

## 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 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. N.C. Evidence Rule 612 addresses refreshed recollection.

**A. Distinguished from Past Recollection Recorded.** Refreshed recollection is often confused with the past recollection recorded hearsay exception under evidence rule 803(5). The confusion likely results from the interplay between the two rules. As noted above, with refreshed recollection, a witness's memory is jogged by a writing, picture, diagram, or object; when a witness's recollection is refreshed in this way, his or her subsequent testimony comes from memory and not from the writing, picture, diagram, or object that refreshed the witness's recollection. *State v. Corn*, 307 N.C. 79, 82-83 (1982) (so explaining the doctrine); *State v. Mlo*, 335 N.C. 353, 367 (1994) (same). If, however, the technique of refreshed recollection fails to sufficiently jog the witness's memory, his or her testimony is inadmissible. This is where the past recollection recorded hearsay exception may come into play. 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. In this scenario the document itself is received into evidence; since the witness cannot remember the event in question, the witness has no relevant testimony. *Corn*, 307 N.C. at 83.

- B. Any Writing or Object May Be Used.** A witness's memory may be refreshed by both a writing, such as a letter or a report, or an object, such as a piece of evidence. N.C. R. EVID. 612 ("writing or object").
- C. Witness Need Not Have Prepared or Signed the Writing.** A writing may be used to refresh a witness's recollection even if it was not signed or prepared by the witness. *State v. Brown*, 350 N.C. 193, 209 (1999); *State v. Royal*, 300 N.C. 515, 528 (1980) (call log used to refresh officer's recollection); *State v. Smith*, 291 N.C. 505, 516-17 (1977). 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." *Smith*, 291 N.C. at 516-17 (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.
- D. 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.*

**II. Foundational Requirements.** The analysis for determining whether or not testimony may be admitted as a refreshed recollection involves a determination of "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); see *State v. Harrison*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Feb. 7, 2012) (quoting *York*); *State v. Black*, 197 N.C. App. 731, 734 (2009) (quoting the same). In the former situation the testimony is admissible; in the latter it is not. *Smith*, 291 N.C. at 518 ("[T]he memorandum must actually 'refresh' the memory of the witness and his subsequent testimony must indeed be from his own collection. Where the testimony of the witness purports to be from his refreshed memory but is [c]learly a mere recitation of the refreshing memorandum, such testimony is not admissible as present recollection refreshed and should be excluded by the trial judge.). However, "[w]here 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). Of course, if the witness testifies that the writing or object failed to jog his or her memory, the witness's testimony is inadmissible. See, e.g., *State v. Spinks*, 136 N.C. App. 153, 160 (1999) (State's attempt to refresh the witness' recollection was unsuccessful).

- A. Reference to Notes During Testimony.** The fact that a witness needs to refer to his or her notes during testimony does not make the refreshed testimony inadmissible. *York*, 347 N.C. at 89; *State v. Collins*, 22 N.C. App. 590, 595 (1974). The key inquiry, the courts have reminded us, "is whether the witness has an independent recollection of the event and is merely using the memorandum to refresh details or whether the witness is using the memorandum as a testimonial crutch for something beyond his recall." *York*, 347 N.C. at 89.

**B. Sample Cases.** Sample cases applying the requisite analysis are summarized below.

State v. Brown, 350 N.C. 193, 209 (1999) (the trial court properly allowed the prosecutor on cross-examination, to use a letter to refresh a defense witness's recollection; on voir dire out of the jury's presence, the prosecutor showed the witness a letter which she had written to her daughter and the witness then stated that her recollection had been refreshed and that she remembered making the statement).

State v. York, 347 N.C. 79, 89 (1997) (the witness's use of notes during his testimony was for the purpose of refreshing his recollection and did not violate the present recollection refreshed rule; the witness testified from memory about the events surrounding his interview of the defendant; when he was questioned about the specific statements, he referred to his notes, made contemporaneously with the interview; the witness spoke in the second person about the details of the interview, consistently prefacing his testimony with the phrase, "Thomas [defendant] stated"; as the witness recounted the interview, the prosecutor asked him questions, which the witness answered independently of his notes; the witness had extensive independent recall about the event in question and it "is thus evident from the full circumstances that this witness used his notes . . . in order to specifically recall for the jury what occurred during his interview with defendant").

State v. Daniels, 337 N.C. 243, 264 (1994) (the trial court erred by not permitting the defendant, on cross-examination of the State's witness (an officer), to refresh the witness's recollection by using a transcription of a telephonic transmission between two other officers).

State v. Mlo, 335 N.C. 353, 367-68 (1994) (the trial court did not err by allowing a detective to use the written transcription of defendant's tape-recorded statements to refresh his recollection of the statements made by defendant; there was no indication that the detective was not able to rely primarily upon his own memory of events).

State v. Royal, 300 N.C. 515, 527-28 (1980) (a radio log sheet properly was used to refresh the officer's recollection as to the time that a call for help was made to the sheriff's office).

State v. Smith, 291 N.C. 505, 517-18 (1977) (the trial court did not abuse its discretion by denying the defendant's motion to strike a witness's testimony on grounds that her review of a trial transcript did not refresh her memory but merely provided a script to recite at trial; the court noted that the evidence was contradictory: at one point the witness, when questioned as to the origin of her testimony, stated that it was "(o)f my own memory" but at another point stated "some is to my memory, and some isn't"; the court noted that "[b]ecause of the looser standards involved with present recollection refreshed, it is critical that the actual circumstances of each case conform to the underlying assumptions of the doctrine. That is, the memorandum must actually 'refresh' the memory of the witness and his subsequent testimony must indeed be from his own collection"; it concluded: "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.”).

*State v. Harrison*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Feb. 7, 2012) (the trial court properly allowed the State’s witness to use a prior statement to refresh her recollection; the prior statement was made to an officer and recounted an interaction between her and the defendant; the witness had an independent recollection of her conversation with the defendant and of making her statement to the officer; she affirmed that her recollection had been refreshed, testified from memory, and her testimony included details not in the statement; her testimony showed that she was not using her prior statement as a crutch for something beyond her recall).

*State v. Black*, 197 N.C. App. 731, 736 (2009) (the trial court did not abuse its discretion by admitting a witness’s refreshed recollection; the witness’s testimony was not merely a recitation of the refreshing memorandum; the witness testified to some of the relevant events before being shown a transcript of his police interview; after being shown the transcript, the witness was equivocal about whether he made the statements recorded in it; however, after hearing an audio tape of the interview out of the presence of the jury, the witness said that his memory was refreshed; he then testified in detail regarding the night in question, apparently without reference to the interview transcript; where, as here, there is doubt about whether about whether the witness was testifying from his or her own recollection, the testimony is admissible, in the trial court’s discretion).

### III. 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. Harrison*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Feb. 7, 2012); *Spinks*, 136 N.C. App. at 160.

### IV. Production or Inspection of Item Used to Refresh.

- A. When Used At Trial.** 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 Trial.** 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).
- C. Inspection Required if Production Impossible.** 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. R. EVID. 612(c). Any portion withheld over objections must be preserved and made available to the appellate court in the event of an appeal. *Id.*
- 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 to introduce in evidence those portions which relate to the witness's testimony. N.C. EVID. R. 612(c).
- 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).
- V. 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).
- VI. 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. Black*, 197 N.C. App. 731, 733 (2009).