

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	CRIMINAL NO: ST-14-CR-0000073
Plaintiff,	)	
	)	14 V.I.C. § 1709 (4 Counts)
v.	)	
	)	
KENNYATA CHARLERY,	)	
(D.O.B.: 12-07-82	)	
	)	
Defendant.	)	
	)	

AMENDED MEMORANDUM OPINION¹

THIS MATTER came before the Court for a motions hearing on August 28, 2014.² The People orally withdrew their Motion to Allow Statements Pursuant to 804(3). The Court directed the People to file a written notice of withdrawal.³ Defendant Kennyata Charlery (“Defendant”) represented that the People’s Motion in Limine Pursuant to Rule 412 of F.R.E. was premature, and that the parties would not address the motion during the hearing. The People did not object to Defendant’s representation.

Accordingly, the hearing proceeded on Defendant’s Motion in Limine to Exclude Log of Messages Retrieved from Memory Card, filed on June 27, 2014. The issue before the Court is whether the printout of a message log retrieved from an electronic memory card constitutes an original writing under Fed. R. Evid. 1002.⁴ Defendant argues that the message log is inadmissible because the log was originally stored on the MSN server; not the memory card. Defendant contends that the only original message log that can be admitted must originate from the MSN server. Defendant also argues that the message log is an inaccurate reflection of the conversation contained therein because there is a possibility that the messages could have been altered. Conversely, the People argue that the message log is the original writing under Fed. R. Evid. 1002 because the memory card is the original storage source, and the printout was not altered. Contrary to both parties’ positions, the Federal Rules of Evidence provides that the originality of electronically stored information is determined by whether the printout accuracy reflects the information that it purports to show; not the location where the information is stored.⁵ In considering the accuracy of the printout, which is intertwined with the question of authenticity,

¹ This Amended Memorandum Opinion is being issued to correct minor scrivener’s errors. The content and ruling remains the same.

² The People were represented by Douglas Sprotte, Assistant Attorney General. Defendant was represented by Julie Smith Todman, Territorial Public Defender.

³ On August 29, 2014, the People file an Informational Motion withdrawing their Motion to Allow Statements.

⁴ See Super. Ct. R. 7 (“The practice and procedure in the Superior Court shall be governed by the Rules of the Superior Court, and to the extent not inconsistent therewith . . . the Federal Rules of Civil Procedure . . .”).

⁵ See Fed. R. Evid. 1001(d).

this Court finds that the printout of the message log is an accurate reflection of the information that it purports to show, and is therefore an original writing. Accordingly, Defendant's Motion in Limine will be denied.

FACTUAL AND PROCEDURAL BACKGROUND

On January 13, 2014, Detective Elesa Francis of the Virgin Islands Police Department ("VIPD") petitioned the Magistrate of the Superior Court of the U.S. Virgin Islands for the issuance of a warrant for Defendant's arrest.⁶ According to the affidavit, there was a sufficient factual basis to establish probable cause for Defendant's violation of V.I. CODE ANN. tit. 14 § 1702 (Rape in the Second Degree), and 14 V.I.C. § 1709 (Unlawful Sexual Contact in the Second Degree).⁷ Detective Francis stated that she received a memory card⁸ from Defendant's wife, which contained a log of text messages allegedly transmitted between Defendant and his minor niece-in-law ("N.M.").⁹ The affidavit provided that Defendant and N.M. were engaged in an ongoing sexual relationship for four years; the first encounter occurring when N.M. was 12-years-old, and Defendant was 27-years-old.¹⁰ On the basis of the affidavit, the Magistrate issued a warrant for Defendant's arrest, setting bail at \$75,000.¹¹

On February 12, 2014, Defendant was arrested by the VIPD.¹² On February 25, 2014, the People filed an Information charging Defendant with several counts of rape in the second degree, unlawful sexual contact in the second degree, and aggravated rape in the second degree.¹³ On June 20, 2014, the People filed a Motion to Dismiss Counts and Amend the Information, which this Court granted on July 2, 2014.¹⁴ The four counts remaining in the Amended Information were for unlawful sexual contact in the second degree in violation of 14 V.I.C. § 1709.¹⁵

On June 26, 2014, Defendant filed a Motion in Limine to Exclude Log of Messages Retrieved from Memory Card, pursuant to Fed. R. Evid. 1002.¹⁶ Defendant's motion included a printout of the message log displaying a text conversation transmitted between two Hotmail email addresses. The messages were sent via MSN's instant messaging application, Mercury Mer Messenger.¹⁷ The People did not file a written response to Defendant's motion.

⁶ See Francis Aff.

⁷ Francis Aff. 2.

⁸ Detective Francis' Affidavit referred to the storage device as a "sim card." However, according to the testimony of Detective Esprit from the VIPD's Investigation Bureau, the message log was stored and retrieved from a "memory card." A memory card is a manufactured "scan-disk" card that stores all data input into an electronic device, except contact information. A sim card only stores contact information.

⁹ Francis Aff. 1.

¹⁰ Francis Aff. 2.

¹¹ Arrest Warrant, Jan. 13, 2014.

¹² Mem. R. of Proceeding, 2, Feb. 13, 2014.

¹³ See Information, Feb. 24, 2014.

¹⁴ People's Mot. to Dismiss Counts & Amend the Information, Feb. 18, 2014.

¹⁵ See Am. Information, June 18, 2014.

¹⁶ See Mot. in Limine to Exclude Log of Messages Retrieved from Memory Card, 1, June 26, 2014.

¹⁷ See Mot. in Limine to Exclude Log of Messages Retrieved from Memory Card, Ex. A, June 26, 2014.

DISCUSSION

A. The People's Motion in Limine Pursuant to Rule 412 of F.R.E.

During criminal or civil proceedings, Fed. R. Evid. 412(a) prohibits the admittance of evidence that is offered to prove that a victim engaged in other sexual behavior, or the victim's sexual predisposition.¹⁸ However, such evidence is admissible to show: 1) "specific instances of a victim's sexual behavior offered to prove that someone other than the defendant was the source of semen or injury"; 2) "specific instances of a victim's sexual behavior with the defendant if offered to prove consent"; and 3) "evidence whose exclusion would violate the defendant's constitutional rights."¹⁹ To offer this evidence under an exception, Fed. R. Evid. 412(c)(1)(B) provides that the defendant must file a motion with the court at least 14 days before trial, unless the court provides otherwise.²⁰ The court must also hold an in-camera hearing to determine whether the evidence will be admitted.²¹

Here, the People's Motion in Limine prematurely seeks to prevent Defendant from offering evidence of the victim's sexual behavior or predisposition that may be admissible under Fed. R. Evid. 412(b). According to the procedures used to determine admissibility, Defendant may file a motion requesting admittance of such evidence up to 14 days prior to trial. Currently, jury selection is scheduled to occur on January 5, 2015, with the trial commencing soon thereafter. Given that the trial date is over two months away, and Defendant has not yet expressed an intent to offer evidence under Fed. R. Evid. 412(b), the Court will not deprive Defendant of his opportunity to do so as prescribed by Fed. R. Evid. 412(c)(1)(B). Therefore, the People's Motion in Limine Pursuant to Rule 412 of F.R.E. is premature, and will be denied.

B. Defendant's Motion in Limine to Exclude Log of Messages Retrieved from Memory Card

As a preliminary matter, the court determines the admissibility of evidence, although "[it] is not bound by the [Federal Rules of Evidence], except for those on privilege."²² In order for electronically stored information to be admissible, the proffered evidence must be (1) relevant, (2) authentic, (3) an original or duplicate, or admissible as secondary evidence to prove its contents, (4) not hearsay or admissible under a hearsay exception, and (5) the probative value must outweigh its prejudicial effect.²³ If a party fails to meet each evidentiary standard, the evidence will not be admitted.

¹⁸ Fed. R. Evid. 412(a).

¹⁹ Fed. R. Evid. 412(b)(1)(A)-(C).

²⁰ Fed. R. Evid. 412(c)(1)(B).

²¹ Fed. R. Evid. 412(c)(2).

²² Fed. R. Evid. 104(a).

²³ Fed. R. Evid. 401, 403, 803, 804, 807, 901(a), 1001-1008.; *Lorraine v. Markel Am. Ins.*, 241 F.R.D. 534, 538 (D. Md. 2007).

1. Relevancy under Fed. R. Evid. 401.

When determining whether evidence is admissible, the Court must first consider the relevancy of the evidence. Under Fed. R. Evid. 401, “[e]vidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” To satisfy this test, “there must be a logical relationship between the proffered evidence and the proponent’s theory of the case.”²⁴ Once this low threshold is met, the evidence is admissible unless provided otherwise in “the United States Constitution, a federal statute, [the Federal Rules of Evidence], or other rules prescribed by the Supreme Court.”²⁵

In this case, the message log that was retrieved from the memory card is relevant under Fed. R. Evid. 401. The People contend that the message log contains a conversation that occurred between Defendant and his minor niece-in-law, N.M., that shows the presence of an ongoing relationship. The content of the message log has the tendency to make facts related to the allegation that Defendant engaged in unlawful sexual contact with N.M. more or less probable, and it is also of consequence in determining whether Defendant violated 14 V.I.C. § 1709. There is a logical connection between the conversation contained in the message log, and the People’s underlying theory that Defendant engaged in sexual acts with N.M. Therefore, because the relevancy of the evidence is evident under Fed. R. Evid. 401, the Court proceeds to determine whether Plaintiff has satisfied the remaining requirements for admissibility.

2. Originality of the Message Log under Fed. R. Evid. 1002.

Whether a printout of electronically stored information obtained from a memory card is an original writing is an issue of first impression in the Virgin Islands. However, the plain meaning of Fed. R. Evid. 1002, and the applicable definition set forth in Fed. R. Evid. 1001(d), provides guidance for this Court. Under Fed. R. Evid. 1002, also known as the Best Evidence Rule, “[a]n original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.”²⁶ In relation to electronically stored information, an “‘original’ means any printout – or other output readable by sight – if it accurately reflects the information.”²⁷ In other words, the proponent of the evidence must produce “any printout” that accurately reflects the information within, in order to prove the content of the evidence.

In applying Fed. R. Evid. 1002, Defendant mistakenly argues that a writing’s originality is determined by the location where the writing is stored. Specifically, Defendant argues that the message log obtained from the memory card is not the original writing because the memory card²⁸

²⁴ *Gumbs v. Int’l Harvester, Inc.*, 718 F.2d 88, 97 (3d Cir. 1983).

²⁵ Fed. R. Evid. 402.

²⁶ Fed. R. Evid. 1002.

²⁷ Fed. R. Evid. 1001(d).

²⁸ In Defendant’s motion, Defendant’s counsel uses “memory card” and “sim card” interchangeably. As explained by Detective Esprit, and for the sake of consistency, the storage device will be referred to as a “memory card.”

was not the *original storage source* of the message log.²⁹ Defendant maintains that the only original message log that can be produced must be retrieved directly from the MSN Server. But contrary to Defendant's contention, Fed. R. Evid. 1001(d) provides that *any* printout of electronically stored information is sufficient to satisfy the Best Evidence Rule, as long as the printout accurately reflects the information that it purports to show. The originality of the writing is not based on the location where the writing is stored. Therefore, the underlying issue of whether the printout of the message log is an accurate reflection of the information therein, is directly related to the issue of whether the writing is authentic under Fed. R. Evid. 901.

3. Authenticity under Fed. R. Evid. 901.

Fed. R. Evid. 901(a) provides that, "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(b) states that authentication may be proven through methods including but not limited to, "testimony that an item is what it is claimed to be,"³⁰ "the appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances,"³¹ or "evidence describing a process or system and showing that it produces an accurate result."³² Importantly, "the proponent need only make 'a prima facie showing [of authenticity], to the court . . . not a full argument on admissibility.'"³³ "Once a prima facie case is made, the evidence goes to the jury and it is the jury who will ultimately determine the authenticity of the evidence, not the court."³⁴ The court only determines whether there is substantial evidence that would allow the jury to infer whether the evidence is authentic.³⁵

During the hearing, the People presented substantial evidence from which a jury could infer that the message log is authentic. Defendant argued that the message log did not accurately reflect the conversation that it purported to show because the messages could have been altered once stored on the memory card. To support this argument, Defendant called Detective Cornel Esprit of the VIPD's Investigations Bureau to testify about his retrieval of the message log.³⁶ Detective Esprit stated that upon receiving the memory card from Detective Francis, he inserted the card into his computer, opened the message log in its text file format, printed the log, and returned the

²⁹ See Mot. in Limine to Exclude Log of Messages Retrieved from Memory Card, 1, June 26, 2014. ("The sim card retrieved can be altered and is **not** the original storage source of the messages sent.").

³⁰ Fed. R. Evid. 901(b)(1).

³¹ Fed. R. Evid. 901(b)(4).

³² Fed. R. Evid. 901(b)(9).

³³ *George v. People*, 59 V.I. 368, 2013 WL 3742533, *7 (V.I. 2013) (citing *Link v. Mercedes-Benz of N. Am., Inc.*, 788 F.2d 918, 928 (3d Cir. 1986) (quoting *United States v. Goichman*, 547 F.2d 778, 784 (3d Cir. 1976)).

³⁴ *Id.*

³⁵ *Id.* (citing *United States v. Wittingham*, 346 F. App'x 683, 685 (2d Cir. 2009) (quoting *United States v. Tan Yat Chin*, 371 F.3d 31, 38 (2d Cir. 2004)).

³⁶ Detective Esprit has 13 years of experience with the VIPD, and is primarily responsible for investigating electronic and cybercrimes.

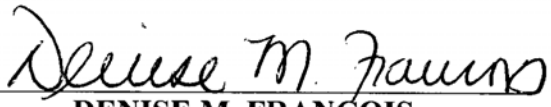
memory card and printout to Detective Francis.³⁷ He testified that he did not alter the message log at any time, although it was possible for the messages to be altered once opened in a text file format. He also testified that even if such changes were made, they would have been discoverable through the memory card's metadata, which he did not access. Defendant did not present any evidence to show that the message log was actually altered by Detective Esprit, or anyone else.

During cross-examination, Detective Esprit testified that he was assigned the task of retrieving the message log because no other investigator had successfully accessed the information stored on the card. He testified that upon opening the message log, he observed text messages that had been transmitted between two Hotmail email addresses, which were sent through MSN's Messenger application. Detective Esprit again provided a step-by-step explanation of the method that he used to retrieve the log, and to create the printout. Based on the information provided by Detective Esprit, it is clear that the People established a prima facie showing of authenticity of the printout through the presentation of testimony from the investigating officer, information about the content and characteristics of the message log, and evidence of the process that was used to obtain the printout. Accordingly, the People have produced sufficient evidence to allow the printout of the message log retrieved from the memory card to go before the jury.

CONCLUSION

During the hearing, the parties did not address the remaining two requirements for admissibility under the Federal Rules of Evidence. However, should the message log be proffered at trial, the proponent must establish that the evidence is not hearsay or falls into a hearsay exception, and that the probative value of the evidence outweighs its prejudicial effect. At that time, the Court will make a determination as to the overall admissibility of the message log. Notwithstanding, in light of the limited issue presently before the court, and for the aforementioned reasons, Defendant's Motion in Limine to Exclude Log of Messages Retrieved from Memory Card will be denied. An Order consistent with this Opinion shall follow.

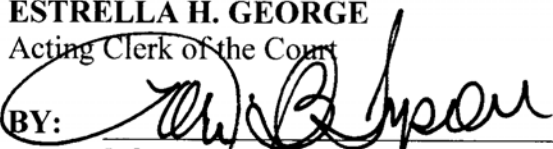
DATED: October 27, 2014


DENISE M. FRANCOIS
Judge of the Superior Court
of the Virgin Islands

ATTEST:

ESTRELLA H. GEORGE

Acting Clerk of the Court

BY: 

LORI BOYNES-TYSON

Court Clerk Supervisor 10/28/14

³⁷ Detective Esprit testified about the differences between email message transmissions and instant messengers. Emails are transmitted via servers that track the location of messages that are sent and received. Instant messengers create a short log of messages that are stored on any device used to send or receive those messages.