No. COA21-217 DISTRICT 11B

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

 )

 ) From Johnston County

 v. )

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 )

TRAVIS RAY OVERCASH )

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**Defendant-Appellant’s Principal Brief**

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**Defendant-Appellant’s Principal Brief**

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# Issue Presented

The rule of completeness authorizes the exclusion of evidence when the proffered evidence fails to portray a complete picture and the evidence that would complete the picture is not available to be presented to the factfinder. Here, a surveillance recording purportedly showing Mr Overcash passing a forged check was lost prior to trial. In its place, the trial court admitted (1) a cellphone photograph of the video taken at the moment the photographer believed it showed Mr Overcash beginning the transaction, (2) a blow-up of the cellphone screenshot created by the lead investigator, and (3) testimony about the photographs and the unavailable surveillance recording. Was the refusal to exclude this evidence reversible error?

# Procedural History

 On 3 September 2019, a Johnston County grand jury indicted defendant Travis Ray Overcash on two counts each of uttering a forged endorsement and obtaining property by false pretenses. (Rpp 10, 12). Mr Overcash was subsequently charged with attaining habitual felon status. (Rp 14). His jury trial began on 16 November 2020, with Senior Resident Superior Court Judge Thomas Lock presiding. (Tp 1). At the close of the State’s evidence, it voluntarily dismissed one count of uttering a forged endorsement and one count of OPFP. (Tp 242; Rp 27). The jury found Mr Overcash guilty of the two remaining charges. (Rp 50). Mr Overcash then pled guilty to being a habitual felon. (Rp 51). The trial court found Mr Overcash to be a Level V offender and habitualized his sentences. (Rpp 55, 58, 60). He received 108 to 142 months imprisonment for the OPFP conviction, followed by 36 to 56 months imprisonment for the conviction for uttering a forged endorsement. (Rpp 58, 60). Mr Overcash noticed appeal in open court. (Tp 306).

# Grounds for Appellate Review

Mr Overcash appeals as a matter of right from final judgments entered upon his convictions in superior court. N.C.G.S. §§ 7A-27(b)(1), 15A-1444(a) (2021).

# Facts

Dana Soriano was the general manager of the Golden Corral restaurant in Smithfield in April 2019. (Tp 206). At that time, employee paychecks were mailed to the restaurant every two weeks and held for pick-up in a clear plastic container in a cabinet under the cash register. (Tpp 208-09). Neither the cabinet nor the container were locked, so “anybody”—“an employee or a customer”—could get into them and take a paycheck. (Tp 209). Employees, however, normally didn’t retrieve their own paychecks; they were handed their paychecks by Ms Soriano or their crew leader. (Tp 208).

By April 2019, Carmen Gonzalez had been working in the kitchen at the Golden Corral for three years. (Tpp 145-46). And Mr Overcash had been working there as a chef for about two months. (Tpp 221, 223). Around the middle of that month, Ms Gonzalez went to Ms Soriano to report her paycheck was missing. (Tpp 208-09). After confirming Ms Gonzalez had been issued a paycheck for $719.27[[1]](#footnote-2) on 9 April 2019, Ms Soriano contacted the bank to find out if the check had “gone through the bank and cleared.” (T p 210; St’s Ex 1).

The bank reported the check had cleared Golden Corral’s account and emailed Ms Soriano a copy of the processed check. (Tpp 158, 210; St’s Ex 1). The back of the check showed it had been cashed at Dunn’s Gas & Grocery, a convenience store in Four Oaks, about 15 minutes away from the Golden Corral. (St’s Ex 1; Tpp 210, 238). The timestamp on the check showed it had been accepted at the store at 3:11 pm on 13 April 2019. (St’s Ex 1).

On 18 April 2019, Ms Soriano reached out to the manager of Dunn’s Gas & Grocery, Teresa Heath, to see if the store had any surveillance video from 13 April 2019. (Tpp 210, 213). Ms Heath “pulled” the surveillance recording and found the requested video. (Tp 173).

On 19 April 2019, before going to Dunn’s Gas & Grocery to watch the surveillance video, Ms Soriano talked with Mr Overcash about the missing paycheck. (Tpp 228-29). Upset that he was being accused of taking Ms Gonzalez’s paycheck, Mr Overcash left the restaurant and didn’t come back. (Tpp 229-30).

Later that day, Ms Soriano drove to Dunn’s Gas & Grocery and watched the surveillance video with Ms Heath in her office. (Tpp 212-13). According to Ms Soriano and Ms Heath—the only two people who watched the video before it was recorded over—the video showed a man they identified as Mr Overcash walk up to a cash register at 3:07 pm on 13 April 2019 and put a piece of paper on the counter. (Tpp 174-75, 199-200, 187, 189-90, 224, 227). The clerk at the register took the paper, ran it through the time clock, and initialed it. (Tp 187). The clerk then put the paper in a drawer next to the register and handed Mr Overcash money from the register. (Tp 187). Mr Overcash took the cash and walked out of the store. (Tp 188).

Mr Overcash was charged with uttering a forged endorsement with respect to Ms Gonzalez’s paycheck and obtaining property from Dunn’s Gas & Grocery by false pretense. (Rp 12). Mr Overcash pled not guilty, and the case proceeded to trial. The jury found Mr Overcash guilty as charged. (Rp 50). After being convicted of the substantive offenses, Mr Overcash pled guilty to being a habitual felon. (Rp 51). The trial court sentenced Mr Overcash to consecutive, habitualized sentences totaling 144 to 198 months imprisonment. (Rpp 58, 60). Defense counsel orally noticed appeal after entry of judgment. (Tp 306).

# Argument

## The trial court violated the rule of completeness by admitting a screenshot of a recorded-over surveillance video, a blow-up of the screenshot, and testimony concerning the photographs and the unavailable video.

### A trial court’s decision to admit or exclude evidence under the rule of completeness is reviewed for abuse of discretion.

The admission or exclusion of evidence pursuant to the rule of completeness, codified in Rule 106 of the Rules of Evidence, is within the trial court’s discretion. *State v. Fowler*, 353 N.C. 599, 620 (2001). Discretionary decisions are normally given deference on appeal and aren’t overturned unless the trial court abused its discretion. *White v. White*, 312 N.C. 770, 777 (1985).

This deference on appeal, however, doesn’t fully insulate the court’s decision from review: “The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.” *Koon v. United States*, 518 U.S. 81, 100 (1996). “‘A [trial] court by definition abuses its discretion when it makes an error of law.’” *State v. Rhodes*, 366 N.C. 532, 536 (2013) (quoting *Koon*, 518 U.S. at 100); *State v. Nunez*, 204 N.C. App. 164, 170 (2010) (“When a trial judge acts under a misapprehension of the law, this constitutes an abuse of discretion.”). Thus “an abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction.” *Koon*, 518 U.S. at 100. Indeed, a ruling “made under a misapprehension of the law” should be corrected on appeal. *State v. Cornell*, 281 N.C. 20, 30 (1972).

### When a proponent’s evidence provides an incomplete picture of an event, the rule of completeness authorizes the exclusion of the proponent’s evidence.

Rule 106 codifies the common-law rule known as “the rule of completeness.” *Fowler*, 353 N.C. at 620. Rule 106 reads in full:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

N.C. R. Evid. 106.

 The purpose of Rule 106’s rule of completeness is to authorize the admission of omitted portions of a statement “to explain the admitted portion, to place the admitted portion in context, to avoid misleading the jury, or to ensure fair and impartial understanding of the admitted portion.” *United States v. Castro*, 813 F.2d 571, 575-76 (2d Cir. 1987); *see generally Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172 n.14 (1988) (identical federal rule addresses “concern that the court not be misled because portions of a statement are taken out of context”).[[2]](#footnote-3)

Put simply, Rule 106 is intended to provide the factfinder with a “complete picture” or “complete understanding” of the context in which a statement was made. *Beech Aircraft Corp.*, 488 U.S. at 170-71; *e.g., State v. Burns*, 287 N.C. 102, 114-15 (1975) (where defendant cross-examined victim about her out-of-court identification to discredit her in-court identification, the State was permitted to “giv[e] the jury the complete picture” of circumstances surrounding out-of-court identification). To provide a complete picture, an adverse party is entitled to have “everything” relevant and explanatory “brought out” before the factfinder. *State v. Weeks*, 322 N.C. 152, 167 (1988); *Thompson*, 332 N.C. at 220.

Rule 106’s reference to “recorded statements” includes photographic and electronic recordings, such as cellphone photographs, videotapes, and films. *See United States v. Spearman*, 186 F.3d 743, 755-56 (6th Cir. 1999) (applying identical federal rule to surveillance videotape); *Brewer v. Jeep Corp.*, 724 F.2d 653, 657 (8th Cir. 1983) (applying federal rule to internal corporate film); *United States v. Williston*, 862 F.3d 1023, 1038-39 (10th Cir. 2017) (applying federal rule to interrogation video); *see also State v. Austin*, 585 N.W.2d 241, 243-44 (Iowa 1998) (applying similar state rule to videotape of interview); *State v. Baca*, 902 P.2d 65, 72 (N.M. 1995) (applying similar state rule to video of therapy session).

In the typical case, Rule 106 is used by an adverse party to *admit* evidence that “‘complement[s]’” the proponent’s evidence. *Beech Aircraft Corp.*, 488 U.S. at 171 (quoting 7 J. Wigmore, *Evidence in Trials at Common Law* § 2113 (1978)); *e.g., Weeks*, 322 N.C. at 167 (“When the State offers into evidence a part of a confession the accused may require the whole confession to be admitted.”).

However, as a rule expressly built on “fairness,” N.C. R. Evid. 106, the rule of completeness may also be used by an adverse party to *exclude* a proponent’s evidence when the proponent’s evidence fails to portray a complete picture, and the “completion evidence,” *Beech Aircraft Corp.*, 488 U.S. at 172, is unavailable at trial. *See United States v. Yevakpor*, 419 F. Supp. 2d 242, 245-47 (N.D.N.Y. 2006) (excluding government’s three one-minute video segments of “stop and search” where snippets failed to provide “complete picture of events” and remainder of video had been destroyed). Whether fairness justifies the exclusion of the proponent’s evidence when the completion evidence is unavailable is determined on a case-by-case basis. *See State v. Hall*, 194 N.C. App. 42, 51 (2008) (declining to “adopt a *per se* rule of exclusion in situations where only portions of a written or recorded statement are available”); *see also Brewer*, 724 F.2d at 657 (Rule 106 should be construed “in such a manner as to promote the growth and development of the law while securing fairness in its administration”).

For example, in *Yevakpor*, 419 F. Supp. 2d at 243-44, the defendant, who was charged with attempting to smuggle heroin across the border, challenged the admission of three one-minute video “segments” taken from a longer surveillance recording of the stop and search at the border. The three minutes of video represented about 12.5% of the known recording. *Id*. at 247. During discovery, the government was unable to provide the entire surveillance video of the stop and search because “the rest of the tape [had been] recorded-over or erased.” *Id*. at 244. Prior to trial, the defendant moved for the exclusion of the video segments under the federal counterpart to Rule 106, arguing “the video surveillance [wa]s incomplete and represent[ed] only a small portion of time from the overall stop and search.” *Id*. at 246. Opposing the motion, the government argued the video segments were akin to “snapshot photographs,” which would ordinarily be admissible at trial, and the unavailability of the remainder of the video went “to the weight of the evidence, not its admissibility.” *Id*. at 246.

The Northern District of New York rejected the government’s contentions. Distinguishing photographs from videos, the district court observed:

[S]till photographs are a different kind of evidence, and are not interchangeable with video recordings. There is a reason that surveillance is now conducted with video recordings and not still photography—the video recordings provide a more complete picture of events, a continuous stream of information, with less risk of scenes being taken out of context.

*Id*. at 246.

 Those “benefit[s],” the court noted, were “curtailed” when the entire surveillance videotape wasn’t preserved. *Id*. The court also concluded the unavailability of the complete video affected the admissibility of the video segments, recognizing the “difficult[y] [in] determin[ing] whether ‘any other part . . . ought . . . be considered contemporaneously with’ the proffered part since no other parts of the video exist for review by the Government or the Defense.” *Id*. at 246 (quoting Fed. R. Evid. 106) (first three alterations added).

The defendant was “hampered,” the court found, “by the loss of the remaining 87.5% of known video.” *Id*. at 247. “Even if the video contained nothing of value to the Defense,” the court reasoned, “that is something Defendant had the right to determine for himself after viewing the video as a whole.” *Id*. As a result of that “loss of opportunity,” the court concluded “the only tenable solution” under Rule 106 was the “exclusion of the remaining three minutes of Government-proffered surveillance video.” *Id*. Accordingly, the court prohibited the government from admitting or otherwise using the video segments at the defendant’s trial. *Id*. at 244-45; *compare Hall*, 194 N.C. App. at 51 (trial court didn’t abuse discretion under Rule 106 by refusing to exclude portions of letters defendant wrote to girlfriend where defendant was in “best position” to get copies of letters and to know whether missing portions were relevant).

### Based on a mistaken reading of this Court’s opinion in *State v.* *Thorne*, the trial court erroneously admitted the screenshot of the unavailable surveillance video, the blow-up of the screenshot, and testimony about the photographs and video.

*i. Defense counsel’s objections and the trial court’s rulings*

While discussing pretrial motions, defense counsel learned the State intended to use a cellphone photograph Ms Soriano had taken of the surveillance monitor while watching the video at Dunn’s Gas & Grocery on 19 April 2019 (State’s Exhibit 2).[[3]](#footnote-4) (Tp 129). Counsel objected to the admission of the “screenshot” on hearsay and best evidence grounds. (Tp 129). Pertinent here, counsel also argued the admission of the screenshot would violate “the rule of complet[eness].” (Tpp 129-30). The trial court denied the pretrial motion to exclude the screenshot. (Tp 131).

Defense counsel renewed her objections to the use of the screenshot of the video throughout the State’s case-in-chief. (Tpp 175, 176, 218-19). During Ms Heath’s testimony, the State provided her with a copy of the screenshot of the surveillance video. (Tpp 175-76). When the State asked Ms Heath about the content of the photograph, defense counsel objected. (Tpp 175, 176). The jury was excused from the courtroom, and the court heard arguments concerning the admissibility of the screenshot. (Tp 177). Counsel again argued the photograph was “hearsay” and “not the best evidence.” (Tp 180). Counsel further contended:

The rule of complet[eness] would say that my client deserves to have the whole video entered if they’re entering any portion of the video . . . . So, again, we object on the basis that the video itself should be admitted and not any portion thereof unless we have the video to be able to scrutinize everything in the store that day, not just one frame of the video that may be able to be misinterpreted, Your Honor.

(Tp 180).

 Turning to the prosecutor, the court “call[ed] the attention of counsel [to] Rule 106” and asked the prosecutor if he had a response. (Tp 180). The prosecutor replied that he had “looked into . . . this issue” and believed the admissibility of the photographs was controlled by *State v. Thorne*, 173 N.C. App. 393 (2005), where this Court held Rule 1004 of the Rules of Evidence (the “best evidence” rule) authorized the admission of a law enforcement officer’s testimony describing what he saw when watching a surveillance videotape that was subsequently lost. (Tpp 181-83). Positing the screenshot was analogous to the testimony found admissible in *Thorne*, the prosecutor argued the photograph should be allowed to “come in.” (Tp 183).

 The court then took a break to read *Thorne*, and to allow defense counsel to review the case. (Tp 183). At the end of the recess, the court advised counsel it had “review[ed] the *Thorne* case,” and asked if defense counsel had any additional arguments in support of her objections. (Tp 183). Defense counsel “renewed [her] arguments from earlier.” (Tp 183). And the prosecutor reiterated his “rel[iance] on the *Thorne* case.” (Tp 183).

The trial court overruled defense counsel’s objections. (Tp 183). Counsel then asked whether, in addition to the photograph being admitted, Ms Heath would be allowed to “testify about what she saw on the video.” (Tp 184). The court ruled Ms Heath would be permitted to “testify about what she saw on the video” because “[t]hat’s what the *Thorne* case discussed.” (Tp 184). When the jurors returned to the courtroom, the court told them the objection had been overruled. (Tp 185).

The State similarly questioned the investigating officer about a “blow-up” photograph he created from the screenshot of the surveillance monitor playing the video (State’s Exhibit 3).[[4]](#footnote-5) (Tpp 202-03). Defense counsel objected to the officer’s testimony about the blow-up on the “same basis” as the initial screenshot. (Tp 203). The court overruled this objection as well. (Tp 203).

Defense counsel also objected when the State questioned Ms Soriano about the screenshot of the surveillance video she took with her cellphone. (Tpp 216-17). The objection was overruled. (Tp 217). Later, when the State moved to have the screenshot and blow-up photographs admitted into evidence, defense counsel renewed her objections. (T p 219). They were again overruled. (T pp 219, 220).

*ii.* *The trial court erroneously relied on* Thorne *in overruling defense counsel’s Rule 106 objection*.

The trial court misread *Thorne*. There, a police officer investigating the robbery of a credit union watched the branch’s surveillance videotape and concluded the robber’s gait was similar to the way the defendant walked. *Thorne*, 173 N.C. App. at 395. The surveillance video of the robbery was subsequently lost. *Id*. At trial, the investigating officer was permitted to testify—over the defendant’s objection—about what he saw when he watched the surveillance videotape, including the robber’s gait. *Id*.

On appeal from his conviction for armed robbery, the defendant argued, among other things, that the trial court should’ve excluded the officer’s testimony about the surveillance video under Rule 403 because “the jurors’ inability to view the contents of the tape unfairly prejudiced him at trial.” *Id*. at 399. This Court rejected that argument, explaining at the “outset” of its analysis that the unavailability of the lost videotape didn’t result in a “per se” violation of Rule 403, because if the officer’s testimony was “otherwise admissible” under Rule 403, then the testimony was likewise admissible as “secondary evidence” under Rule 1004. *Id*.; *see* N.C. R. Evid. 1004 (authorizing admission of “other evidence of the contents of a[n] [original] writing, recording, or photograph” unless the originals were destroyed in bad faith by the proponent, are unobtainable, are in possession of the opponent, or relate to collateral issues). This Court went on to conclude the trial court properly conducted the required balancing under Rule 403 in admitting the officer’s testimony. *Id*. at 399-400. As a result, the testimony was properly admitted under Rule 1004—despite the unavailability of the best evidence. *Id*. at 400.

Here, while *Thorne* “discussed” defense counsel’s “best evidence” objection to the screenshot and blow-up, nothing in *Thorne* addressed counsel’s separate argument that the photographs and related testimony should’ve been excluded pursuant to Rule 106’s rule of completeness. (T p 184). As this Court was careful to note in *Thorne*, 173 N.C. App. at 399, Rule 1004 permits the use of secondary evidence only if the secondary evidence is “*otherwise admissible* under the Rules of Evidence.” *Id*. at 399 (emphasis added). Rule 1004 is a “rule of preference,” not an independent basis of admissibility. N.C. R. Evid. 1004 cmt. Just as the officer’s testimony in *Thorne* was admissible under Rule 1004 only if it was “otherwise admissible” under Rule 403, the challenged photographs and testimony in this case were admissible under Rule 1004 only if they were “otherwise admissible” under Rule 106.

Put simply, the trial court got *Thorne’s* analysis backwards: evidence inadmissible under Rule 106’s rule of completeness isn’t transformed into admissible evidence simply because it satisfies Rule 1004’s best evidence rule. *Id*. at 399. The trial court in this case was thus operating under a misapprehension of law when it relied on *Thorne* to overrule defense counsel’s Rule 106 objections. *See United States v. Hinkson*, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (where trial court misidentifies “legal rule to apply,” court “abuse[s] its discretion”); *e.g., State v. Tuck*, 191 N.C. App. 768, 773 (2008) (trial court misapprehended the law, and thus abused its discretion, by allowing the State to impeach a defense witness with a prior inconsistent statement that hadn’t been turned over to the defense, where the issue wasn’t whether the impeachment was proper under the rules of evidence but was whether the State had complied with the discovery statute).

Accordingly, the trial court abused its discretion by admitting (1) the screenshot of the surveillance video, (2) the blow-up of the screenshot, (3) the testimony relating to these two photographs, and (4) the testimony concerning the contents of the unavailable surveillance video. *See Yevakpor*, 419 F. Supp. 2d at 244-45 (where snippets of surveillance video were inadmissible under federal Rule 106, trial court prohibited “the admission *or use* of the videotape segments at trial” (emphasis added)).

### Mr Overcash was prejudiced by the trial court’s refusal to exclude the challenged photographs and testimony.

There is a reasonable possibility that, had the trial court properly excluded the challenged photographs and related testimony, the jury would’ve reached a different result at Mr Overcash’s trial. *State v. Lee*, 335 N.C. 244, 273 (1994); N.C.G.S. § 15A-1443(a) (2021). Mr Overcash is thus entitled to a new trial.

Where a trial court erroneously admits evidence under Rule 106, the potential prejudice is that the jury may be “misled” by the “out-of-context” evidence. *Beech Aircraft Corp.*, 488 U.S. at 172 n.14. The prejudice is often “impossible to repair.” *Id*. This danger is especially acute and difficult to remedy where, as here, the completion evidence isn’t available, and thus neither party can adequately contextualize the proffered evidence. *See Yevakpor*, 419 F. Supp. 2d at 246 (“It is difficult to determine whether ‘any other part . . . ought . . . be considered contemporaneously with’ the proffered part since no other parts of the video exist for review by the Government or the Defense.” (quoting Fed. R. Evid. 106)).

The trial court in *Yevakpor*, for example, recognized the danger posed by the three one-minute video segments and prohibited the government from using them at the defendant’s jury trial. They were potentially misleading to the jury, and the defendant lacked any ability to contextualize the segments or correct the jury’s confusion. *Yevakpor*, 419 F. Supp. 2d at 252, 247. The court first noted the segments had been “cherry-picked” from the longer surveillance recording because their content—the events and actions the segments showed—were “beneficial” to the prosecution’s case. *Id*. at 252, 247. The government’s “self-select[ed]” evidence had been stripped of context: there was no accompanying audio; the “actors” in the video couldn’t be “examine[d]” at trial; their “actions [we]re subject to interpretation”; and the jury’s “interpretation would be sk[ewed] by not presenting the excerpts in context.” *Id*. at 250.

The district court, moreover, recognized the defendant had been “hampered” in his ability to contextualize video segments due to the unavailability of the rest of the surveillance recording. *Id*. Unable to “view[] the video as a whole,” the defendant couldn’t determine whether the recording contained anything “of value” to his defense. *Id*. at 247. However guilty the video clips might have made the defendant look, any “material and arguably exculpatory” information was “[o]f equal evidentiary value” to the defendant—and this information had been lost. *Id*. at 249. Consequently, without the completion evidence, the defendant couldn’t counteract the prosecution’s intended use of the snippets by “cast[ing] the Government’s proffer in a different light to the jury.” *Id*. at 250. Thus, the trial court concluded, allowing the government to use the video clips at trial would “undermin[e] the reliability” of the jury’s verdict. *Id*. at 249.

The court’s concerns in *Yevakpor* are present in this case. As defense counsel noted, the screenshot and its blow-up represent just “one frame” of a longer surveillance recording. (Tp 180). And that one frame had been “cherry-picked” from the surveillance recording just like the video segments in *Yevakpor*. Although Ms Soriano had “no clue” who took and cashed Ms Gonzalez’s paycheck, she confronted Mr Overcash about it before ever watching the surveillance video from Dunn’s Gas & Grocery. (Tpp 212, 229). When she did view the video, she only “watched a minute or so.” (Tp 218). And she couldn’t “tell exactly what was happening” at the cash register because the man in the video had his back turned to the surveillance camera. (Tp 228). Ms Soriano nonetheless took a “snapshot” of the surveillance monitor as “proof” that a man she believed to be Mr Overcash appeared at the register to conduct a transaction she believed to be the cashing of Ms Gonzalez’s paycheck. (Tp 218).

As in *Yevakpor*, the screenshot and blow-up had been stripped of all context in the absence of the full video: There was no audio. The State, for whatever reason, elected not to call the clerk who cashed the check to testify at trial. The actions of the man in the screenshot were “subject to interpretation,” and the jury’s interpretation of what the screenshot showed was skewed without presenting the entire “context” of the transaction. *Id*. at 250.

The defense, moreover, was prejudiced by the unavailability of the entire surveillance video. Unable to review the complete recording, there was no way for Mr Overcash to know whether the remaining portions contained any “material and arguably exculpatory” information that would be of “equal evidentiary value” to him. *Id*. at 249. Just as the government in *Yevakpor* wanted to use the video clips because they purportedly connected the defendant to the smuggled drugs, here, the State wanted to use the screenshot because it was the only visual evidence “t[ying] [Mr Overcash] to the transaction” in Dunn’s Gas & Grocery. (T p 182). And the lead investigator, who never watched the surveillance video, made sure the jury couldn’t miss the temporal connection between Mr Overcash’s presence in the store and the passing of the check by “circl[ing] the date and the timestamp” in the screenshot when he printed it out. (Tp 199; St’s Ex 2). The blow-up, moreover, quite literally “zoomed in” on the prejudicial content of the screenshot. (Tp 199). Mr Overcash had no way to fairly combat this use of the screenshot and blow-up and “cast” the State’s evidence in a more complete “light to the jury.” *Id*. at 250.

In sum, the screenshot and blow-up were devoid of all context without the presentation of the full surveillance recording for the jury. Since everything but “one frame” of the video had been recorded over, Mr Overcash had no way to correct the “‘distortion’” created by the screenshot and amplified by the blow-up. *United States v. Ellis*, 121 F.3d 908, 921 (4th Cir. 1997) (quoting *Beech Aircraft Corp.*, 488 U.S. at 172). The prejudicial impact of this photographic evidence and the related testimony about the photographs and the unavailable surveillance video “undermin[es] the reliability” of the jury’s verdict in this case. *Yevakpor*, 419 F. Supp. 2d at 249. Mr Overcash is thus entitled to a new trial.

# Conclusion

The trial court committed prejudicial error under Rule 106 by failing to exclude (1) the screenshot of the surveillance monitor, (2) the blow-up of the screenshot, (3) the testimony relating to these two photographs, and (4) the testimony concerning the contents of the unavailable surveillance video. Mr Overcash deserves a new trial where, “in fairness,” N.C. R. Evid. 106, this evidence is not admitted.

Respectfully submitted, this the 16th day of April, 2021.

/s/ Wyatt Orsbon

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# Certificate of Compliance

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel certifies this principal brief, prepared using a proportional font, is less than 8,750 words (excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance, and appendixes) as reported by the word-processing software.

/s/ Wyatt Orsbon

Wyatt Orsbon

Assistant Appellate Defender

# Certificate of Filing and Service

 Counsel hereby certifies Mr Overcash’s principal brief was filed by uploading it to the appellate division’s electronic filing website in accordance with Rule 26(a)(2).

Counsel further certifies this brief was duly served on Daniel P. O’Brien, Special Deputy Attorney General, at *DObrien@ncdoj.gov*, in accordance with Rule 26(c).

This the 16th day of April, 2021.

/s/ Wyatt Orsbon

Wyatt Orsbon

Assistant Appellate Defender

No. COA21-217 DISTRICT 11B

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

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 ) From Johnston County

 v. )

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TRAVIS RAY OVERCASH )

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**Appendix**

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App. 1 – 2 State’s Exhibit 1 3, 4

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App. 5 – 6 State’s Exhibit 3 14

1. A copy of the check, State’s Exhibit 1, is appended to this brief. [↑](#footnote-ref-2)
2. Our courts “frequently look[] to federal decisions for guidance with regard to the Rules of Evidence,” especially where, as here, “the federal rule is identical to our rule.” *State v. Thompson*, 332 N.C. 204, 219 (1992) (applying “lessons” from federal decisions discussing federal counterpart to Rule 106). [↑](#footnote-ref-3)
3. A copy of the cellphone photograph, State’s Exhibit 2, is appended to this brief. [↑](#footnote-ref-4)
4. A copy of the blow-up photograph, State’s Exhibit 3, is appended to this brief. [↑](#footnote-ref-5)