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Seeing is Believing: Preserving Your Argument as to Audiovisual Evidence and Demonstrative Aids in the Courtroom

June 01, 2016

With the advent of courtroom technology, parties are increasingly relying on audiovisual evidence or demonstrative aids to present their case to the trier of fact. Sometimes, however, counsel fail to specifically object to some aspect of the presentation – whether it be an objection to certain portions of the content, or to the timing or introduction of the presentation to the jury. *See State v. Boyd*, 209 N.C. App. 418, 423-24 (2011) (holding that counsel's objections to particular content in a video, but not to the presentation of the video itself, are insufficient to preserve for appeal the argument regarding the presentation of the video); *Sea v. State*, 49 So. 3d 614, 616-17 (Miss. 2010) (holding that failure to make a contemporaneous objection when tapes were offered and introduced into evidence resulted in waiver of any objection to their content). In addition, counsel sometimes fail to assure that the evidence or aid is made a part of the record. Counsel also may fail to take steps to record the visible impact of the audiovisual evidence or demonstrative aid on a witness or juror(s). *United States v. Dudley*, 804 F.3d 506 (1st Cir. 2015), is illustrative of these points. There, the defendant appealed his conviction for possession of child pornography, arguing on appeal, *inter alia*, that the district court erred by permitting the government to play during its case-in-chief and closing argument two 30-second video excerpts of child pornography seized from the defendant's home. The defendant contended the video's probative value was substantially outweighed by the danger of unfair prejudice. Prior to trial, the trial court denied defendant's motion *in limine*, which sought to exclude the government from showing the jury any images of child pornography. At trial, however, rather than re-new his objection, the defendant's counsel now stated it was "fine" for the government to show the videos during its closing argument. The First Circuit suggested, but did not decide, that the specific argument regarding the unfair prejudice of showing the videos during the closing argument had been waived. The Court then noted that even if it had not been waived, the Court could not assess "from the vista of a cold appellate record" whether showing the video during closing argument was unfairly prejudicial. So the issue could not be

advanced to the appellate court. **Preservation Issues**:

- The failure to specifically object, or affirmatively acquiescing to, any aspect of an audiovisual presentation may result in waiver of any argument related to it on appeal; and
- The failure to have a copy of a video or multimedia file used at trial included into the record may result in waiver of any argument related to it on appeal. Even apart from waiver, the appellate court will not be able to see its full force and effect and thus likely will conclude it must defer to the trial judge who actually saw and heard it.

Tips: Although the defendant properly filed a motion *in limine* seeking to preclude the presentation of the videos to the jury at any time during the trial, the defendant then appeared to acquiesce to the government's use of the video by later stating that such presentation was "fine." Instead, the defendant should have requested that the court note his continuing objection to the presentation of the video before it was initially presented to the jury, and renewed the objection when the government indicated its intent to show the jury the video during its closing argument. It is also critical both to preserving an argument for appeal, and then presenting a strong one, that any audiovisual demonstrative aid that was not admitted into evidence be made a part of the record. It can be difficult, if not impossible, to establish reversible error on appeal for evidentiary rulings, particularly those based on unfair prejudice, because appellate courts generally review such rulings for an abuse of discretion. Thus, parties should show, not simply tell, the appellate court that the presentation of a video or introduction of other such evidence was unfairly prejudicial. Parties should also note for the record that a particular juror, witness, party, or other person present in the courtroom had a strong emotional reaction to the objected-to video. Otherwise, one can get caught in a "My Cousin Vinny"/Billy Gambini moment on appeal, arguing to no avail that your client's statement in a transcript is not really an admission, but merely an incredulous statement in response to an accusation ("I shot the clerk"). Don't be a Billy Gambini! Take the necessary steps to provide the necessary record to have a realistic chance of success on appeal.

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