

9.14 Video Recording

(1) In general.

A video recording of a scene, person or persons, or an occurrence is admissible in the discretion of a trial judge provided it is shown to be relevant to an issue in the proceeding and is properly authenticated.

(2) Authentication.

(a) A video recording may be authenticated by any of the following:

(i) the testimony of a witness to the recorded events, or of an operator or installer or maintainer of the equipment, that the video accurately represents the subject matter depicted;

(ii) the testimony, expert or otherwise, that a video truly and accurately represents what was before the camera;

(iii) the testimony of a witness and other evidence that demonstrates that the video accurately represents the subject matter depicted.

(b) Evidence establishing the chain of custody of the video may buttress its authenticity and integrity and even allow for acceptable inferences of its reasonable accuracy and freedom from tampering.

Note

Subdivision (1) is derived from *People v Patterson* (93 NY2d 80, 84 [1999]) ["At the outset, we emphasize that relevant videotapes . . . are ordinarily admissible under standard evidentiary rubrics. Some reliable authentication and foundation . . .

. are, however, also still necessary. The decision to admit or exclude videotape evidence generally rests, to be sure, within a trial court's founded discretion”]).

In the exercise of its discretion, the trial court may consider whether the trial would be “unduly delayed by exhibiting” the video or whether the video is “sensational only and unnecessary,” particularly where the evidence may be “submitted in another form”; or whether the video unfairly exaggerates any of the true features which are sought to be proved (*Boyarsky v Zimmerman Corp.*, 240 App Div 361, 365, 367 [1st Dept 1934]); or whether a photograph of a video image rather than the video with its audio should more properly be admitted. (See *People v Jin Cheng Lin*, 26 NY3d 701, 727 [2016] [a court properly exercised its discretion to authorize the admission of a photograph of the defendant to show his physical appearance after interrogation rather than a video with self-serving audio].)

A compilation of portions of footage drawn from numerous surveillance cameras is equally admissible when properly authenticated and the trial court is satisfied that there is no reason to believe the compilation was incomplete or otherwise unsatisfactory (*People v Cabrera*, 137 AD3d 707, 707-708 [1st Dept 2016] [the witness “explained that she viewed several hours of videotape and created a 30-minute disc that included all the footage that was relevant to the case, that is, all views of any persons involved in this case” and there was “no reason to believe that the compilation was incomplete or otherwise unsatisfactory”]).

A video recording may be relevant for what it does not show, as well as for what it does show (e.g. *People v Ruiz*, 7 AD3d 737, 737 [2d Dept 2004] [The Supreme Court properly admitted security videotapes from a certain hospital into evidence to rebut the defendant's claim that he was at that hospital during the time of the robbery]). In a criminal case, a surveillance video that plainly shows the defendant committing a criminal act is direct evidence and thus does not require a circumstantial evidence charge (*People v Hardy*, 26 NY3d 245 [2015]; see *People v Gee*, 99 NY2d 158, 162 [2002] [videotape of a robbery of a store clerk]).

Other examples of a properly admitted video recording include: *People v Edmonson* (75 NY2d 672, 674 [1990] [“evidence of a prior extrajudicial identification made by the complaining witness from a videotape taken by the police, canvassing a particular neighborhood and focusing on numerous passersby,” is admissible]); *People v Tunstall* (63 NY2d 1, 10 [1984] [a videotape of the lineup in which a defendant was identified is admissible]); *People v Scullion* (137 AD3d 645 [1st Dept 2016] [video of the purportedly intoxicated defendant performing coordination tests was admissible]); *Matter of Burack* (201 AD2d 561, 561 [2d Dept 1994] [video of the execution of a will was properly admitted as evidence of the decedent’s testamentary capacity]); *People v Fondal* (154 AD2d 476, 476-477 [2d Dept 1989] [video showing the defendant and accomplice “in the act of shoplifting” was admissible]); *Caprara v Chrysler Corp.* (71 AD2d 515, 522-523 [3d Dept 1979] [a video showing the “impact the injury has had on plaintiff’s life” was admissible], *aff* 52 NY2d 114 [1981]); and *Boyarsky v Zimmerman Corp.*

(240 App Div 361, 365 [1st Dept 1934] [video of plaintiff conducting himself as a “perfectly well man instead of the invalid which he claimed to be” was admissible]).

Technical flaws in a video recording that do not impact on the fairness of what the video depicts go to the “weight” of the evidence, not its admissibility. In *People v Davis* (28 NY3d 294, 303 [2016]), for example, the “authenticating witness, who maintained the surveillance system, testified that during the computerized process of compressing and archiving the digital video files, certain images may overlap. However, he further testified that the process, which he personally conducted, does not conjure up persons that were not originally present in the camera shot. As such, the trial court did not abuse its discretion in concluding that the image-overlap issue went to weight, but not admissibility, of the video evidence.” Other examples include: *People v Yanez* (180 AD3d 816, 816 [2d Dept 2020] [that a time stamp on a video differed from the time the videos were actually recorded went to “the weight of the evidence, not its admissibility”]) and *People v McEachern* (148 AD3d 565, 566 [1st Dept 2017] [the “alleged uncertainty about whether the videotape depicted the events at issue went to the weight to be accorded the evidence rather than its admissibility”]).

Once a video is properly admitted, a court may allow the jury to utilize an accurate, typewritten transcript of the audio portion, if necessary, to aid the jury in understanding the audio (*People v Dyla*, 169 AD2d 777, 778 [2d Dept 1991] [the court properly allowed the jury “to utilize typewritten transcripts as an aid to understanding the defendant’s videotaped statement”]).

Subdivision (2) (a) (i) and (ii) and (b) is derived from the language of *Patterson* (93 NY2d 80, 84 [1999]), which stated:

“a videotape may be authenticated by the testimony of a witness to the recorded events or of an operator or installer or maintainer of the equipment that the videotape accurately represents the subject matter depicted. Testimony, expert or otherwise, may also establish that a videotape ‘truly and accurately represents what was before the camera.’ Evidence establishing the chain of custody of the videotape may additionally buttress its authenticity and integrity, and even allow for acceptable inferences of reasonable accuracy and freedom from tampering” (citations omitted).

Patterson concluded, however, that “[t]hese illustratively noted methods of authentication are not exclusive” (*Patterson* at 84; see Barker & Alexander, Evidence in New York State and Federal Courts § 1104.1 [d] [2d ed West’s NY Prac Series]; Guide to NY Evid rule 9:07, Methods of Authentication and Identification, subds [1] [Admission of authenticity], [2] [Testimony of witness], [6] [Circumstantial evidence], [7] [Voice identification]).

Subdivision (2) (iii) is thus designed to encompass those additional methods of authentication. For example, in *People v Goldman* (35 NY3d 582, 588 [2020]), a YouTube video that depicted the defendant rapping about “ ‘run[ning] up’ into a rival crew’s ‘house’ ” was properly authenticated and admitted as evidence of the defendant’s motive for driving with three others into a rival crew’s territory and shooting and killing a teenage boy. The proof of authentication of the video included evidence that the defendant was the undisputed person in the video singing; that the video showed the defendant and two of the other individuals who were in the car with the defendant during the shooting “in similar attire to what they were wearing on the night of the homicide”; that the “background demonstrated that it was evidently filmed in defendant’s neighborhood” (*id.* 595); and a fair inference from a prosecution witness’s testimony and the uploading of the video after the homicide that the video was made after the homicide.

Other examples of properly authenticated video recording include: *Zegarelli v Hughes* (3 NY3d 64, 69 [2004] [“Testimony from the videographer that he took the video, that it correctly reflects what he saw, and that it has not been altered or edited is normally sufficient to authenticate a videotape”]) and *People v Scullion* (137 AD3d 645, 645 [1st Dept 2016] [Although the police officer who administered the coordination tests did not testify, “the videotape was authenticated by the arresting officer, who was a witness to the recorded events”]).

There is “no requirement that a video recording have audio to be admissible” (*Belton v Lal Chicken, Inc.*, 138 AD3d 609, 610 [1st Dept 2016]).

The “chain of custody” method of authentication requires, “in addition to evidence concerning the making of the [video]tape[] and identification of the [participants], that within reasonable limits those who have handled the [video]tape from its making to its production in court ‘identify it and testify to its custody and unchanged condition’ ” (*People v Roberts*, 66 AD3d 1135, 1136 [3d Dept 2009]). Any “gaps in the chain of custody” go to the “weight that was to be accorded to the video recordings, not their admissibility” (*People v Edmonds*, 165 AD3d 1494, 1497 [3d Dept 2018]).