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Reading Transcripts

BY STEPHEN A. SALTZBURG

When lawyers introduce transcripts into evidence, how can they make the contents clear, memorable, and persuasive to jurors? Do some approaches impermissibly "vouch" for the contents? These two questions can be addressed and answered in the context of a case in which the defendant complained about the procedure utilized by the prosecution to highlight for a jury the contents of transcribed chat-room conversations.

United States v. Tragas: The Facts

The government brought numerous charges against Joanne Tragas as a result of her participation in an international credit and debit card fraud conspiracy. The case is reported at 727 F.3d 610 (6th Cir. 2013).

Tragas acted as a middleman between suppliers of stolen credit and debit card information who were overseas and street-level users of that information in the United States. Her overseas suppliers obtained and sold to her information typically encoded in the magnetic strip on the back of credit and debit cards. The transactions were accomplished using international wire transfers. Tragas would take the stolen data and resell it to her coconspirators in the United States. Her customers used machines to encode the information obtained from Tragas on magnetic strips on blank plastic cards, which were then used as credit cards, gift cards, and hotel key cards. Once encoded, the counterfeit cards contained the very same information found on the legitimate cards.

Tragas's customers could and did use the fraudulent cards to purchase virtually whatever they wanted. They bought gift cards and high-end electronics, and they used the cards to get cash.

Two of Tragas's best customers were twin brothers, Dion and Dionte Hunter. They bought the stolen information from Tragas and either used it themselves or sold it to others. The investigation into the conspiracy revealed that the Hunters paid Tragas in several different ways: depositing money into her bank account, making wire transfers, and permitting her to use genuine gift cards that had been purchased through the use of the stolen credit card data that Tragas provided. Tragas never actually met in person with the Hunters, but they communicated frequently using online chat services and instant messaging. The Hunters kept records of these chat conversations stored on their laptop computer, and police discovered the messages in a search of the laptop.

The parties to the chat conversations did not use names, but the defendant's picture was the "profile picture" associated with the instant message account holder who supplied the stolen information to the Hunters. The prosecution also had evidence that Tragas used the information supplied in chat conversations to make gift card purchases.

Tragas was convicted on every charge brought by the government: one count of conspiracy, seven counts of aiding and abetting unlawful activity under the Travel Act, one count of bank fraud, and two counts of wire fraud. The court of appeals affirmed her conviction but remanded for resentencing.

Reading the Transcripts

The government introduced transcripts of the chat conversations at trial. Once introduced, the prosecutor and a Secret Service agent read many of the conversations aloud to the jury. The prosecutor read aloud the statements attributable to Tragas, and the case agent read aloud the statements attributable to her coconspirators. At first, Tragas's counsel did not object. But after several conversations were read, defense counsel objected on the ground that reading the transcripts aloud was cumulative, as the transcripts themselves were already in evidence.

On appeal, Tragas argued that the reading of the transcripts denied her a fair trial. The court of appeals found it difficult to pin down the exact nature of her argument, but addressed several points on which the argument seemed to rest.

Hearsay. Tragas appeared to accept that there was no hearsay problem with the transcripts. Her statements were admissible against her under Federal Rule of Evidence 801(d)(2)(A), and the coconspirators' statements were admissible under Rule 801(d)(2)(E).

Theatrical performance. Tragas argued that by reading the transcripts aloud, the prosecutor and the case agent conducted a "theatrical performance" that was akin to a reenactment of the chat conversations. She maintained that as a result of this performance, the prosecution portrayed her written communications in a way that "telegraphed" to the jury that she was guilty.

The court responded that it could find no authority for the proposition that reading aloud previously admitted documentary evidence is either improper or prejudicial. It cited two cases permitting the

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practice: *Bank of Nova Scotia v. United States*, 487 U.S. 250, 262–63 (1988) (finding no unfair prejudice where two IRS agents read in tandem from a transcript before a grand jury); and *United States v. Chambers*, 441 F.3d 438, 456–57 (6th Cir. 2006) (finding no unfair prejudice where a police officer read portions of a defendant's previously admitted diary to the jury). The court rejected the notion that simply reading aloud what was contained in a writing amounted to an improper reenactment and concluded that reading properly admitted evidence to a jury was not unfairly prejudicial.

The court recognized that a problem could arise if a prosecutor attempted to stage a performance that strayed from the direct evidence introduced at trial or reflected the prosecutor's opinions rather than the evidence. It found, however, that the prosecutor and case agent attempted to read the transcripts accurately and that the minor discrepancies between what was read aloud and the transcripts were immaterial, especially in light of the fact that the jury had copies of the transcripts with which to follow along.

At one point, the court stated it appeared that Tragas's principal argument, made in a variety of ways, was that merely by reading words aloud, the prosecutor and case agent "imbue[d] the evidence with some sort of magical power." (*Tragas*, 727 F.3d at 615.) The court was unimpressed by the argument or Tragas's assertion that the prosecutor and case agent engaged in a remarkable departure from traditional American practice.

Improper summary. Tragas argued that reading the transcripts aloud amounted to an impermissible overview or summary of the government's case. The court responded that, while a defendant may be prejudiced if a law enforcement officer is able to introduce otherwise inadmissible evidence as an overview at the outset of a trial, the transcripts were admissible evidence, and neither the prosecutor nor the case agent appeared to summarize anything. They simply read the contents of properly admitted documents.

Improper vouching. Tragas argued that the prosecutor's reading of the chat conversations constituted improper vouching, which occurs when a prosecutor improperly indicates a personal belief in the credibility of a witness and thereby places the prestige of the United States behind the witness. The court responded by pointing out that Tragas could not identify any comments or statements that could be construed as improper vouching or bolstering. Although the court did not make the point, it seems that the improper vouching argument was particularly inapt to the extent that the prosecutor was simply reading Tragas's own statements. It is difficult to comprehend the complaint that the prosecutor was vouching for Tragas.

Confrontation violation. Tragas finally argued that, because the prosecutor is not a witness and cannot be cross-examined, any opinions, testimony, or interpretations of evidence by the prosecutor are barred by the Sixth Amendment confrontation clause. Once again, the court declined to equate reading the transcripts with offering opinions or testimony and concluded that there was no confrontation problem.

Was There a Problem?

Is there something that courts should be concerned about in the way the prosecutor chose to present the chat conversation evidence to the jury in *Tragas*? The correct answer is a resounding "no," and the reasons for this should be clear.

First, it is not unusual for lawyers to read the contents of documents to jurors. Lawyers do that all the time. In civil cases, they highlight words in contracts—sometimes by blowing them up so that they receive special emphasis, sometimes by reading them aloud for emphasis, and at other times by doing both for extra emphasis. Lawyers frequently read e-mails aloud in both civil and criminal cases. Thus, an argument that it is improperly "theatrical" to read the contents of documents flies in the face of well-established practice.

Second, it is imperative that lawyers highlight the portions of documents upon which they want jurors to focus. This is necessary to ensure that jurors appreciate why documents have been put into evidence, and that they have an adequate opportunity to become familiar with the contents. Few lawyers are content to simply offer documents into evidence with the hope or the assumption that the jury will read them at some time during the trial or deliberations. Some judges don't send all exhibits into the jury room during deliberations, and, unless the contents of documents are called to the jury's attention when they are introduced, the jury may never see the contents. Even if documents are sent to the jury room, there is no assurance that all jurors will read them. In short, lawyers have a right and a need to put the contents of documents before the jury in a way that ensures that the jury comprehends the contents and is focused on the portions that counsel believe are most significant.

Third, there is nothing in the law of evidence or in procedural rules that requires that only one person read from a document. It is not uncommon in civil cases for a lawyer and an assistant to read deposition testimony by having one person read the questions and another person read the answers. This actually highlights for a jury when a question or answer begins and ends. There is no reason why in a criminal case having a prosecutor and case agent do the same should be deemed prejudicial. The jury was

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better able to follow the conversation and to distinguish Tragas's statements from others' with two people reading the statements than if the prosecutor alone read everything. That said, there might be a problem if a prosecutor were to choose another reader who might have a special impact on a jury. Though unlikely to occur, if a prosecutor were to have a famous actor, a former president, a popular elected official, or a respected religious leader join in reading aloud a transcript, a court might believe that the prosecutor was seeking an unfair advantage. This was not the case in *Tragas*.

Fourth, there is no restriction on a prosecutor or a defense counsel reading a document in a way that emphasizes certain words. The jury will see the document as well as hear the reading, and can decide for itself whether the document was read in a fair manner. Moreover, despite Tragas's attempts to prevent a prosecutor from "interpreting" evidence, prosecutors and defense lawyers do this in every case as part of closing argument. They ask the jury to accept their view of what evidence actually means. Thus, a prosecutor may tell the jury in closing that "we submit the defendant's statement . . . meant that the defendant was agreeing to buy stolen credit card information," while defense counsel may argue to the contrary that "we submit the defendant's statement had nothing to do with credit cards, stolen or legitimate." It is permissible for both prosecutor and defense counsel to read during closing argument portions of admitted documents and to argue the meaning of what they read.

Fifth, far from being unfair, the reading of a document by a prosecutor alone or by a prosecutor assisted by a case agent does something important for the defense: namely, it ensures that defense counsel and the defendant know what has been read and what has been emphasized so that the defense is in a position to respond—by its own reading of documents or in closing argument. While jurors may read documents on their own and focus on parts not called to their attention by counsel, it is unlikely that jurors will pay more attention to the parts that have been ignored by the lawyers than to parts that have been emphasized.

Finally, there is nothing wrong with prosecutors and defense counsel working to keep jurors interested in the presentation of evidence. Having a prosecutor or a defense counsel read a document to a jury in a monotone with no emphasis is likely to result in boredom or juror inattention or both. Having two people participate in reading a document as in *Tragas* may do much to keep the jurors interested and attentive. That is to be applauded rather than condemned. ■

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