

REFRESHED RECOLLECTION

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- I. Generally.** When a witness testifies that he or she cannot remember an event or incident in question, a party may seek to jog the witness's memory by, for example, having the witness examine a writing, picture, diagram, or object. If doing so sufficiently jogs the witness's memory, the witness then may testify about the event. This technique is called refreshed recollection, or sometimes, present recollection refreshed.

Refreshed recollection is a common law doctrine. See *State v. Corn*, 307 N.C. 79, 83 (1982) (formally explaining the doctrine prior to the adoption of the evidence rules). Evidence Rule 612 applies when a witness's memory is refreshed before or during the witness's testimony by a writing, such as a letter or a report, or an object, such as a piece of evidence. N.C. EVID. R. 612 ("writing or object"). The rule addresses an adverse party's right to production and use of the writing or object employed to refresh the witness's memory, but it does not define the bounds of how a witness's recollection may be refreshed. *Id.* ("If . . . a witness uses a writing or object . . .") (emphasis added); see also *State v. Shuford*, 337 N.C. 641, 647 (1994) (Rule 612 governs only the production and use of writings or objects used to refresh a witness's recollection).

- II. Distinguished from Past Recollection Recorded.** Refreshed recollection is often confused with the past recollection recorded hearsay exception under evidence rule 803(5). See, e.g., *State v. Harris*, 253 N.C. App. 322, 331 (2017) (noting that whether the basis for the admissibility of a video recording was Rule 803(5) or Rule 612 was not

clearly stated by the proponent or the trial court; “[W]e must distinguish between a writing that is offered as a ‘past recollection recorded’ and one that is offered as a ‘present recollection refreshed’ because the admissibility requirements are critically different.”). With refreshed recollection, a witness’s memory is jogged by some object or aid and his or her subsequent testimony is substantive evidence which comes from memory and not from the object or aid that refreshed the memory. *State v. Corn*, 307 N.C. 79, 82-83 (1982) (so explaining the doctrine); *State v. Mlo*, 335 N.C. 353, 367 (1994) (same). The memory aid is not admissible as substantive evidence merely because it was used to refresh the witness’s recollection. *State v. Shuford*, 337 N.C. 641, 647 (1994).

Under past recollection recorded, if the necessary foundational requirements are satisfied, the witness’s past recollection, as documented in a writing for example, may be admissible as substantive evidence. See [Hearsay Rules](#) (discussing Rule 803(5) requirements in detail). In this scenario the document itself is read into evidence since the witness cannot remember the event in question. *Id.*; see also *Corn*, 307 N.C. at 83.

III. When Memory May Be Refreshed. A party may attempt to refresh a witness’s recollection when the witness is unable to recall a relevant fact or detail, even though the witness recalls some portion of the matter at issue. See *State v. Daniels*, 337 N.C. 243, 263-64 (1994) (where an officer could not recall whether he described the defendant to his duty captain as “a little coked up,” the trial court erred by refusing to permit the defendant to refresh the officer’s recollection of that statement using a transcript of the conversation); *State v. Jones*, 280 N.C. App. 241, 249 (2021) (witness could remember portions of a conversation but recalled additional detail after reviewing a letter he had written). When a witness indicates, or it is otherwise apparent, that the witness’s present recollection of the matter is sufficient, it is not error to preclude a party from attempting to refresh the witness’s memory. See *State v. Foster*, 236 N.C. App. 607, 615 (2014) (trial court did not err by sustaining the State’s objection to the defendant’s attempt to use a medical report to refresh witness’s recollection of her level of intoxication where witness testified that she remembered whether she was intoxicated).

IV. What May Be Used. While a witness’s memory may most commonly be refreshed by a writing, such as a letter or a report, or an object, such as a piece of evidence, appellate cases speak broadly about what stimuli may be used. See, e.g., *State v. Smith*, 291 N.C. 505, 516-17 (1977) (“Because of the independent origin of the testimony actually elicited, the stimulation of an actual present recollection is not strictly bounded by fixed rules but, rather, is approached on a case-by-case basis looking to the peculiar facts and circumstances present.”); *Foster*, 236 N.C. App. at 615 (observing that memory may be “refreshed or jogged through the employment of a writing, diagram, smell or even touch” (quotation omitted)); see also *State v. Lesane*, 137 N.C. App. 234, 243 (2000) (leading questions during direct examination are permissible to refresh a witness’s memory). Evidence treatises suggest that traditionally there has been no strict categorical limitation as to what may be used as a memory aid. See *State v. White*, 18 N.C. App. 31, 34-35 (1973) (favorably citing a treatise’s assertion that “no good reason is apparent why any object perceptible to the senses, or even a sound or an odor, should not be used”); ROBERT P. MOSTELLER ET AL., 1 MCCORMICK ON EVIDENCE § 9 (9th ed. 2025) (to the same effect).

A. Witness Need Not Have Prepared or Signed a Writing. There is no requirement that a writing used to refresh a witness’s recollection be signed or prepared by the witness. See, e.g., *State v. Royal*, 300 N.C. 515, 528 (1980)

(radio log properly used to refresh officer's recollection). In fact, the witness need not have been directly involved in the creation of the writing or the event it memorializes. See *State v. Daniels*, 337 N.C. 243, 264 (1994) (proper to refresh an officer's recollection concerning an arrest using a transcript of a phone call between a sergeant and a deputy relating details of what the officer had told the sergeant). The courts have explained: "If upon looking at any document [the witness] can so far refresh his memory as to recollect a circumstance, it is sufficient; and it makes no difference that the memorandum is not written by himself, [f]or it is not the memorandum that is the evidence but the recollection of the witness." *State v. Smith*, 291 N.C. 505, 516-17 (1977) (citation omitted). Thus, an eyewitness to a crime may be asked if a police officer's report of the event refreshes his or her memory. See *State v. Demery*, 113 N.C. App. 58, 67 (1993) (proper to refresh witness's recollection in this manner).

- B. A Writing Need Not Have Been Made Contemporaneously With the Event.** A writing or other document may be used to refresh a witness's recollection even if it was not made contemporaneously or close in time to the event in question. *Smith*, 291 N.C. at 517. Thus, a transcript from a prior trial may be used to refresh a witness's memory as to the original event. *Id.*

- V. Testimony Must Be the Product of the Witness's Memory.** The critical determination following an attempt to refresh a witness's recollection is whether the witness's testimony is in fact a product of the witness's memory, in which case the testimony may be admitted, or is "*clearly* a mere recitation" of the memory aid, in which case the testimony is inadmissible. *Smith*, 291 N.C. at 518; see also *State v. Spinks*, 136 N.C. App. 153, 160 (1999) (State's attempt to refresh the witness's recollection with a law enforcement officer's summary of the witness's previous oral statement was unsuccessful). In making this determination, the courts assess "whether the witness has an independent recollection of the event and is merely using the memorandum [or other material] to refresh details or whether the witness is using the memorandum as a testimonial crutch for something beyond his recall." *State v. York*, 347 N.C. 79, 89 (1997). Relevant factors include the strength of the witness's memory of the matter before reviewing the aid, whether the witness afterwards can testify to the matter without continued reliance on the aid, and whether the witness is able to supply details beyond what the aid provides. See *State v. Harrison*, 218 N.C. App. 546, 552 (2012) (witness independently recalled conversation, testified from memory, and supplied details not contained in statement); *State v. Black*, 197 N.C. App. 731, 736 (2009) (witness recalled some events before reviewing transcript and afterwards testified in detail, apparently without further reference to it); *Jones*, 280 N.C. App. at 249-51 (witness recalled part of conversation before reviewing letter and later supplied details not contained in letter). The fact that a witness needs to refer to the memory aid during testimony does not make the refreshed testimony inadmissible. *York*, 347 N.C. at 89.

The inquiry is case-specific and no single factor is dispositive, including a witness's own assertion that his or her recollection was refreshed. *Smith*, 291 N.C. at 516 ("case-by-case" analysis); *Jones*, 280 N.C. App. at 251-52 (considering witness's assertion that memory was refreshed against contradicting factors). "Where there is doubt as to whether the witness purporting to have a refreshed recollection is indeed testifying from his own recollection, the use of such testimony is dependent upon the credibility of the witness and is a question for the jury." *Smith*, 291 N.C. at 518; *Black*, 197 N.C. App. at 736 (trial court did not abuse its discretion by allowing refreshed

testimony where there was doubt as to whether the witness's testimony was truly refreshed).

VI. Admissibility of Item Used to Refresh.

- A. Not Admitted in Evidence.** When a party uses a document or other item to refresh a witness's recollection, doing so does not introduce the document or other item into evidence. *State v. Spinks*, 136 N.C. App. 153, 160 (1999); *see also* *State v. English*, 194 N.C. App. 314, 318 (2008) (so stating in the context of determining whether the defendant had the right to final argument). As the courts have explained: "Where a writing is used to refresh the recollection of a witness, it is not the writing which is evidence but the testimony of the revived recollection." *State v. Nelson*, 298 N.C. 573, 598 (1979).
- B. To Be Admitted, Item Must Be Independently Admissible.** Using an item to refresh recollection does not make the item admissible in evidence; to be admissible, there must be some independent basis for admissibility. *State v. Shuford*, 337 N.C. 641, 647 (1994); *State v. Harrison*, 218 N.C. App. 546, 551 (2012); *Spinks*, 136 N.C. App. at 160. For example, in *State v. Jones*, 280 N.C. App. 241, 252-53 (2021), a letter used to refresh a witness's recollection was independently admissible for corroboration as a prior consistent statement.

VII. Production or Inspection of Item Used to Refresh.

- A. When Used While Testifying.** If a witness uses a writing or object to refresh his or her memory while testifying, an adverse party is entitled to have the writing or object produced at trial. N.C. EVID. R. 612(a); *see also* *State v. Jackson*, 302 N.C. 101, 107 (1981) (if the witness had referred to the notes for the purpose of refreshing his recollection, defense counsel would have been entitled to examine them). However, if the witness simply carries notes to the stand but does not read from them or refer to them while testifying, the other side is not entitled to production. *Jackson*, 302 N.C. at 107.
- B. When Used Before Testifying.** If the witness uses a writing or object to refresh his or her memory before testifying, disclosure is in the discretion of the court. N.C. EVID. R. 612(b). *See, e.g.,* *State v. Griffin*, 136 N.C. App. 531, 553 (2000) (trial court did not abuse its discretion by denying defendant's motion to view notes a witness reviewed prior to coming to court that the witness left locked in his car).
- C. Inspection When Production Is Impractical.** If production of the writing or object at trial is impracticable, the trial court may order it to be made available for inspection. N.C. EVID. R. 612(c).
- D. Privileged or Irrelevant Matter.** If a party claims that the writing or object contains privileged information or information not directly related to the relevant testimony, the trial court must:
- examine the writing or object in camera,
 - excise any such portions, and
 - order delivery of the remainder to the party entitled to it.

N.C. EVID. R. 612(c). Any portion withheld over objections must be preserved and made available to the appellate court in the event of an appeal. *Id.* See also *State v. Hall*, 330 N.C. 808, 824 (1992) (trial court properly followed this procedure).

- E. **Use By Adverse Party.** A party entitled to have a writing or object produced under Rule 612 is entitled to inspect it, to cross-examine the witness on it, and, if otherwise admissible, to introduce in evidence those portions which relate to the witness's testimony. N.C. EVID. R. 612(c); see *Shuford*, 337 N.C. at 647 (even where Rule 612 is applicable regarding the production, inspection, and use of a writing or object, the item "is subject to the same rules of admissibility that apply to any evidence").
- F. **Sanctions.** If a writing or object is not produced, made available for inspection, or delivered pursuant to an order under Rule 612, the court must "make any order justice requires, but in criminal cases if the prosecution elects not to comply, the order shall be one striking the testimony or, if justice so requires, declaring a mistrial." N.C. EVID. R. 612(c).

VIII. **Best Evidence Rule Inapplicable.** The best evidence rule does not apply when a document is used merely to refresh recollection. *State v. Mlo*, 335 N.C. 353, 368 (1994).

IX. **Discretionary Decision.** A ruling on a witness's use of a memory aid to refresh recollection is in the sound discretion of the trial judge and will not be disturbed absent an abuse of discretion. See, e.g., *State v. Jones*, 280 N.C. App. 241, 247 (2021); *State v. Black*, 197 N.C. App. 731, 733 (2009).

X. **Related Memory Issues: Hypnosis and Refreshed or Recovered Memory.**

- A. **Hypnotically Refreshed Memory.** Hypnotically refreshed testimony from a witness other than the defendant generally is barred as insufficiently reliable. See *State v. Peoples*, 311 N.C. 515, 533 (1984) (describing the general bar). The trial court must exercise its discretion to determine the reliability of such testimony by a defendant on a case-by-case basis. *Rock v. Arkansas*, 483 U.S. 44, 61 (1987) (holding that a categorical bar on hypnotically refreshed testimony is unconstitutional when applied to a testifying defendant).
- B. **Repressed or Recovered Memory.** Some appellate cases have dealt with "repressed" or "recovered" memory, a psychological concept that may arise in a criminal case when a witness reports recalling a distressing or traumatic event that he or she was unable to recall for some period. See, e.g., *State v. King*, 366 N.C. 68 (2012); *State v. Heyne*, 293 N.C. App. 724, 729 (2024). The North Carolina Supreme Court has held that "unless qualified as an expert or supported by admissible expert testimony, the witness may testify only to the effect that, for some time period, he or she did not recall, had no memory of, or had forgotten the incident, and may not testify that the memories were repressed or recovered." *King*, 366 N.C. at 78. Consistent with its statement in *King*, the rule appears to operate narrowly to prohibit a lay witness from characterizing a memory as "repressed" or "recovered," but does not necessarily prohibit the witness's testimony of his or her experience of regaining the memory. See *Heyne*, 293 N.C. App. at 730 (rule did not bar victim's testimony about how her memory suddenly "flooded back" and later was "solidified" through talk therapy).

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