

In order for computer data to **not** be considered hearsay, the data must be computer self-generated as part of the computer's internal system (e.g. functions that monitor the status of the system, counting records and et cetera) and not data entered by a person. See *Smith v. State*, 866 S.W.2d 731 at 732 (Tex.App.—Houston [14th Dist.] 1993, no pet.) (recognizing that computer self-generated data is not hearsay); *Murray v. State*, 804 S.W.2d 279, at 283-284 (Tex.App.—Fort Worth 1991, pet. ref'd) (recognizing computer self-generated data that is the result of a computer's internal operations as being in contradistinction to data that reflects statements placed into the computer by a person, and that the former is not hearsay where the latter is); *Ly v. State*, 908 S.W.2d 598 at 600-601 (Tex.App.—Houston [1st Dist.] 1995, no pet. h.) (stating, "A computer self-generated printout that does not represent the output of statements placed into the computer by out of court declarants is not hearsay," and further defining that "computer self-generated data" is such that has "no reliance upon human input"); *Burleson v. State*, 802 S.W.2d 429 at 439-440 (Tex.App.-Fort Worth 1991, pet. ref'd) (recognizing that a count of computer records is computer self-generated data that is not hearsay whereas the actual content of such records entered by persons is hearsay); *Murray, supra* ("Often, a computer printout amounts to the feeding back of data placed into the computer by a person; although the data may be in different form than it was when it was fed into the computer, it retains its status as the statement or statements made by a person.").



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NO. B14-92-00341-CR.

866 S.W.2d 731 (1993)

***Francis Gerard SMITH, Appellant,******v.******The STATE of Texas, Appellee.****Court of Appeals of Texas, Houston (14th Dist.).  
November 10, 1993.**Ross Palmie, Houston, for appellant.**Linda A. West, Houston, for appellee.**Before MURPHY, SEARS and DRAUGHN, JJ.***OPINION**

SEARS, Justice.

Appellant was convicted by a jury of driving while intoxicated. The Court assessed punishment at six months in jail, probated over two years, and a two hundred and fifty dollar fine. Appellant brings one point of error, complaining that the trial court erred in admitting the intoxilyzer printout slip into evidence. We affirm.

On July 18, 1991, Appellant was stopped by Officer Huber for speeding and failing to maintain a single lane. After observing and talking to Appellant, Officer Huber found it necessary to administer field sobriety tests. On completion of the tests, Officer Huber informed Appellant that he was under arrest "for the suspicion or for driving while intoxicated." Officer Huber transported the Appellant to the La Porte jail, where Officer Moore administered an intoxilyzer test.

[866 S.W.2d 732]

Officer Moore followed correct procedures for the operation of the instrument. He testified that Appellant did not do anything prior to the administration of the test that could have invalidated the test. He witnessed Appellant "blow" into the instrument two times. Once the test was completed, the instrument printed out the results on a slip of paper, and Officer Moore signed the bottom of the slip.

Becky Cuculic, a technical supervisor for the state of Texas, testified that the intoxilyzer had been inspected on June 25, 1991, and had been working properly. The State established that Ms. Cuculic was the custodian of the intoxilyzer reports, and then offered Appellant's report into evidence. Appellant's trial counsel stated "I object as to hearsay, Judge. 802." The Court responded, "Hearsay? I can't—I can't possibly conceive hearsay." The report was then admitted into evidence.

In his sole point of error, Appellant maintains that the report is hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." (emphasis added). Tex.R.Crim.Evid. 801(d). Rule 801 defines a statement as "(1) an oral or written *verbal* expression or (2) nonverbal conduct of a *person*, if it is intended by him as a substitute for verbal expression." TEX. R.CRIM.EVID. 801(a). The Rule further defines declarant as "a *person* who makes a statement." Tex.R.Crim.Evid. 801(b). A computer is not a person, and therefore can not be a "declarant" who makes a "statement."

We agree with the decision of the Fort Worth Court of Appeals in *Murray v. State*, 804 S.W.2d 279 (Tex.App.—Fort Worth 1991, pet ref'd). In it, the Court held that computer self-generated data is not hearsay, and that the proper objection instead is whether the State has established that the printout is reliable. *Murray* at 284. The trial court was correct in overruling Appellant's hearsay objection to the intoxilyzer report. Appellant's sole point of error is overruled, and the judgment of the trial court is affirmed.

804 S.W.2d 279 (1991)

**Joe Dale MURRAY, Appellant,**  
**v.**  
**The STATE of Texas, State.**

No. 2-89-233-CR.

**Court of Appeals of Texas, Fort Worth.**

February 6, 1991.

Rehearing Overruled March 13, 1991.

\*280 David B. Lobingier, Fort Worth, for appellant.

Tim Curry, Dist. Atty., David K. Chapman, and Edwin Youngblood, Asst. Dist. Attys., Fort Worth, for appellee.

Before JOE SPURLOCK, II, FARRIS and DAY, JJ.

## **OPINION**

DAY, Justice.

Joe Dale Murray appeals his conviction for the offense of aggravated sexual assault. *See* TEX.PENAL CODE ANN. § 22.021 (Vernon 1989).

We affirm.

On December 27, 1986, S.G. arrived at the Arlington Hilton Hotel where she was to stay during the completion of a flight attendant training course. S.G. was assigned to room 1224 and received a card key to that room. The door to S.G.'s room would not open despite her repeated attempts to insert the card key and get the green light on the lock to illuminate. S.G. eventually opened the door, although she was unable to determine whether the door opened because the lock unlocked or because she pushed the door open. After depositing her luggage in the room, S.G. walked across the room, intending to hang up her jacket. She became aware that she was not alone and attempted to exit the room. A white male, whom S.G. identified at trial as Murray, grabbed her, pushed her against the wall, and ordered her to undress. S.G. removed her clothing. Murray, armed with a knife, cut off S.G.'s watch chain and bracelet and touched the insides of her thighs with the knife. Murray then had sexual intercourse with S.G., after which S.G. lost consciousness. After regaining consciousness, S.G. ran out of the room and proceeded to the lobby. S.G.'s wrists and neck had been cut. She was taken by ambulance to Arlington Memorial Hospital where a doctor performed a rape examination. After hearing S.G.'s testimony and considering the evidence presented, the jury convicted Murray. Murray perfected this appeal.

Murray's first point of error asserts that the trial court erred in denying his objection to the court's charge. Specifically, Murray contends that the trial court should have limited the definition of the term "intentionally" to the *results* of his conduct as opposed to the *nature* of his conduct.

The court's charge, in pertinent part, follows:

A person acts intentionally, or with intent, with respect to the *nature* of his conduct or to a *result* of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

A person acts knowingly, or with knowledge, with respect to the *nature* of this conduct or to circumstances surrounding his conduct when he is aware of the *nature* of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a *result* of his conduct when he is aware that his conduct is reasonably certain to cause the *result*. [Emphasis added.]

Now if you find and believe from the evidence beyond a reasonable doubt on or about the 27th day of December, 1986 in Tarrant County, Texas the defendant, Joe Dale Murray, did then and there intentionally or knowingly, by the use of physical force or violence or by threatening to use force or violence which [S.G.] believed said defendant had the present ability to execute and without the consent of [S.G.] who was not the spouse of the said defendant, cause the penetration of the female sexual organ of said [S.G.] by placing his penis in the female sexual organ of [S.G.], and said defendant used or exhibited a deadly weapon, to-wit, a knife, that in the manner of its use or intended use was capable of causing death or serious bodily injury in the course of the same criminal episode, then you will find the defendant guilty of the \*281 offense of aggravated sexual assault as charged in the indictment.

Unless you so find and believe from the evidence beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant and say by your verdict "not guilty."

The Court of Criminal Appeals has consistently recognized that Texas Penal Code § 6.03 delineates three "conduct elements" which may be applicable to an offense: the *nature* of the conduct; the *result* of the conduct; and the circumstances surrounding the conduct. *McQueen v. State*, 781 S.W.2d 600, 603 (Tex.Crim.App.1989) (quoting *Lugo-Lugo v. State*, 650 S.W.2d 72, 74 (Tex.Crim.App. 1983)); *Musgrave v. State*, 608 S.W.2d 184, 191 (Tex.Crim.App. [Panel Op.] 1980) (Roberts, J., concurring). An offense may contain any one or more of these "conduct elements" which alone or in combination form the overall behavior which the legislature intended to criminalize, and it is those essential "conduct elements" to which a culpable mental state must apply. When an offense is *only* a "result" or "nature of the conduct" type offense, the court should submit statutory definitions of "intentionally" or "knowingly" which are limited to the respective culpable mental state required. *Saldivar v. State*, 783 S.W.2d 265, 268 (Tex.App.Corporis Christi 1989, no pet.) (quoting *Bosier v. State*, 771 S.W.2d 221, 225 (Tex.App.Houston [1st Dist.] 1989, pet. ref'd)). Similarly, when an offense is *both* a "result" and a "nature of the conduct" type of offense, with respect to the intent or knowledge required, the trial court should submit complete statutory definitions of "intentional" and "knowingly" so that the jury can consider both the result of the offender's conduct and the nature of his conduct. *Saldivar*, 783 S.W.2d at 267-68.

Murray cites *Alvarado v. State*, 704 S.W.2d 36 (Tex.Crim.App.1985), for his contention that the court's definition of "intentional" was too broad and that such definition should have been limited to the result, rather than the nature, of his conduct. We believe Murray's reliance on *Alvarado* is misplaced. *Alvarado* was a case involving injury to a child pursuant to § 22.04 of the Texas Penal Code. After an exhaustive analysis of the legislative history underlying § 22.04 and Chapter 6 of the Texas Penal Code, the Court of Criminal Appeals determined that injury to a child was a "result" crime. *Alvarado*, 704 S.W.2d at 39. Murray contends that this

finding is controlling on all cases governed by Chapter 22 of the Texas Penal Code. We disagree.

Aggravated sexual assault cases have not yet been characterized as either "result" or "nature of the conduct" type offenses. *Saldivar*, 783 S.W.2d at 267. Therefore, we must apply the rule that when an offense is not clearly categorized as either a "result" or a "nature of the conduct" type offense, with respect to the intent and knowledge required, as is the case at bar, the trial court *may* submit statutory definitions of "intentional" and "knowingly" because *both* definitions allow the jury to consider the nature of the offender's conduct *or* the results of his conduct. *Id.*<sup>[1]</sup> We find that the trial court did not err in denying Murray's request to limit the definition of the term "intentionally" in its charge to the jury. Murray's first point of error is overruled.

Murray's second point of error asserts that the trial court erred in overruling his motion to suppress his in-court identification by S.G. Specifically, Murray claims that S.G.'s identification of Murray was not of independent origin but rather was the result of hypnotically-induced testimony which resulted from unnecessarily suggestive pretrial identification procedures. Murray further contends that the State failed to provide proper safeguards to insure \*282 that S.G.'s refreshed recollection was reliable.

The record reflects that S.G. was never under the effect of a hypnotic trance. Bruce Thomas, the psychologist enlisted to hypnotize S.G., testified on direct examination as follows:

Q. [By Mr. Youngblood] I apologize for asking you a vague question. What I mean by what happened was, you said you had attempted to go into a hypnosisbased progressive relaxation session. Were you able to hypnotize [S.G.]?

A. I did not feel so. However, I felt that the relaxation in and of itself would be beneficial in order to calm down any kind of emotional impact her experience might have so that she might more objectively recall some material that she had experienced and deleted in some way.

Q. Can you elaborate for the Court what you mean then by this relaxation?

A. I would have to review the tapes to be absolutely sure that's exactly what was done, but that's normally what I do. On progressive relaxation, basically what that is, is it allows them to concentrate on various parts of their body to help them relax as they go deeper into a state of relaxation.

Q. Is that hypnosis?

A. It is an induction that you can use for hypnosis.

Q. In this case was it?

A. I don't think she was ever hypnotized.

Q. Why not?

A. Well, there were several things, one of which was that muscle relaxation wasn't there; the voice tone inflection didn't have any of the slowed-down, lethargic kind of sound, as I recall. Also, I think, if I remember correctly, there were movements that she made, gestures that didn't seem to be the kind of subconscious motor behavior you have. It was more spontaneous, quick, this nature.

I had the impression that just any time if she wanted to she could just get up and leave. You know, it wasn'tI really did not feel that she reached a satisfactory state of hypnosis.

Thomas thereafter discussed his experience, training, guidance, and education with respect to the field of hypnosis. After viewing the videotapes of S.G.'s relaxation sessions, Thomas testified on direct examination as follows:

Q. [By Mr. Youngblood] ... Having had an opportunity now to review both tapes, do you have, both from that opportunity and from your own independent recollection, an opinion to offer the Court about whether or not [S.G.] was in fact under what you have defined for the Court as hypnosis?

A. I believe [S.G.] to be in a heavy state or a good solid state of relaxation. As far as a trance state hypnosis, I do not believe that she reached a trance state of hypnosis.

Q. Was it your intent during either session to influence [S.G.]'s ability to recall a specific face or person? In other words, were you trying to get her to come to some sort of understanding that you had a preconceived notion about?

A. No, sir, there was no specific individual or face I was getting her or leading her to perceive.

Q. Was it your intent to suggest any answers to her?

A. It was not my intent.

Q. You've done this before, but just so we will have a current frame of reference, could you again define for the Court what you mean by hypnosis?

A. Hypnosis is a concentration of attention to a narrow, narrow scope or frame of reference that allows the person to become more suggestible, to take suggestion, to become more unaware of other events going on around them.

Q. Would that hypnosis involve an altered state of consciousness?

A. It would be an altered state of consciousness.

Because the evidence presented at the pretrial hearing clearly and convincingly establishes the fact that S.G. was never placed under hypnosis, Murray's complaint that S.G.'s eyewitness testimony and incourt identification was tainted by hypnosis \*283 necessarily fails. *Connolly v. Farmer*, 484 F.2d 456, 457 (5th Cir.1973). For if S.G. never underwent hypnosis, her identification of Murray was undoubtedly not the product of hypnosis. Murray's motion to suppress the identification was therefore properly overruled. Murray's second point of error is overruled.

In his third point of error, Murray asserts that the trial court erred in commenting on the weight of the evidence by instructing the jury to limit its consideration of Murray's exhibits, in violation of Rule 105 of the Texas Rules of Criminal Evidence. We find that Murray waived any error with respect to this matter.

Rule 105 provides, in part, as follows:

(a) When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly; ...

TEX.R.CRIM.EVID. 105(a).

The court gave the following instruction before the jury viewed the two videotapes of interview sessions between S.G. and a psychologist enlisted to hypnotize S.G.:

Ladies and gentlemen of the jury, you are about to be shown videotapes of sessions occurring between [S.G.] and Dr. Bruce Thomas. This evidence is submitted to you *for the sole purpose of aiding you, if it does, in deciding whether or not [S.G.] was hypnotized on either occasion*. Further, if you believe that she was hypnotized on either occasion, did Dr. Thomas suggest facts to the subject that resulted in her alleged identification of the Defendant if she did. And thirdly, if facts were suggested, did they in the totality of the circumstances give rise to a substantial likelihood of misidentification of the Defendant. In other words, did the alleged identification of the Defendant as the perpetrator come from facts in her mind, [S.G.], or facts suggested by Dr. Thomas. *And you will not consider the evidence for any other purpose* than those stated. [Emphasis added.]

Murray objected on the ground that the court's instruction was a comment on the weight of the evidence, invaded the province of the jury, and was not "the type of instruction that is called for by Rule 105." Murray claims that the videotapes should have been considered by the jury with regard to the issue of impeachment in addition to its consideration as to the issue of S.G.'s hypnosis. Murray further contends that the court's instruction prohibited the jury from using the tape or its contents to judge S.G.'s credibility.

However, we find that the court's limiting instruction comports with the court's charge to the jury and is substantially similar to that requested by Murray in his "Defendant's Motion for Requested Jury Charge No. 5." Murray cannot request an instruction, have it given in a form substantially similar to that requested by him, and thereafter object to the charge at trial and on appeal. For this reason, Murray's third point of error is overruled.

Murray's fourth point of error asserts that the trial court erred in admitting State's Exhibit No. 71A, a printout generated by the lock on room 1224 of the Arlington Hilton Hotel. The State offered the printout as evidence of Murray's entrance into S.G.'s hotel room through the use of a card key prior to her entrance. Murray contends that the printout constitutes hearsay which was not properly authenticated by the State. We find that the evidence offered by the State was *not* hearsay.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. TEX.R.CRIM.EVID. 801(d). A "declarant" is a person who makes a statement. TEX.R.CRIM.EVID. 801(b). A "statement" is (1) an oral or written verbal expression or (2) nonverbal conduct of a person, if it is intended by him as a substitute for verbal expression. TEX.R.CRIM. EVID. 801(a). The State contends, and we agree, that State's Exhibit No. 71A is not the statement of a person and is not hearsay. As the State so aptly argues:

\*284 The printout in this case is unlike many we think of when we consider the general subject of computer printouts. Often, a computer printout amounts to the feeding back of data placed into the computer by a person; although the data may be in different form than it was when it was fed into the computer, it retains its status as the statement or statements made by a person. [Citations omitted.] However, ... the printout in the present case does not fit in that category [because] the results of the computer's internal operations is not hearsay evidence. It does not represent the output of statements placed into the computer by out of court declarants. [Citation omitted.]

In [other analogous cases], the printouts were the result of computer records of telephone traces, but ... the printout in the present case is exactly the same sort of automatic electronic recording device described in these cases. As is the case with telephone traces, the electronic door lock recording device in this case was

activated automatically; it was not the reproduction or reorganization of statements entered into the device by a declarant. That is, it was "computer [self-]generated data" rather than "computer stored data." [Citation omitted.]

This distinction between computer stored data, which is clearly hearsay, and computer self-generated data, which ... is not hearsay, is in accord with Rule 801, which requires that a statement by [sic] made by a *person* before it can fall within the definition of hearsay.

We find the State's argument particularly persuasive in light of a recent commentary which directly addresses this point:

Although use of terms of art such as "read" or "say" might lead one to assume that a hearsay problem is present... it would be incorrect to assume that a hearsay problem is present *anytime* a machine "talks," transmits data, or otherwise communicates information. [Emphasis added.]

[C]an a machine, in itself, be a "declarant" and can it make "statements?" The answer to the first question is "no." Mechanical devices, like bloodhounds, are not persons and cannot be "declarants." But they can serve as vehicles for storing or transmitting "statements" made by a "person." Thus, if Officer Jones... was reading information which had been entered by a person, such as a business ledger or letter, those portions of the hearsay definition dealing with a statement by a declarant would be satisfied. If, however, Officer Jones was reading information which was simply being automatically recorded by the machine, such as climatological data, a hearsay problem is not presented. The mere fact that the same data was ultimately printed in hard copy would not convert it into hearsay.

Schlueter, *HearsayWhen Machines Talk*, 53 TEX.B.J. 1135 (1990).

While we conclude that the proffered printout was not hearsay, we must also determine whether the State proved that the printout was reliable. During the trial, the State established that the printout from the door lock of room 1224 came from a small computer that was connected to the door lock after the offense occurred. The door lock was part of a system that used keys similar to credit cards. The lock could be opened by the key given to the room guest or by any one of several master keys possessed by the manager, the cleaning woman, and the maintenance man. Each of these keys had its own code. Whenever a key was inserted in the door lock of a particular room, a memory device inside the lock automatically recorded the approximate time of entry, as well as the code of the particular key that was used to open the door. Thus, when hotel personnel wished to find out who had entered a particular room and when, they could do so by connecting the computer to the door lock, which generated the printout. James Dempsey, the hotel manager, had care, custody, and control of the hotel, its door lock system, the lock on room 1224, and the computer that generated the printout tape from that lock on December 28. Paul Lyday, \*285 the hotel's chief engineer, prompted the printout in this case.

Although the locking system was new to this particular hotel, it had been previously tested. The hotel encountered some difficulties with the locking system in the weeks immediately after the offense. The trustworthiness of the locks and the printout generated from these locks was the subject of Lyday's testimony on voir dire:

Mr. Beatty: You think those *locks* were trustworthy on December 27th of 1986? [Emphasis added.]

Mr. Lyday: You are asking for an opinion, Counselor.

Mr. Beatty: That's right.

Mr. Lyday: My opinion, no.

....

Mr. Ray: Do you have an opinion as to whether or not these times that were printed out on this receipt as to the operation of the door lock [on] Room 1224 for each of those times, was it

Mr. Lyday: It would indicate it was working properly.

Mr. Ray: Working properly then.

Mr. Lyday: Yes.

Mr. Ray: Okay. And if somebody entered before or after and it didn't register, *it wasn't the computer part of this lock, then, that was messed up, was it?* [Emphasis added.]

Mr. Lyday: That's correct.

....

THE COURT: Let me ask you this. You said that frankly you didn't think they were trustworthy. In what areas are they not trustworthy? I mean that's a broad statement. Are you talking about what you were just talking about with the counselor, or are they just totally untrustworthy?

Mr. Lyday: Oh, I think they are now, but at that time they weren't.

THE COURT: So there won't be any misunderstanding, in what way are they untrustworthy? Can I have reasonable assurances as a fact finder that onit's printed this out, that the GM, the master card Number 17 opened this door at 6:00 o'clock on December 23rd. If it prints it, is it reliable?

Mr. Lyday: You can bet money on it.

....

THE COURT: But if it, in your opinion if it printed it, it happened. Mr. Lyday: That's correct.

Lyday's testimony distinguishes between the reliability of the door locks and the reliability of the computer printout. Lyday stated that the lack of trustworthiness he previously referred to related to the lock's tendency to prevent the door from shutting properly. However, Lyday's subsequent testimony related that the lock was trustworthy with respect to the information which appeared on the computer printout. The trial court found that the printout process was "scientifically reliable enough for the jury to rule on whether or not it's of any value to them in this particular case." We find that the State adequately proved the reliability of the computer printout. Because Murray's objection is based on the premise that State's Exhibit 71A is hearsay, and because the State proved the trustworthiness of the printout, we overrule his fourth point of error.

Murray's sixth point of error contends that the trial court erred in permitting S.G. to testify at the punishment phase of the trial concerning her medical disabilities, medical problems, physical and mental losses, and emotional scarring and healing. Murray claims that this testimony is beyond the scope of permissible testimony at a punishment hearing because evidence appropriate at such a hearing is limited to Murray's past criminal record, character, and reputation.

At the punishment phase, the State declared that it intended to recall S.G. to the stand in order to ask her about any post-assault effects she incurred. S.G. testified about the effects of the offense in the following respects: the nature and length of her medical treatment; the disruption of her professional career; and the emotional and physical scars she continued to carry as a result of the assault. The Court of Criminal Appeals has recently held that this type of testimony is admissible at the punishment phase of a non-capital trial in \*286 *Miller-El v. State*, 782 S.W.2d 892 (Tex. Crim.App.1990). The court rejected the Court of Appeals' holding that because the testimony amounted to "a medical forecast of the victim's future health" rather than "an assessment of injuries on the occasion in question," such evidence was unrelated to any issue at the punishment phase of the trial and "clearly calculated to inflame the minds of the jury." *Id.* at 893. The court summarily held that testimony regarding future hardships that the victim would suffer was admissible at the punishment phase of a non-capital prosecution as evidence regarding the "circumstances of the offense," so long as the factfinder could rationally attribute moral culpability to the accused for that injury. *Id.* at 895.

In the present case, Murray was the only actor and unquestionably either intended or should have anticipated the results testified to by S.G. In either case, Murray was blameworthy. *Id.* at 897. Thus, the jury was entitled to hear and consider S.G.'s testimony. The trial court did not err in permitting her testimony. Murray's sixth point of error is overruled.

Murray's fifth point of error contends that the evidence is insufficient to sustain his conviction. We disagree. In reviewing the sufficiency of the evidence to support a conviction, the evidence is viewed in the light most favorable to the verdict. *Human v. State*, 749 S.W.2d 832, 834 (Tex. Crim.App.1988); *Jackson v. State*, 772 S.W.2d 575, 577 (Tex.App.Fort Worth 1989, pet. ref'd). The critical inquiry is whether, after so viewing the evidence, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Bonham v. State*, 680 S.W.2d 815, 819 (Tex.Crim.App.1984); *Brady v. State*, 771 S.W.2d 734, 735 (Tex.App. Fort Worth 1987, no pet.). The sufficiency of the evidence is a matter of law. The issue on appeal is not whether we as a court believe the State's evidence or believe that the defendant's evidence "outweighs" the State's evidence. *Wicker v. State*, 667 S.W.2d 137, 143 (Tex.Crim.App.), *cert. denied*, 469 U.S. 892, 105 S.Ct. 268, 83 L.Ed.2d 204 (1984). If there is evidence which establishes guilt beyond a reasonable doubt, we are not in a position to reverse the judgment on sufficiency of the evidence grounds. *Id.*

The record reflects that S.G. identified Murray in a photograph spread, a lineup, and in person at trial. Photographs of the physical evidence taken from the scene of the offense—clothing, shoulder bag, undergarments, curler, bracelet, and other personal items—corroborate not only her proximity in the room at the time of the offense but also her description of the incident. S.G. also identified, for demonstrative purposes only, the kind of knife held by Murray during the offense. S.G. testified with regard to the following facts: she went into her room and initially took no notice of anyone else's presence; she became aware of some movement near the bathroom shortly thereafter; Murray grabbed her, prevented her from leaving, and slammed her head against the wall; Murray threatened to hurt her if she did not cooperate and indicated that he had a knife to help him enforce his threats; Murray later put the knife to her throat; as a result of Murray's violent and threatening conduct, she agreed to have sexual intercourse with him against her will; Murray committed the sexual act with her; and after regaining consciousness, she ran from the room and made an outcry in the hotel lobby.

Additional evidence and testimony related that Murray's fingerprints were located on the outer surface of the clear glass mirrored doors on the closet of S.G.'s hotel room, the edge of the bathroom sink near the counter, the edge of the tub, and the toilet seat lid top. Murray's fingerprints were also obtained from the computer coded room key. A police officer testified that the fingerprints collected in the hotel room matched those obtained from the computer card. Coupled with the printout previously discussed, which represented a

recording of Murray's entrance into S.G.'s hotel room, we find there was sufficient evidence to support Murray's conviction. Murray's fifth point of error is overruled.

\*287 The judgment of the trial court is affirmed.

## NOTES

[1] The *Saldivar* court ultimately determined that because it could not determine whether an aggravated sexual assault offense was a "result" type offense or a mixture of a "result" and "nature of the conduct" type offense, and because the appellant objected to the inclusion of a "result" reference in the definition of "intentionally" or "knowingly" and not to the inclusion of the "nature of the conduct" instruction, the trial court did not err in including a "result of the conduct" instruction in the charge. *Id* at 268.

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Murray v. State, 804 S.W.2d 279 (Tex. App. 1991)

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Barnes v. State, 56 S.W.3d 221 (Tex. App. 2001)

Court of Appeals of Texas | July 19, 2001 | Cited 5 times

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Court of Appeals of Texas | Sept. 13, 2006 | Cited 0 times

Baker v. State, 94 S.W.3d 684 (Tex. App. 2002)

Court of Appeals of Texas | Oct. 10, 2002 | Cited 0 times

**LY v. STATE**

No. 01-95 00789-CR.

908 S.W.2d 598 (1995)

**Tony LY, Appellant,**

**v.**

**The STATE of Texas, Appellee.**

Court of Appeals of Texas, Houston (1st Dist.).

October 12, 1995.

**Victor R. Blaine, Houston, for Appellant.**

**John B. Holmes, Jr., Ernest Davila, Rick Molina, Houston, for Appellee.**

**Before COHEN, HEDGES and TAFT, JJ.**

**OPINION**

TAFT, Justice.

Appellant was convicted of aggravated perjury. The court assessed punishment at three-years confinement. Appellant was released on an appeal bond, conditioned upon his participation in the Electronic Monitoring Supervision Program.<sup>1</sup> The court order required appellant to remain on home curfew between 9 p.m. and 8 a.m. daily.

We are asked to review the admissibility of computer generated records and the sufficiency of such evidence in proving appellant violated his curfew as a basis for the trial court's bail revocation. We affirm.

**Facts**

On June 20, 1995, at 9:13 p.m., the electronic monitoring computer reported that appellant was outside the permitted range of the receiver. The computer reported that appellant returned within range of the receiver at 10:10 p.m. The next day, Sharon Patton, a Harris County Pre-Trial Services employee, responsible for supervising individuals on electronic monitoring as a condition of bond, reported the violation. The court revoked appellant's appeal bond and ordered his arrest. In a hearing held July 5, 1995, the court concluded that appellant had violated the conditions of his curfew and further found that there existed good cause to believe that appellant would not appear when his conviction became final or would

**[908 S.W.2d 600]**

likely commit another offense while on bond. The court thus upheld the revocation of appellant's bond. Appellant filed notice of appeal pursuant to TEX.CODE CRIM.P.ANN. art. 44.04(g) (Vernon Supp.1995).

## Admissibility of Computer Generated Documents

In his first point of error, appellant asserts that the trial court erred in admitting State's Exhibit Two, a printout generated by the computer used for electronic monitoring at the Harris County Pre-Trial Services. Specifically, appellant contends that the printout constituted inadmissible hearsay, and that the State did not prove the reliability of the electronic monitoring system. The State offered the computer generated printout to show appellant violated curfew, a condition of his appeal bond.

### A. Hearsay

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. *See Burleson v. State*, [802 S.W.2d 429](#), 439 (Tex.App.-Fort Worth 1991, pet. ref'd) (rejecting appellant's hearsay objection to computer generated display); TEX.R.CRIM. EVID. 801(d). "A `declarant' is a person who makes a statement." *Murray v. State*, [804 S.W.2d 279](#), 283 (Tex.App.-Fort Worth 1991, pet. ref'd); TEX.R.CRIM.EVID. 801(b). "A `statement' is (1) an oral or written verbal expression or (2) nonverbal conduct of a person, if it is intended by him as a substitute for verbal expression." *Murray*, 804 S.W.2d at 283; TEX.R.CRIM.EVID. 801(a).

A computer self-generated printout that does not represent the output of statements placed into the computer by out of court declarants is not hearsay. *See Murray*, 804 S.W.2d at 284 (concerning electronic door lock recording device); *Burleson*, 802 S.W.2d at 439-40 (involving computer generated display to show the number of records missing from payroll commission file). The computer printouts at issue in the *Murray* and *Burleson* cases were the results of an automatic recording device, much like the printout in this case. As in this case, the electronic recording device was activated automatically; it was not the result of the observations or reproduction of statements entered into the device by a declarant. *See Murray*, 804 S.W.2d at 284 (explaining computer stored data is hearsay whereas computer self-generated data is not); *Burleson*, 802 S.W.2d at 439-40 (equating computer generated evidence to a snapshot). Because there is no reliance upon human input, the determination that such computer self-generated data is not hearsay is in accord with rule 801. *See Murray*, 804 S.W.2d at 284 (explaining that a machine cannot be a declarant nor make statements).

Appellant relies upon *May v. State*, [784 S.W.2d 494](#) (Tex.App.-Dallas 1990, pet. ref'd), where the trial court had allowed the State to introduce testimonial evidence of an intoxilyzer readout to prove May's insobriety. The appellate court determined that testimony of an operator repeating information observed on a computer readout constituted inadmissible hearsay. *Id.* at 497. *May* is distinguishable from this case because here the printout itself was introduced into evidence.

In this case, State's exhibit two is not hearsay because it does not represent the output of statements placed into the computer by out of court declarants. Rather, the exhibit is tangible evidence which was generated instantaneously by the computer itself as part of the computer's internal system. The system was designed to monitor, report, and record whether an individual, participating in the electronic monitoring program, is outside the permitted range of the receiver during curfew hours. Because the computer printout did not rely upon the assistance,

observations, or reports of a human declarant, it did not constitute hearsay. The computer merely reported appellant's movements, which were not intended by him to be a substitute for verbal expression.

We conclude that the electronic monitoring computer printout did not constitute hearsay.

#### B. Reliability of Computer Generated Results

Although appellant's first point of error specifically targets hearsay, it also appears

[908 S.W.2d 601]

to attack the reliability of the computer generated printout. Appellant seems to depend upon *May v. State*, 784 S.W.2d at 497, for the proposition that the computer generated printout constituted hearsay because Patton was not familiar with the scientific principles behind the electronic monitoring system. In *May v. State*, 784 S.W.2d at 498, the court held:

If the State seeks to introduce intoxilyzer test results into evidence it must establish: (1) that the machine functioned properly on the day of the test as evidenced by the running of a reference sample through the machine; (2) the existence of periodic supervision over the machine and operation by one who understands the scientific theory of the machine; and (3) proof of the results of the test by a witness or witnesses qualified to translate and interpret such results so as to eliminate hearsay.

See *Vanderbilt v. State*, [629 S.W.2d 709](#), 729 (Tex.Crim.App.1981); see also *Harrell v. State*, [725 S.W.2d 208](#), 209-10 (Tex.Crim.App. 1986).

*May* is distinguishable from the instant case. *May* only concerns the proper predicate needed to introduce intoxilyzer test evidence at trial pursuant to the statutory provisions addressing the admissibility of alcohol breath tests.<sup>2</sup>

Here the computer is not an intoxilyzer, but an electronic recording device. Therefore, the State did not have to satisfy the three prong test cited in *May*. Because an intoxilyzer is a technical instrument, whose internal operations are not easily understood by the layman, courts have required a qualified witness to testify that the intoxilyzer was operated by one who understands the scientific theory of the machine. *May*, 784 S.W.2d at 498. Such evidence establishes the reliability of the intoxilyzer results and supports the admissibility of scientific test results. *Shannon v. State*, [800 S.W.2d 896](#), 902 (Tex. App.-San Antonio 1990, pet. ref'd). Thus, appellant's contention that the State must establish that Patton understood the scientific theory of the machine is without merit.

Courts that have addressed this issue have not set out a particular test for establishing the reliability of computer generated printouts. *Murray*, 804 S.W.2d at 284; *Burleson*, 802 S.W.2d at 441. However, the *Murray* court did provide some insight for determining whether the State has met its burden of proving reliability. In *Murray*, the court upheld a trial court finding that the printout process was reliable where the State presented testimonial evidence showing the accuracy and proper operation of the computer. *Murray*, 804 S.W.2d at 284.

During trial, Patton testified to the reliability and accuracy of the electronic monitoring system. She further testified that Digital Products Corporation, the vendor and manufacturer of the electronic monitoring equipment, was also contacted on June 20th to verify that the electronic equipment was operating properly. Patton's testimony established that the monitor was trustworthy with respect to the information which appeared on the computer printout and that the computer was working properly when the printout was generated. *Burleson*, 802 S.W.2d at 441. Moreover, no controverting evidence was offered by appellant to indicate that the computer was not reliable or was not operating properly when the printout was generated.

We conclude that the State adequately proved the reliability of the computer printout.<sup>3</sup>

### C. Summary

Having concluded that the computer generated printout was not hearsay and that the

[908 S.W.2d 602]

electronic monitoring procedure was shown to be reliable, we overrule appellant's first point of error.

### Sufficiency of the Evidence

In his second point of error, appellant avers that the State did not establish by a preponderance of the evidence that appellant failed to remain within the range of the electronic monitoring receiver during the designated curfew. Specifically, appellant argues that testimony from the State's sole witness, Sharon Patton, was not sufficient to establish he violated a condition of his appeal bond.

Pursuant to TEX.CODE CRIM.P.ANN. art. 44.04(c) (Vernon Supp.1995), the trial court revoked appellant's bail, concluding by a preponderance of the evidence that the State proved appellant violated a condition of his appeal bond. The court made this finding even though appellant, along with three defense witnesses, testified that appellant was present in his home in compliance with the conditions of his curfew. "The fact finder is entitled to judge the credibility of witnesses, and can choose to believe all, some, or none of the testimony presented by the parties." *Turney v. State*, 859 S.W.2d 500, 502 (Tex.App.-Houston [1st Dist.] 1993, pet. ref'd). Thus, the trial court here, as fact finder, was entitled to find the testimony of appellant's witnesses incredible.

We conclude that the computer generated printout, explained by the testimony of Sharon Patton, was sufficient to prove by a preponderance of the evidence that appellant had violated the condition imposed upon him by the appeal bond.

We overrule appellant's second point of error.

### Conclusion

We affirm the trial court's order revoking appellant's appeal bond.

### FootNotes

1. This program is authorized by TEX.CODE CRIM. P.ANN. art. 17.44 (Vernon Supp.1995).
2. TEX.REV.CIV.STAT.ANN. art. 67011-5, § 3(b) (Vernon Supp.1995) provides for the admissibility of intoxilizer results, so long as the test is performed according to rules of the Texas Department of Public Safety.
3. The Texas Rules of Criminal Evidence do not appear to contemplate any particular predicate for the introduction of computer generated evidence. The proper analysis would thus be the balancing test of TEX.R.CRIM.EVID. 403 as to whether such evidence, though relevant, had probative value which was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or considerations of undue delay or needless presentation of cumulative evidence.

**BURLESON v. STATE**

**No. 2-88-301-CR.**

802 S.W.2d 429 (1991)

**Donald Gene BURLESON, Appellant,**

**v.**

**The STATE of Texas, State.**

Court of Appeals of Texas, Fort Worth.

January 25, 1991.

Law Offices of Beech & Boone and Jack W. Beech, Fort Worth, for appellant.

Tim Curry, Crim. Dist. Atty., C. Chris Marshall, Asst. Crim. Atty., Chief of Appellate Section and Betty Marshall, Asst. Crim. Atty., for the State.

Before JOE SPURLOCK, II, HILL and MEYERS, JJ.

**OPINION**

HILL, Justice.

Donald Gene Burleson, following his plea of not guilty, was convicted by a jury of the offense of harmful access to a computer pursuant to the 1985 version of TEX. PENAL CODE sec. 33.03. Act of June 14, 1985, 69th Leg., R.S., ch. 600, 1985 Tex. Gen.Laws 2246-47, *amended by* Act of June 14, 1989, 71st Leg., R.S., ch. 306, 1989 Tex.Gen.Laws 1265-68. The court assessed punishment at seven years probated and \$11,800 in restitution. Burleson urges seven points of error: (1) in points of error one and two he contends that the trial court erred in overruling his motion to quash the indictment because the indictment failed to specify the number of records he allegedly deleted from the computer system of his former employer and because the indictment failed to specify the programs he supposedly used to accomplish such deletions; (2) in points of error three and four he contends that the evidence was insufficient to sustain a finding that data were deleted from his employer's computer memory or storage, and insufficient to sustain a finding that a computer malfunctioned; and, furthermore, in point of error five he contends that the trial court improperly included in its charge the issue of data deletion because the evidence was insufficient to show that data had been deleted; (3) in point of error six he contends that Texas Penal Code section 33.03

**[802 S.W.2d 433]**

is unconstitutional because it is overly broad and vague and, therefore, violates due process under the United States and Texas constitutions; and (4) in point of error seven he contends that the court erred in admitting computer-generated evidence at trial.

We affirm. We hold: (1) that the 1985 version of TEX.PENAL CODE sec. 33.03 as enacted by the sixty-ninth legislature is constitutional as applied to Burleson because it was not too vague to

inform him that his conduct was criminal; (2) that the indictment did not fail to provide Burleson with the requisite notice, and that, even if it did, such failure did not prejudice Burleson's defense because his defense was not based upon any information which may have been lacking in the indictment and because an open and full discovery process provided Burleson with whatever information may have been lacking in the indictment; (3) that the evidence was sufficient to sustain beyond a reasonable doubt a finding that data were deleted and a computer did malfunction as well as sufficient to warrant submitting to the jury the question of data deletion; and (4) that the court did not err in overruling Burleson's trial objection to a computer-generated display showing the number of records missing from his employer's data file because such evidence was not hearsay, because it was shown to be accurate and reliable, because it did not violate the best evidence rule or the rules of optional completeness and related writings, because the sponsoring witness was qualified to testify, and because even if the court did err its error did not beyond a reasonable doubt contribute to Burleson's sentence or conviction in that there was other testimony showing that he deleted records from his employer's data file; and, furthermore, the court did not err in overruling Burleson's objection to any computer-generated printout because such printouts were admissible for the same reasons that the computer-generated display was admissible, and because any error which may have been committed did not beyond a reasonable doubt contribute to Burleson's conviction or sentence in that there was other testimony that he deleted records.

Burleson, a senior programmer/analyst, was fired from his company, USPA, on September 19, 1985. He was also the technical security officer for the company's IBM System 38 computer system and knew the passwords USPA's computer operators used to sign on to the system.

USPA employed about 450 agents who worked world-wide devising financial programs for their clients; the agents were paid monthly commissions totalling about two million dollars. In order for USPA's agents to receive their monthly commissions, USPA would enter commission information gathered from various sources into its computer system and run a preliminary payroll commission report and, two days later, a final payroll commission report which actually issued checks for each agent. Each monthly payroll commission report was compiled from a payroll commission data file which contained about 400,000 individual records.

When the preliminary payroll commission report for September 1985 was checked at about 8:30 a.m. on September 21, two days after Burleson was fired, it was discovered that a large number of the records necessary to compile the report were missing. A history log produced by the computer system showed that between approximately 3:00 a.m. and 3:48 a.m. on September 21, 1985, various terminals at USPA's offices had been turned on, including the terminal in Burleson's former office and the terminal of Al Wynn, a current employee. Wynn testified that he was not in the building on September 21, 1985 when someone signed on to his terminal, and George Jimenez, another employee, testified that he was the only one at USPA on the early morning of September 21 and that he left at 1:00 a.m. and did not return until 7:30 a.m. Although Burleson had turned in a set of keys when he was fired, there was testimony that he had had at least one extra key for the building.

By backtracking various computer printouts, Duane Benson, USPA's programmer for the payroll commission system, testified

that records were deleted from the payroll commission file by a set of programs which were in turn triggered by instructions (jobs) entered into the system at 3:37 a.m. on September 21. The programs which actually deleted the records on September 21 were duplicates of a program (a source program) with a different name that had been created by September 4, 1985 when Burleson was still employed. By September 3, 1985, a program had been created that would duplicate programs, change their name, and move them around in the computer system.

Benson produced a history log generated by the computer that showed that on Labor Day morning, Monday September 2, when USPA was closed for the holidays, someone signed on to Burleson's terminal using both Burleson's security officer password and his personal password. From Burleson's terminal, the source program which would under a different name actually delete the records was compiled or referenced. Also, the program which would duplicate, rename, and move programs around was compiled or referenced. On September 3, Burleson's terminal made several references to the same two programs.

On September 23, 1985, the entire USPA computer system shut down for four hours. On September 28, 1985, Burleson went to Benson's home to pick up videotapes. Benson testified that Burleson admitted that he created the program responsible for shutting down the computer system as well as creating the programs responsible for deleting the records. Benson testified that Burleson specified the particular programs responsible for the shutdown and the deletions.

At trial Burleson presented testimony that the deletion of the records could have been accidental and that the computer system could have shut itself down as part of its normal operating procedure. Burleson denied making any admissions to Benson, and testified that he was not at the USPA offices on September 2-3 because he and his son were visiting Burleson's father in Jasper, Texas on September 2-3. Burleson offered various witnesses and evidence to show that he was out of town on September 2-3, including a Texaco credit card receipt for a flat tire repaired in Rusk, Texas on September 3.

In rebuttal, the State presented evidence that Burleson was seen at USPA on September 2, that he attended a staff meeting on September 3, that his son attended school in Burleson, Texas on September 3, and that the credit card receipt dated September 3, 1985 was on a Texaco credit card form that was not printed or used by Texaco until October 1987.

We first address Burleson's point of error number six challenging the constitutionality of the 1985 version of TEX.PNAL CODE sec. 33.03. The relevant portions of section 33.03 are as follows:

§ 33.03 Harmful Access (a) A person commits an offense if the person intentionally or knowingly:

(1) causes a computer to malfunction or interrupts the operation of a computer without the effective consent of the owner of the computer or a person authorized to license access to the computer; or

(2) alters, damages, or destroys data or a computer program stored, maintained, or produced by a computer, without the effective consent of the owner or licensee of the data or computer program.

*Id.*

Burleson claims that section 33.03 is overly broad and vague, arguing that it imposes criminal liability for altering data without the consent of the data owner, but that data is often altered as part of the normal work day without such consent. He further argues that no data owner would consent to mistaken alteration; thus, section 33.03 also imposes criminal liability for negligent alteration. Furthermore, Burleson argues that section 33.03 imposes criminal liability for innocently interrupting the operation of a computer without consent. In short, he claims that the statute raises the possibility for criminal liability based on negligence.

**[802 S.W.2d 435]**

We hold that the issue of overbreadth is not relevant to this case because section 33.03 does not deal with speech or conduct constitutionally protected by the First Amendment. Traditionally, an attack on a statute as being facially overbroad is reserved for alleged First Amendment violations. *Bynum v. State*, [767 S.W.2d 769](#), 772 (Tex.Crim.App.1989). Burleson urges no complaint that his First Amendment rights have been violated, nor can we perceive that section 33.03 sweeps within its coverage speech or conduct protected by the First Amendment; consequently, the alleged overbreadth of section 33.03 is not an issue raised in this case. *Id.* at 772.

We next address the issue of whether section 33.03 is an unconstitutionally vague penal statute. To show that section 33.03 is unconstitutionally vague, Burleson must not only show that it fails to give fair notice to the general populace of the activity it criminalizes, but also he must show that it is impermissibly vague as applied to his specific conduct. *Id.* at 773-74. Even if we assume *arguendo* that section 33.03 may not give fair notice to a hypothetical programmer who negligently alters data without the effective consent of the data owner, Burleson was not indicted merely for the negligent alteration of data. Count one, paragraph one of the indictment alleged that Burleson, without consent, knowingly and intentionally altered, damaged, and destroyed data by causing his former employer's computer to execute programs that deleted data. Paragraph two alleged that Burleson, without consent, knowingly and intentionally introduced into his employer's IBM System 38 computer system programs designed to interfere with the normal operation of the computer, that such programs did interfere with the normal operation of the computer, and that programs introduced by Burleson caused the system to turn itself off. Count two of the indictment alleged that Burleson harmfully accessed or attempted to harmfully access his former employer's computer by unlawful entry into his former employer's building.

Considering the indictment under which Burleson was tried, we cannot conclude that section 33.03 was so vague as to not afford Burleson fair notice that the conduct he allegedly engaged in was criminal. The criminal activity for which he was indicted was not that of a law-abiding individual unwittingly ensnared by the prohibitions of a vague penal statute. *Id.* at 775. We overrule point of error number six.

In points of error number one and two, Burleson urges that the trial court erred by overruling his motion to quash the indictment because the indictment failed to specify the number of records he supposedly deleted and failed to identify the programs he supposedly used to accomplish such deletion. Burleson argues that the indictment's failure to specify the number of records deleted substantially affected his right to prepare a defense. Specifically, Burleson claims that he could not counter the numerous theories which could be offered to show how the alleged offense was committed, that he could not determine whether the State was alleging logical or physical deletion of the records,<sup>1</sup> and that he could not pinpoint the alleged offense so as to protect himself from double jeopardy in the future. Burleson makes the same argument to attack the indictment's failure to identify the programs he allegedly used, stressing that such failure foreclosed a future defense of double jeopardy.

We hold that the indictment was specific enough to allow Burleson to raise, in the future, a defense of double jeopardy if the need were to arise. Count one of the indictment charged that Burleson, in Tarrant County, on or about September 21, 1985, altered, damaged, and destroyed data

[802 S.W.2d 436]

necessary for the production of the September 1985 "registered representative agent payroll"; that such data was produced, stored, and maintained by an IBM System 38 computer system; that such computer system was owned by William Hugenberg, Jr.; that the harm was caused by the execution of computer programs; and that the introduction of the programs interfered with the operation of the computer and caused the computer to shut down. Given the specificity of the indictment, we fail to see how Burleson would be prevented from raising the defense of double jeopardy if he were tried a second time for the same offense. TEX.CODE CRIM.PROC. ANN. art. 21.04 (Vernon 1989).

We also hold that the indictment, without specifying the number of records deleted, sufficiently described the records allegedly deleted to provide Burleson with fair notice of the crime with which he was charged. TEX.CODE CRIM.PROC. ANN. art. 21.09 (Vernon 1989) provides that personal property alleged in an indictment shall be described, if known, by name, kind, number, and ownership; if such descriptions are unknown, a statement to that effect and a general classification will suffice. The records that concern us here are not physical objects that can readily be described by name, kind, and number; rather, they exist as electronically encoded data. Nevertheless, the indictment did allege in general the kind of information contained in the deleted records, it specified their function at a particular point in time (to produce the September 1985 commission payroll), it alleged the ownership of the records, it specified the computer system where the records resided, and it alleged the method by which the records were deleted. We hold that under the facts of this case, the exact number of numerous, electronically encoded records actually deleted is an evidentiary detail, not a matter of notice, and an indictment need not allege evidentiary details. *Livingston v. State*, [739 S.W.2d 311](#), 321 (Tex.Crim.App.1987), *cert. denied*, 487 U.S. 1210, 108 S.Ct. 2858, 101 L.Ed.2d 895. *Cf. Hendrick v. State*, [731 S.W.2d 147](#), 149 (Tex.App.—Houston [1st Dist.] 1987, pet. ref'd) which upheld the sufficiency of an indictment that did not specify the name, kind, or number of money stolen, but did allege that the value of the money was more than \$750 and less than \$20,000.

Likewise, we find that a specific description or identification of the computer programs Burleson supposedly introduced into the computer system is an evidentiary issue that need not be pleaded in the indictment. Count one of the indictment alleges that programs were used to delete records, to interfere with the operation of the computer system, and to shut down the computer. We note that the programs alleged in the indictment were the instrumentality by which the alleged crimes were committed. By alleging programs as the instrumentality, the indictment in this case was sufficient to provide Burleson with the requisite notice to prepare a defense. *Cf. Livingston*, 739 S.W.2d at 321-22 upholding the sufficiency of an indictment which alleged only that the murder weapon was a "gun."

In points of error one and two, Burleson essentially takes the position that a crime involving computer technology requires a hypertechnical indictment. We do not agree. The indictment is sufficient if it uses ordinary and concise wording so as to inform a person of common understanding what is meant and, with a degree of certainty, gives the accused notice of the offense with which he is charged. *Id.* at 322. Thus, we also find no merit in Burleson's argument that the indictment is deficient because it fails to distinguish between physical and logical deletions of data. Although the distinction between physical and logical deletions may be significant to a programmer, we hold that such is a distinction without a difference for the purpose of section 33.03. Moreover, the distinction between physical and logical deletions is not made in common usage. WESTER'S THIRD NEW INTERNATIONAL DICTIONARY 596 (1981) defines "delete" to include the process of obscuring or "marking for exclusion during further processing (as retyping or printing)." Webster's

[802 S.W.2d 437]

also defines delete as "to eliminate as a factor or a matter for consideration."

Even if the indictment did fail to give a requisite item of notice, Burleson has not shown how such defect in the context of this case affected his ability to prepare a defense. *Adams v. State*, [707 S.W.2d 900](#), 903 (Tex.Crim.App. 1986). First, Burleson's own expert testified on direct that the IBM System 38 computer was capable only of logical deletions. Thus, we do not see how the indictment's failure to distinguish between physical and logical deletions could have harmed Burleson. Second, Burleson presented a defense based on alibi and deletion of data by another programmer. These defenses are unrelated to and independent of the alleged defects in the indictment; consequently, any notice defect that may have existed did not prejudice Burleson's defense. *Cf. Id.* at 904 in which an indictment's failure to specify which of two films were to be introduced at an obscenity trial did not prejudice a defense claiming that material depicting normal sex acts does not appeal to prurient interests.

Finally, before trial, Burleson had access to the information he claimed was lacking in the indictment. The State followed an open file policy; the record clearly shows that Burleson was provided with full discovery; and Burleson consequently knew the information the State relied on in its prosecution. Because prior to trial Burleson was provided with the information he sought, although not necessarily in the indictment, we find that any harm that may have arisen from the trial court's refusal to quash the indictment had, in the context of this case, no impact on Burleson's ability to muster a defense. *See Bynum*, 767 S.W.2d at 780. We overrule points of error number one and two.

Points of error number three, four, and five are based on challenges to the sufficiency of the evidence. In points of error three and four Burleson uses semantic distinctions to argue that the evidence was insufficient to sustain a finding that he caused data to be deleted from his employer's computer memory or storage, and insufficient to sustain a finding that a computer malfunctioned. In point of error number five, Burleson argues that because of the insufficiency of the evidence, the question of data deletion should never have been submitted to the jury.

We find that Burleson's semantic distinctions are without merit in this case. Under point of error three, Burleson claims that the evidence was insufficient to support the indictment's allegation that records were deleted because the records were not physically deleted or destroyed, but only logically deleted so that they were inaccessible to the computer for processing the payroll commission file. As we have already held, the distinction between physical and logical data deletions in this case is of no consequence, and the record contains ample evidence from which a rational trier of fact could have found beyond a reasonable doubt that the records, for the purpose of section 33.03, were deleted.

Also under point of error number three, Burleson claims that the evidence was insufficient to support the indictment's allegation that data was deleted from his employer's "computer memory and computer storage." Burleson argues that the terms "computer memory" and "computer storage" denote computer hardware as opposed to computer software, and there was no evidence to show whether the data were deleted from hardware or software. Burleson offers nothing to substantiate his claim that the terms "computer memory" and "computer storage" designate only hardware and are not broad enough, as commonly used, to include software and other components of a computer system. Moreover, like the distinction between physical and logical deletions, we hold that the distinction between computer software and hardware, in the context of this case, is of no consequence. Finally, even if the distinction should be observed, the 1985 version of TEX.PENAL CODE sec. 33.01(2) defines "computer" in expansive terms to include not only the central processing unit, but also to include "all input, output, processing, storage, or communication facilities that are connected or related to the

**[802 S.W.2d 438]**

device [central processing unit]." Act of June 14, 1985, 69th Leg., R.S., ch. 600, 1985 Tex.Gen.Laws 2246-47, *amended by* Act of June 14, 1989, 71st Leg., R.S., ch. 306, 1989 Tex.Gen.Laws 1265-68. The evidence was more than sufficient to allow a rational trier of fact to find beyond a reasonable doubt that records were deleted from input, processing, or storage connected or related to the central processing unit.

Under point of error number four, Burleson claims that the evidence was insufficient to support the indictment's allegation that the computer malfunctioned. Burleson argues that the computer (hardware) did not itself malfunction when the records were deleted. Rather, the computer performed properly and its inability to process the deleted records was caused by a software malfunction. The distinction Burleson tries to draw, especially given the broad definition of "computer" under section 33.01, is lost on this court. Moreover, even if the distinction is valid, Burleson totally ignores the undisputed evidence that his employer's computer shut down for a number of hours on September 23, 1985 and the testimony that Burleson admitted he caused the shut down by boobytrapping the computer with a program. We hold that there was sufficient

evidence to allow a rational trier of fact to find beyond a reasonable doubt that the computer did malfunction.

In our discussion of point of error number three, we have already addressed Burleson's point of error number five which claims that the evidence was insufficient to warrant a jury submission on the issue of data deletion. Because we hold that the evidence was sufficient to warrant the submission of an issue as to data deletion and sufficient to support a finding that data was deleted, that the evidence was sufficient to support a finding that data were deleted from a computer, and that the evidence was sufficient to support a finding that a computer did malfunction, we overrule points of error numbers three, four, and five.

In point of error number seven, Burleson contends that the trial court improperly overruled his objection to the admission of computer-generated evidence. We note that point of error number seven actually presents two complaints: (1) the court's overruling Burleson's trial objection as to the admissibility of Benson's testimony which was based on a particular computer generated display, and (2) the court's overruling Burleson's trial objection as to the admissibility of any computer-generated printout.

We first address Burleson's trial objection as to the admissibility of Benson's testimony which was based on a particular computer-generated screen display. The statement of facts shows that Burleson made his trial objection while he had State's witness Benson on voir dire. The objection was made in response to the State's attempt to have Benson testify on direct as to the number of records deleted from the September 1985 payroll commission file. Benson's testimony, in turn, was based on a computer screen display which he caused to be generated on September 21, 1985 when he learned that there was a problem with the payroll commission file. The display indicated that about 160,000 records were missing from the September 1985 payroll commission file. A hardcopy printout of the display was produced by the State, but not admitted into evidence.

We note that Burleson's single trial objection to Benson's testimony based on the computer-generated display includes multiple points, some of which attack the admissibility of Benson's testimony by attacking the admissibility of the computer-generated display itself and by attacking Benson's competence to interpret the display, others which appear to be a misdirected attack on the records contained in the payroll commission file, and yet others which appear to take aim at both the computer-generated display and the payroll commission records.

In a single objection, Burleson urged that Benson's testimony as to the number of records missing from the payroll commission file was hearsay not qualified under the business records exception, that such testimony itself contained hearsay, that the State did not prove that the equipment

**[802 S.W.2d 439]**

or programs which generated the display upon which Benson's testimony was based were reliable or operating properly, that there was no showing by the State that Benson was qualified to interpret the display, that admission of the testimony violated the best evidence rule because "underlying documentation of the facts" was not introduced to support Benson's oral testimony, and that admission of Benson's testimony as to the display without the admission of other

computer-generated evidence violated the rules of optional completeness and related documents. The court overruled the objection. After voir dire, when the State resumed its direct of Benson and once again inquired as to the number of records missing from the payroll commission file, Burleson twice reurged his objection in summary form by reference to his detailed objection offered on voir dire. The objection was first sustained and then overruled with the court granting a running objection.

We hold that the court did not err in overruling Burleson's trial objection that the State had failed to establish a business records exception for the computer-generated display which served as the basis of Benson's testimony. Had Benson testified as to the content of the payroll commission records themselves and had his testimony been offered to show the truth of the matter asserted, a hearsay exception would undoubtedly have been required to circumvent TEX.R.CRIM.EVID. 801 and 802.

However, Benson did not testify as to the content of the payroll commission records; rather, he testified to the number of records missing from the payroll commission file based upon a computer-generated display. A business rule exception did not have to be established because the type of computer-generated evidence in question (the display of the number of records in the payroll commission file) was not hearsay. It was not a verbal or nonverbal out-of-court statement made by a person. TEX. R.CRIM.EVID. 801. Rather, it was tangible, albeit fleeting, evidence which was generated by the computer itself as part of the computer's internal system designed to monitor and describe the status of the system.<sup>2</sup> The display was offered to show the

**[802 S.W.2d 440]**

number of records missing from a computer file at a particular point in time. Although computer-generated, it was the computer equivalent of a snapshot.

We also find no merit to Burleson's hearsay objection if such objection could be construed to address the computer-generated display itself. No doubt the display indirectly showed the conduct of several persons. Benson testified that he generated the display by entering a keyboard command, and his testimony indicates that the IBM System 38 computer was pre-programmed by IBM to generate such displays. However, there is no indication that the command to initiate the display or the programs responsible for the display were verbal or non-verbal assertive conduct. TEX.R.CRIM.EVID. 801.

Although Burleson's objection as to Benson's qualifications to testify about the computer-generated screen does directly address the admissibility of Benson's testimony, we find no merit to the objection. Burleson points to nothing indicating that the computer-generated display was so complicated or technical that Benson would need to be qualified as an expert in order to testify as to what the display indicated. Moreover, even if it were necessary that Benson be an expert in order to testify as to what the computer-generated display indicated, we still find no merit to the objection. The statement of facts reveals that Benson had been a senior programmer/analyst for about fifteen years at the time of trial; that he was familiar with USPA's IBM System 38 computer system; that he was familiar with the way payroll commission records were stored in the system; that he had routinely and frequently in the past commanded the computer to display the same type of file description at issue in this case; that he was the one

who designed, wrote, and tested the payroll commission system used by USPA; and that he was the most experienced person at USPA in regard to the workings of the company and the company's computer operations.

We hold that the responsibility for making preliminary, factual decisions as to the admissibility of evidence rests with the trial court. TEX.R.CRIM.EVID. 104; *Casillas v. State*, [733 S.W.2d 158](#), 168 (Tex.Crim.App. 1986). Assuming that Benson had to be established as an expert, we fail to see how the court could have abused its discretion in allowing Benson to testify. *Key v. State*, [765 S.W.2d 848](#), 849-50 (Tex. App.—Dallas 1989, pet. ref'd). We find that there was sufficient evidence of Benson's knowledge, skill, and experience to establish him as an expert if his expertise were a prerequisite to admitting his testimony. TEX.R.CRIM.EVID. 702.

Burleson's objection as to the reliability and accuracy of the computer-generated display does, like his objection as to Benson's qualifications to testify, directly address the issue of the display's admissibility. However, as with the objection to Benson's qualifications, we hold that the objection to the reliability and accuracy of the display is without merit. We note that neither Burleson's objection nor brief clearly states whether his complaint is aimed at the authentication of the computer system which generated the display or at the reliability of the technology behind the system.

If the objection were aimed at the authentication of the computer system, we hold that it was properly overruled. The State introduced evidence that the system was working properly when it produced the display and that the system had produced accurate displays in the past. TEX.R. CRIM.EVID. 901(b)(9).

If the objection were aimed at the reliability of the technology behind the computer system, we hold that the objection was again properly overruled. Assuming *arguendo* that the computer technology behind the computer-generated display was novel, the State introduced testimony that such technology was generally trusted

**[802 S.W.2d 441]**

and accepted in the computer industry. Benson testified as to the sophistication and reliability of the IBM System 38 computer and its self-monitoring programs, and he further testified that for several years he had performed monthly tests on the payroll commission system. Jimenez, another USPA data processing employee, testified that the IBM System 38 computer regularly produced reliable history logs showing when various computer transactions were conducted. Donald Thompson, an employee of IBM who installed and serviced USPA's IBM System 38 computer, testified that the IBM System 38 computer was the most reliable he had ever serviced. Finally, David Kinney, a computer consultant and Burleson's own expert witness, testified that he personally knew of numerous corporations that relied on IBM System 38 computers for their data processing needs, that he personally had written over one million lines of computer code for IBM System 38 computers, and that he had written an oil and gas accounting program for IBM System 34 and System 38 computers which was being used by over 100 businesses in Texas alone. Burleson points to no evidence indicating that the computer or its programs responsible for generating the screen display were not reliable or were not working properly when the display was generated.

Because of the testimony introduced at trial, we find that the State presented ample evidence for the court to conclude by a preponderance of the evidence that the computer technology behind the computer generated display was trustworthy, reliable, and standard to the computer industry. TEX.R.CRIM.EVID. 104(a); *Bourjaily v. United States*, [483 U.S. 171](#), 107 S.Ct. 2775, 2778-79, 97 L.Ed.2d 144 (1987). Regardless of whether Texas courts will apply the relevancy test, as urged by this court, or the *Frye* test in determining the admissibility of novel scientific or technical principles, we hold that the display was nevertheless admissible under either test. *See Kelly v. State*, [792 S.W.2d 579](#), 584-85 (Tex.App.—Fort Worth 1990, pet. granted) in which this court discusses and applies the relevancy test to DNA fingerprinting; *see also Glover v. State*, [787 S.W.2d 544](#), 547-48 (Tex.App.—Dallas 1990, pet. granted) in which the Dallas Court of Appeals discusses and applies the *Frye* test to DNA fingerprinting.

We further hold that the court properly overruled Burleson's best evidence objection that "underlying documentation of the facts" was not presented to support Benson's oral testimony. Again, we note that neither the objection nor Burleson's brief clearly states what kind of "documentation of the facts" was lacking. If the objection was addressed to the payroll commission records themselves, we reiterate our holding that an objection as to the records does not reach the issue before us; an objection as to the records does not address the admissibility of testimony concerning the number of records in the payroll commission file. If the objection was addressed to the documentation of the programs which were responsible for the computer-generated display, we reiterate our holding that there was sufficient evidence to authenticate the process responsible for the computer-generated display. If the objection was addressed to the actual display itself, the display qualified as an original under the best evidence rule because it was output other than a printout, was readable by sight, and was shown to be an accurate reflection of the data. TEX.R.CRIM. EVID. 1001(3).

Further, we hold that the court properly overruled Burleson's objection that admission of the computer-generated display, without admission of other computer-generated evidence, violated the rules of optional completeness and related documents. In his brief, Burleson argues that a computer non-system save of the payroll commission file on September 19, 1985, two days before the display was generated, was not preserved; consequently, there was no way to compare the number of records in the file before and after the alleged malfunction with the payroll commission system. We hold that because the non-system save was not preserved when it was made—and we note that on September 19, 1985 there appeared to be no reason to

**[802 S.W.2d 442]**

preserve such a save—there was no related or complete writing to introduce into evidence under TEX.CRIM.R.EVID. 106 or 107. Moreover, Burleson presents us with no authority to support his contention in his objection that "Things of this computer [are] one long document. We need to see both ends of it to see the snapshot of what happened." To support Burleson's contention, as applied in this case, would place USPA under the burden of preserving evidence before it was aware of any necessity of doing so. We find that USPA's failure to preserve the non-system save of September 19, 1985 may go to the weight to be accorded the September 21, 1985 computer generated display, but not its admissibility.

Stressing our previous finding that Benson was qualified as an expert, we note that he was qualified to give his opinion as to the number of records missing from the payroll commission file and did not have to base his opinion upon an admissible computer-generated display if the display was the kind of information reasonably relied upon by experts in the field in forming opinions or inferences. TEX. R. CRIM. EVID. 703. The statement of facts shows that the display, whether admissible or not, had been reasonably relied upon by Benson in the past to give the status of the payroll commission file. Because the program which was responsible for the display was supplied by IBM as part of the IBM System 38 computer system, we find that the trial court could have easily inferred that IBM intended that the program and its display be relied upon to give the status of System 38 files. Consequently, we hold that Benson's expert testimony as to the number of records missing from the payroll commission file, even if based on an inadmissible display, was itself admissible under TEX.R.CRIM.EVID. 703.

Finally, even if the court did err in admitting Benson's testimony as to the number of records missing from the payroll commission file, such error did not beyond a reasonable doubt contribute to Burleson's conviction or sentence because Benson also testified that Burleson admitted he was responsible for deleting the records. TEX. R.APP.P. 81(b).

We overrule Burleson's point of error number seven in regard to the admission of Benson's testimony which was based on the computer-generated display because the computer-generated display was not hearsay; because Benson was qualified as an expert, if such qualification had been necessary, to testify about the display; because the process behind the display was authenticated and the technology which produced the display was shown to be standard and reliable; because there is no merit to the argument that admission of the display violated the best evidence rule, the rule of optional completeness, or the rule of related writings; because Benson was qualified to give an opinion based on the display even if the display itself were not admissible; and because any error in admitting the testimony was harmless.

We next address Burleson's objection as to the admission into evidence of any computer-generated printout. Burleson's objection to any computer-generated printout was the same objection, offered in summary form, that he made to the computer-generated display. Although the trial on the merits consumes over 1,600 pages of testimony and Burleson's brief does not inform us as to when he made his objection, we note that the court granted Burleson a running objection as to all computer generated printouts when Burleson objected to the State's attempt to develop Benson's direct testimony which was based upon a computer-generated history log showing the date and time of various transactions on the computer system. We also note that in his brief Burleson claims that his objection went to any computer-generated "document," but that his objection at trial was to computer-generated "printouts." For the purpose of our analysis, we can fathom no difference between computer-generated printouts as opposed to documents; however, if there is a difference our analysis is based on printouts as actually objected to by Burleson.

Burleson's brief fails to delineate the kind of computer-generated evidence encompassed

**[802 S.W.2d 443]**

by his objection to any computer generated printout. From the context of his objection and brief, we note that the computer-generated printouts Burleson complains of in his point of error do not appear to be business records or summaries of business records entered into, processed, and produced by the computer. Rather, the computer-generated evidence Burleson objects to are printouts produced by the computer system which describe or monitor the internal workings of the system. Such evidence includes not only the computer-generated screen display which shows the number of records contained within a computer file, but also computer generated history logs which show when various terminals accessed the system and when various transactions occurred within the system.

We hold that the court properly overruled Burleson's objection as to any computer-generated printout for the same reasons that it properly overruled his objection as to the computer-generated display. Even without the use of computer-generated printouts, there was testimony that Burleson admitted deleting records. Consequently, any error in regard to the use of computer-generated printouts did not beyond a reasonable doubt contribute to Burleson's conviction or sentence. TEX.R. APP.P. 81(b). We overrule point of error number seven in regard to Burleson's objection as to any computer-generated printouts. Because we have already overruled point of error number seven in regard to the computer-generated display, point of error number seven is overruled in its entirety.

The judgment is affirmed.

## Footnotes

1. Throughout his brief and intertwined in his points of error, Burleson draws a distinction between physical as opposed to logical deletion of data, in this case the deletion of records used to produce the payroll commission reports. When used by programmers, physical deletion of data means the actual destruction of data. t.App.—Fort Worth 1991) Logical deletion, however, means that the data has been marked or masked so that it is not recognized and not available for data processing, even though the data itself has not been destroyed. The computer simply does not know that the data exists.

2. See *People v. Holowko*, [109 Ill.2d 187](#), 93 Ill. Dec. 344, [486 N.E.2d 877](#), 878-79 (1985) in which the Illinois Supreme Court held that computerized printouts of phone traces were not hearsay because such printouts did not rely on the assistance, observations, or reports of a human declarant. The report of phone traces was generated instantaneously as the calls were placed and was "merely the tangible result of the computer's internal operations." In deciding that computer reports of phone traces were not hearsay, the Illinois Supreme Court noted the decision in *State v. Armstead*, [432 So.2d 837](#), 839-41 (La.1983) in which the Louisiana Supreme Court held that computerized records of phone traces were not hearsay and held that such records were computer-generated data to be distinguished from computer-stored declarations. The Illinois Supreme Court noted that computer science had created many devices "the reliability of which can scarcely be questioned"; thus, their reliability was subject to judicial notice upon a showing "of the accuracy and proper operation of the particular device under consideration." Although the Louisiana Supreme Court did not address the issue of whether the computer's reliability was subject to judicial notice, it did stress that reliability was the main issue concerning the

admissibility of computerized phone traces: "We therefore view the computer generated data in this case as demonstrative evidence of a scientific test or experiment." Tex.App.—Fort Worth 1991) In *Schlueter, Hearsay—When Machines Talk*, 53 Tex.BJ. 1135 (Oct. 1990), the author criticizes a Dallas Court of Appeals decision which held that the numbers viewed on an intoxilyzer's computer screen (no hardcopy test result was printed) were hearsay. *May v. State*, [784 S.W.2d 494](#) (Tex.App.—Dallas 1990, pet. ref'd.). Although the *May* decision claims to be based on hearsay, the court's analysis in finding the intoxilyzer results inadmissible shows that the court based its decision not on hearsay, but on the reliability of the test. The court held that for the results to be admissible the State would have to show: (1) that the machine functioned properly on the day of the test, (2) that the machine was operated by one who understood the scientific principles behind it, and (3) that the results be interpreted by a qualified witness so as to eliminate hearsay. *Id.* at 498. We agree with *Schlueter* that, under the facts presented, the problem with the admissibility of the evidence in *May* was not hearsay, but a failure to authenticate the intoxilyzer; and, furthermore, problems of authentication and hearsay are not interchangeable. *Schlueter* at 1135. The three prong test for authenticating intoxilyzer results presented in *May* was a test initially elaborated by the Texas Court of Criminal Appeals. See *Harrell v. State*, [725 S.W.2d 208](#), 209-10 (Tex.Crim.App. 1986). Although the third prong does require that intoxilyzer results be interpreted by a qualified witness so as to eliminate hearsay, we believe such requirement addresses who may testify and does not stand for the proposition that intoxilyzer results are themselves hearsay.