

**AUTHENTICATION OF ELECTRONICALLY
STORED EVIDENCE**

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Sharon Pruitt is a staff attorney with Juvenile Crime Intervention (JCI) of the Texas Office of the Attorney General. Mrs. Pruitt addresses legal questions from law enforcement and school officials, updates juvenile-related agency publications, and conducts legal training programs. She has presented juvenile and education-related legal topics at statewide and regional conferences for law enforcement, educators and administrators, and probation officials. She previously served as Chair of the State Bar of Texas Juvenile Law Section Council.

Before joining the Office of the Attorney General, Mrs. Pruitt was a juvenile prosecutor for the Gregg County District Attorney's Office. She has also prosecuted in Smith County and in Harris County. In 2001, Mrs. Pruitt became Board Certified in Juvenile Law.

TABLE OF CONTENTS


AUTHENTICATION OF ELECTRONICALLY STORED EVIDENCE (PowerPoint Presentation) 1



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

Authentication of Electronically Stored Evidence


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Relevance

Rule 401 and 402 Texas Rules of Evidence


- ▶ Before any evidence is admissible, it must be relevant
- ▶ Evidence has no relevance if it is not authentically what its proponent claims it to be



Authentication

Rule 901 Texas Rules of Evidence


- ▶ Authentication is a condition precedent to admissibility of evidence
- ▶ Proponent must make a threshold showing sufficient to support a finding that the matter in question is what the proponent claims
- ▶ Court is the gate-keeper (threshold)
- ▶ Fact finder determines the ultimate question of authenticity



Authentication

Rule 901(b)(1), (3)-(4) Texas Rules of Evidence


- ▶ Evidence may be authenticated in a number of ways
 - Direct testimony from a witness with personal knowledge
 - Comparison with other authenticated evidence
 - Circumstantial evidence



Social Networking Evidence

Griffin v. State, 19 A. 3d 415 (Md. 2011)

- ▶ Myspace page
- ▶ Objection to authentication: someone other than the purported creator could have created the profile when only identified by date of birth and a photograph of the profiled person
- ▶ **Held:** Proponent needs more than the circumstantial links provided by date of birth and photos, including
 1. Testimony by witness with knowledge
 2. Computer forensic examination
 3. Information to link the profile through website corporate records



Social Networking Evidence

Tienda v. State, 358 S.W. 3d 633 (CCA 2012)

- ▶ Tienda is convicted of Murder resulting from a drive-by. State offered the defendant's purported Myspace profiles, photographs and messages to connect Tienda to the actual shooting.
- ▶ Defense objected that the Myspace evidence was not properly authenticated by the sponsoring witness, the victim's sister, or the Myspace subscriber report.
- ▶ **HELD:** Circumstantial evidence may support a finding of authenticity where the content, photographs and messages contain sufficient individualization.



Social Networking Evidence


Tienda v. State, 358 S.W. 3d 633 (CCA 2012)

- ▶ Three different Myspace profiles
- ▶ Subscriber reports show two accounts created by "Ron Mr. T"
- ▶ Third account created by "Smiley Face"- defendant's known nickname
- ▶ Registered email addresses for the accounts were: "ronnietiendajr@" and "smileys_shit@"
- ▶ Photos: resembled defendant with gang-affiliated tattoos and hand gestures
- ▶ Quotes: "You aint BLASTIN You aint Lastin", "I live to stay fresh!! I kill to stay rich!!"
- ▶ Music links: "RIP David Valadez" included a song played by the victim's cousin at the victim's funeral, another music link was to a song "I Still Kill"




Circumstantial Evidence

- ▶ Myspace business records
 1. Subscriber is ron mr.t of D-town with email of "smileys_shit@"
 - Photo of defendant entitled Smiley Face clearly shows tattoos with date and time stamp on photo
 - "You aint BLASTIN You aint Lastin" male, 21, D-town, last login date: 2007
 - "RIP David Valadez" and music link



Circumstantial Evidence

- ▶ Myspace business records
 2. Subscriber is ron Mr. T of D-town 75212 with email of "ronniendajr@"
 - Photos of defendant bare-chested showing gang tattoos including "Tango Blast" across his chest and "18" on head in same font as page
 - Page entitled "Mr. Smiley Face" male, 22, D-town, last login 2008 contains music link to "50 cent I Still Kill by dj Bali"
 - Messages: admitted 53 messages sent between 2:00 p.m. and 9:44 p.m. on September 21, 2008 – 9 indicate that the defendant is the creator, owner and user of account



Circumstantial Evidence

- ▶ Myspace business records
 3. Subscriber is Smiley Face of Dallas 75212 with email of "ronniendajr@"
 - Self-portraits in taken with smartphone mirror showing tattoos
 - Photo of defendant wearing his ankle monitor



Sufficient Individualization


- ▶ The numerous photographs of unique arm, body, neck tattoos and distinctive eyeglasses and earring
- ▶ References to the victim's death and the funeral music
- ▶ References to the defendant's "Tango Blast" gang
- ▶ Messages referring to
 - The shooting at Rumors with Nu-Nu
 - Hector as a "snitch"
 - References to wearing the monitor for a year
- ▶ Sent from Myspace pages identified as Ron Mr. T or Mr. Smiley Face with email of "ronnietiendajr@"
- ▶ **Held:** Sufficient to support a finding by a rational jury that the Myspace pages were created and maintained by the defendant



Social Networking Evidence

Campbell v. State, No. 03-11-00834 (Austin 2012)


- ▶ Facebook messages containing defendant's banner and date/time stamped
- ▶ Defendant admits ownership of page just not the messages
 - "...i should never put my hand on you..."
 - "...i did you bad, I am begging your forgiveness, please ana, don't lock me up..."
 - "...so stupid for hurting you...please message me"
- ▶ Victim denies knowledge of password/access to account and denies sending message; defendant's speech pattern
- ▶ **Held:** The content and speech pattern in messages contain sufficient individualization to authenticate.



Social Networking Evidence

Rene v. State, 376 S.W. 3d 302 (14th 2012)

- ▶ Punishment evidence included printouts of photographs from Myspace profile: “137’s Don Lo”
- ▶ Photos of defendant displaying tattoos and gang hand signs, wearing a t-shirt referencing gang territory, holding pistols and cash with co-defendant
- ▶ No subscriber information, no self-portraits, but almost every photo was of the defendant, including his tattoos, and witnesses testified that defendant is known as “Lo”
- ▶ Witness testified in detail about Defendant’s six tattoos indicating gang affiliation, rank and territory
- ▶ Overwhelming evidence of gang membership so if any error in admission of Myspace photos, it’s harmless.



Social Networking Evidence

In re: A.D.W., et al., No. 2-648/12-1060 (Iowa 2012)

- ▶ Parental termination case
- ▶ Facebook photos offered through caseworker showing a marijuana growing operation
- ▶ Mother admitted ownership of the Facebook profile but was not questioned about the photos of the marijuana growing operation
- ▶ Objection to authentication
- ▶ Held: admission of photos was error but harmless.



Electronically Stored Evidence

Franklin v. State, No. 05-11-00990 (Dallas 2012)

- ▶ Engaging case
- ▶ Defendant had a cell phone in his hand when arrested
- ▶ A forensic examiner testified that he retrieved contacts, call histories, audio and text messages from the phone
- ▶ 3 text messages were admitted into evidence
 - “Three people off at the bridge before ten”
 - “Im on my way 2 the bridge”
 - “Whats the date on the check? Skybox”
- ▶ Objection to authentication because there was no registration or owner information
- ▶ Held: Circumstances are sufficient to allow a jury to reasonably find the defendant sent and received the messages.



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