

Authenticating

Can cellphone text messages stand up in court?

BY PIERRE GROSIDIER

Parties seeking to admit cellphone text messages at trial face two authentication challenges. They must show that the documents they want to admit into evidence are accurate copies of the original text messages, and they must show that the persons to whom they seek to ascribe the messages actually wrote them.¹

Courts have uniformly held that existing rules of evidence are “generally ‘adequate to the task’” of authenticating electronic information and have declined to create new and special rules.² The authentication threshold of Texas Rule of Evidence Rule 901(a) is met “by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Only a threshold showing is necessary. The trial court must simply decide “whether the proponent of the evidence has supplied facts that are sufficient to support a reasonable jury determination that the” proffered evidence is authentic.³ The jury ultimately decides the weight to give the admitted evidence.

Rule 901(a)’s liberal admissibility standard can be met in a number of ways. As the cases discussed in this article show, electronic evidence, including cellphone text messages, is most often authenticated through witness testimony and circumstantial evidence.⁴

The first authentication hurdle is that of the text messages themselves, which reside on cellphones from which they are not easily extracted and transcribed into print. Forensic extraction is always possible but costly. Fortunately, simpler methods work just as well. In *Montoya v. State*, an incriminating text message was read into the record, the cellphone was admitted into evidence, and the wit-

ness “pulled out [the] phone and pulled up the ... text message for the attorneys to review.”⁵ In *Butler v. State*, the court admitted photographs of text messages displayed on a BlackBerry.⁶

Ascribing text messages to their putative senders is not as straightforward. The Texas Court of Criminal Appeals held in *Tienda v. State* that showing that a “text message emanates from a cellphone number assigned to the purported author” is not sufficient to establish the message’s authenticity.⁷ As the court noted, “cellphones can be purloined” and someone other than the cellphone owner might have sent the messages. Authenticating cellphone text message authorship, therefore, requires something more than establishing originating cellphone ownership. But as the following cases show, that “something more” is not very demanding under Rule 901(b)(4).

In *Butler*, the Court of Criminal Appeals reversed the decision of the 13th Court of Appeals in Corpus Christi, which had reversed the defendant’s conviction because of allegedly inadequately authenticated text messages.⁸ The trial court had found Butler guilty of the aggravated kidnapping of his then-girlfriend. A week before trial, Butler sent his ex-girlfriend a series of emails threatening her and her family should she testify against him. Butler’s profane messages contained death threats and accusations of snitching and betrayal. The victim testified that the messages came from a phone number that belonged to Butler, and that, between text messages, Butler also called her from that number “talking mess.”

The Court of Criminal Appeals held that enough evidence “supplied the necessary predicate” for the text mes-

sages’ admissibility. In particular, the substance and context of the text messages accusing the victim of assisting authorities and the threatening phone calls in between text messages provided “circumstantial evidence” sufficient to authenticate the messages.

Similarly, in *Chavezcasarrubias v. State*, the witness authenticated incriminating text messages as Chavezcasarrubias’ because the witness had previously communicated with him at that number by voice and via text messages and the text messages contained information that only she and Chavezcasarrubias would have known.⁹

Taken together, these cases show the relative ease with which cellphone text messages can be authenticated, provided that the substance and context of the messages can be linked to the facts of the case. **TBJ**

NOTES

1. Hearsay objections to text messages’ admissibility are usually addressed through the party-opponent exception. See, e.g., *Aekins v. State*, No. 04-13-00064-CR, 2013 WL 5948188, at *6 (Tex. App.—San Antonio [4th Dist.] Nov. 6, 2013 (mem. op.), aff’d, 447 S.W.3d 270 (Tex. Crim. App. 2014)).
2. *Tienda v. State*, 358 S.W.3d 633, 638-39 (Tex. Crim. App. 2012).
3. See generally, *id.* at 637-38.
4. See generally, Steven Goode, *The Admissibility of Electronic Evidence*, 29 Rev. Litig. 1, 9 (2009).
5. No. 05-10-01468-CR, 2012 WL 1059699, at *3 (Tex. App.—Dallas [5th Dist.] Mar. 30, 2012, no. pet.) (mem. op.).
6. 459 S.W.3d 595, 599 (Tex. Crim. App. 2015); see also *Aekins*, 2013 WL 5948188, at **5-6 (photos of cellphone text messages admissible); *Manuel v. State*, 357 S.W.3d 66, 76 (Tex. App.—Tyler [12th Dist.] 2011, no. pet.) (same).
7. *Tienda*, 358 S.W.3d at 642.
8. *Butler*, 459 S.W.3d at 598.
9. No. 02-14-00418-CR, 2015 WL 6081502, at *1 (Tex. App.—Fort Worth [2nd Dist.] Oct. 15, 2015, no. pet.) (mem. op.); see also *Gardner v. State*, No. 02-14-00459-CR, 2015 WL 4652718, at *1 (Tex. App.—Fort Worth [2nd Dist.] Aug. 6, 2015, pet. ref’d) (mem. op.) (circumstantial evidence authenticated text messages); *Aekins*, 2013 WL 5948188, at *6 (same).



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