Neb. 742, 756 (2011).

Demonstrative exhibits are admissible if they supplement a witness' spoken description of the transpired event, clarify some issue in the case, and are more probative than prejudicial. Demonstrative exhibits are inadmissible when they do not illustrate or make clearer some issue in the case; that is, where they are irrelevant or where the exhibit's character is such that its probative value is substantially outweighed by the danger of unfair prejudice. *State v. Daly*, 278 Neb. 903 (2009); *Ford v. Estate of Clinton*, 265 Neb. 285, 656 N.W.2d 606 (2003)

Demonstrative Evidence, Presentation by the John Marshall Inn, April 12, 2011.

4. Practice tips.
   - Let your judge and opposing counsel know in advance.
   - Know what is needed to overcome any objections – most importantly foundation.
   - Judge, exhibit xx is offered as demonstrative evidence. Rule 401 allows relevant, accurate evidence that will aid the trier of fact and that clarifies issues and is more probative than prejudicial. This exhibit is a supplement to the testimony of the witness and will clarify that testimony.

6. Marking an on an Exhibit.

1. Applicable statutes:

Neb. Rev. Stat. § 27-401. Rule 401. 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.

Neb. Rev. Stat. § 27-1003. Rule 1003. A duplicate is admissible to the same extent as an original unless

(1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

2. References: See the discussion above on maps and diagrams. Demonstrative exhibits are admissible if they (1) supplement the witness' spoken description of the transpired event, (2) clarify some issue in the case, and (3) are more probative than prejudicial. Demonstrative exhibits are inadmissible when they do not illustrate or make clearer some issue in the case; that is, where they are irrelevant, or where the exhibit's character is such that its probative value is substantially outweighed by the danger of unfair prejudice. *Benzel v. Keller Indus., Inc*., 253 Neb. 20, 567 N.W.2d 552 (1997).

3. Practice Tips:

- Judge's preferences will differ. Ask the Court ahead of time about preferences, depending on your plans.

- If the exhibit is a diagram of the scene of the occurrence, for example, and you wish for more than one witness to mark on the exhibit to assist her testimony, consider having each witness mark on her own *separate* exhibit (a copy of the original) and at the very least, ensure you are using different colored markings for each witness, having the witness initial her writing.

- By using a copy of the original as a separate exhibit for marking, the original exhibit will remain in evidence, unedited, while an additional copy or copies of the same exhibit with witnesses markings can be offered as demonstrative evidence.

- If using the exhibit as demonstrative, simply lay foundation with questions such as:
  - Were you present?
  - Does this appear to be a fair and accurate representation of _____?
  - Do you believe that this exhibit will help and better explain for us your testimony regarding _____?

- Do not forget to make a formal record regarding the markings on the exhibits. Examples of questions that would assist the record are:
  - "Would you please take this *red* pen and place your initials in the upper right hand corner of Exhibit ___?" and after the witness has done so, ask something along the lines of, "Have you so placed your initials?" or at least, "Let the record reflect _____"

- If you are having the witness identify where certain events occurred or the position of objects not already clearly marked on the diagram, help your record and clarity by giving specific instruction on how you wish for the witness to specifically mark, e.g., "with a red circle", or "please write _____ where _____ was standing", etc.

- A variety of Ipad and other Apps easily allow editing of an existing document electronically. The Ipad app "Exhibit A" will allow this for nearly any format of exhibit, including photos. "PDF Expert", is another terrific tool for contracts or documents language that you wish to highlight for the fact-finder. If intending to use these, take the time *before* trial to visit the Judge's Courtroom to become familiar with the technology to avoid annoying delays.

- If allowed to mark on an original exhibit has already been offered previously, I would recommend re-offering the exhibit after the markings and of course, offering the exhibit if it is a new, separate exhibit.

7. Diagrams

See article 5 above.

8. Business Records.

Introducing the foundation for business records should be boiled down to a check list like:

- A record, in any form, of acts, events, conditions, opinions, or diagnosis
- Made at or near the time
- By, or from information transmitted by, a person with knowledge
- Kept in the course of a regularly conducted business activity
- Where it is the regular practice of the business activity to make the record
- Where the source of information or method to or circumstances of preparation indicate trustworthiness

All of the elements of foundation can be shown by the custodian or other qualified witness, or by proper certification.

Evidence admitted pursuant to the business records exception to the rule against hearsay is presumed to be trustworthy. Moreover, if foundation is laid for the business records exception, then the authentication requirements of Neb. Rev. Stat. § 27-901 (Reissue 2008) are also met. *State v. Nolan*, 283 Neb. 50 (Neb. 2012).

Neb. Rev. Stat. § 27-901 (Reissue 2008) requires only sufficient facts that the evidence is what its proponent claims it to be. If sufficient foundation is laid to satisfy the business records exception, then the relatively low threshold requirement of § 27-901(1) has also been met. *Id.*

Computerized printouts that are merely the visual counterparts to routine electronic business records are usually hearsay, but they can be admissible under the business records exception.
State v. Robinson, 272 Neb. 582, 724 N.W.2d 35 (2006).

9. Decorum

Many courts, especially on the federal level, have adopted a court room decorum policy. Before you appear you should be well versed in those policies. Those policies may specify when to stand or sit, how to address the court, how to refer to litigants and witnesses, how to approach the bench, how to mark, offer and display exhibits, how to make objections (while standing or after approaching the bench), as well as other basic principles concerning courtroom behavior and decorum.

If the particular court has not adopted a specific courtroom decorum policy a brief conversation with the court's bailiff or court reporter, in advance, is a savvy practice. In any event, counsel should review courtroom decorum policies to be familiar with the types and nature of practices to be aware of is a trial begins and proceeds.

10. Challenges for Cause: The Correct Way is the Judge's Way
(as long as you make a record)

Defendant's Attorney: Prospective Juror #2, do you believe you can be fair and impartial in light of the allegations against the defendant?

Prospective Juror (YC): "The plaintiffs say this defendant stole their life savings??? Well, I don't know your client, but I know his type. Fair and impartial? Yeah, sure, whatever . . ."

(Defendant's Attorney is frozen . . . speech bubble: "Uh oh. Do I approach the bench? Make a challenge for cause right here? This guy's gotta go.")

Two possible ways to handle:

1) Defendant's Attorney: Uh, Judge . . . this juror is clearly biased not only against my client, but against the . . . the entire system of justice which you and I have taken an oath to uphold and support. He must be excused for cause."

2) Defendant's Attorney: "Your honor, may we approach?"

   Counsel makes the challenge for cause at the bench, in hushed tones, and on the record.

Note that your judge may want challenges for cause to be done at the end of your voir dire. One reason for doing so is to prevent copy-cat jurors from using the same responses to be excused.

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

KRG EASTGATE PAVILION, LLC	:	Case No. 2015 CVH 00880
	:	(Judge Herman)
Plaintiff,	:	
v.	:	
K&K 31, LLC	:	
Defendant.		

DEFENDANT K&K, LLC'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE AFFIDAVIT OF MICHAEL H, KANE DATED JULY 26, 2016

Plaintiff KRG Eastgate Pavilion, LLC ("KRG") has moved to strike the Affidavit of Michael H. Kane filed in support of the motion for summary judgment (the "Kane Affidavit") because the documents attached as exhibits to that affidavit have not been authenticated. The argument is not only wrong as a matter of law, it contradicts the Ohio Rules of Civil Procedure.

The Kane Affidavit, and also Mr. Kane's Affidavit filed in opposition to KRG's motion to strike, make frequent reference to and quote the pleadings and the documents produced by KRG in response to K&K's discovery requests. KRG does not dispute the authenticity of any of the documents attached as exhibits to the Kane Affidavit, or referenced in K&K's memoranda. Instead, KRG argues that K&K has not properly authenticated those exhibits. KRG's argument effectively puts it in the untenable position of impugning the authenticity of documents that it itself has produced and the pleadings that are on file with this Court.

The Affidavit of Michael H. Kane submitted in opposition to the instant motion to strike details the basis for Mr. Kane's knowledge of the facts and statements contained in the Kane

Affidavit. Mr. Kanes's personal knowledge of the facts in that affidavit is based on site visits to the Outlot and adjacent shopping center, his knowledge of the contents of a pleading filed with the Court, and his reliance on the authenticity of the documents produced by KRG in discovery.

KRG's argument directly contradicts the Ohio Rules of Civil Procedure and Ohio law. Documents produced by an opposing party in response to discovery requests are self-authenticating. In *Strumpff v. Harris*, 2015-Ohio-1329, 31 N.E. 3d 164 ¶38 (2nd Dist. 2015), the Court found that documents can be authenticated by testimony that they were requested and produced in response to discovery requests. The Court also observed that the Ohio Supreme Court has concluded that "Evid. R. 901 could be satisfied by evidence that the party attempting to introduce as exhibits had received the exhibit from the opposing party…," *State v. Sanders*, 92 Ohio St. 3d 245, 2001-Ohio-128, 750 N.E. 2d 90 (2001).

The Court in *Strumpff*, instructed that "…the trial court should consider the totality of the circumstances surrounding the documents' production, including, but not limited to, ... the nature of the documents, cited that party responding to the discovery request." *Id* at ¶39. Here the documents referenced in the Kane Affidavit, and the Affidavit in opposition dated August 23, 2016, were almost all produced in discovery by KRG, and in most cases actually created by K&K. Therefore, consistent with *Strumpff* and *Sanders*, the authenticity of the document is implied by the act of their production in response to discovery requests. Were they not authentic, the production thereof as responsive to the demand would be a misrepresentation and a fraud.

KRG also argues that the Court should not consider the contents of the pleadings in this action, or Plaintiff's response to Interrogatories, also on the ground of lack of authentication. This argument contradicts Civ. R. 56(c), which states: "Summary judgment shall be rendered

forthwith if the pleadings, … answers to interrogatories… show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Is KRG seriously suggesting that the Court ignore Civ. R. 56 and ignore the pleadings in its determination of the pending motions? "The pleadings filed in the instant case were a part of the record in this case and the court could consider these pleadings in making a determination on summary judgment." *Helfrich v. Madison*, 5th Dis. Licking No. 08-CA-150, 2009-Ohio-5140 ¶40 (Sept. 28, 2009). . See also, *Northpoint Properties, Inc. v. Petticord*, 179 Ohio App. 3d 342, 901 N.E. 2d 869 (2008). Likewise, Civ. R. 56(c) specifically authorize consideration of answers to interrogatories in ruling on a motion for summary judgment.

KRG's motion to strike the Kane Affidavit is nothing more than a blatant attempt to make an end run around the facts, the merits of this case and the Ohio Rule of Civil Procedure. The motion should be denied.

Respectfully submitted,

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