STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Hampton County
Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GREGORY SANDERS,

PETITIONER

Opinion No. 2022-UP-298 (S.C. Ct. App. filed July 13, 2022)

APPELLATE CASE NO. 2018-000911

APPENDIX

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The State, Respondent,

v.

Gregory Sanders, Appellant.

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Appeal From Hampton County
Carmen T. Mullen, Circuit Court Judge

Unpublished Opinion No. 2022-UP-298
Heard November 10, 2021 – Filed July 13, 2022

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Assistant Attorney General Michael Douglas Ross, and Assistant Attorney General Julianna E. Battenfield, all of Columbia; and Solicitor Isaac McDuffie Stone, III, of Bluffton, all for Respondent.

PER CURIAM: Gregory Sanders appeals his convictions for murder and possession of a weapon during the commission of a violent crime. Sanders argues the trial court erred by admitting a text message into evidence because the text message was (1) not properly authenticated and (2) inadmissible hearsay. We affirm.

FACTS/PROCEDURAL HISTORY

In the early morning hours of May 10, 2016, Sanders shot and killed Tyhira Harrington. A Hampton County grand jury indicted Sanders for murder and possession of weapon during the commission of a violent crime. At a jury trial in May of 2018, Sanders testified in his own defense and admitted to the shooting but claimed he was acting in self-defense.

At trial, Marilyn Garvin, Harrington's mother, testified she knew Sanders because he had spent time at an apartment she shared with Harrington, and Harrington did his hair. Garvin explained that a few days prior to the murder, she came across Sanders while she and her boyfriend, Samson Williams, were walking to the store. Garvin testified Sanders stated, "[Y]ou better get you a black dress, because I'm going to kill your daughter, because she took me to Allendale to try to get me set up."[1]

Garvin testified that on the night of the shooting, she was in the process of moving out of the apartment she shared with Harrington. She stated Sanders came to Harrington's apartment earlier in the evening while she, Harrington, Kywana Bradley, Yhantyse "Daisy" Priester, and a man named Alexander were there. Garvin heard Harrington deny setting Sanders up to be robbed. Garvin recalled that Sanders "threw a bandana down on the floor" and said "it's on the five" but she did not know what that meant. She stated no one struck Sanders while he was in the apartment and he walked out unharmed after the encounter.

Garvin then testified she received a text message from Johnny McKnight, who was saved as a contact in her cellphone under the nickname, "Johnny Blaze." Garvin identified State's Exhibit 25 as a screenshot of the text message and agreed the message had not been changed or altered, and it was a "fair and accurate . . . copy of the text message." She stated she recognized State's Exhibit 25 "[b]ecause they [sic] programmed in my phone as Johnny Blaze, and the same text [wa]s in my

[1] Williams also testified at trial and gave the same account regarding Sanders's statement to Garvin.

phone." Garvin further indicated she still owned the same phone and could access the text message. When the State moved to enter the text message into evidence, Sanders objected, arguing the text message was inadmissible hearsay and questioning who created the text message. The trial court admitted the text message into evidence subject to Sanders's objection.

Garvin then read the text message aloud for the jury: "I just seen [Sanders's girlfriend] walkn behind da apts. He's probably hidn 2. Tryn sum. GOD S GIFT." She interpreted the text message to mean that Sanders and his girlfriend were "trying to lure [Harrington] out [of her] house." Without objection, Garvin explained she then called Harrington to tell her that McKnight had sent her a text message indicating that "[Sanders] and his girlfriend w[ere] going back behind [Harrington's] apartment." A few hours later, Garvin learned Harrington had been shot.

Bradley testified that earlier in the evening of the shooting, she, Priester, and Harrington had gone to a club and when they returned to Harrington's home, Sanders was there "to clear his name." Bradley recalled Harrington confronted Sanders about what he said to Garvin and the conversation led to an argument. Bradley stated there was no fighting, no one hit Sanders, and Sanders left when he was asked to leave. Bradley testified that after Sanders left, Harrington and Priester also departed to take Garvin home. Bradley stated she stayed behind, and while sitting in the apartment, she heard someone "playing with" the front doorknob. Bradley explained she did not know who it was at the time but called Harrington to warn her that someone was trying to get into her apartment and to be careful.

Priester, Randy White, and Marquis Alston, all of whom were with Harrington when she drove back to the apartments, also testified at trial. White, who was dating Harrington, testified Harrington picked him up on the night of the shooting and Priester and Alston were already in the car. White recalled Harrington received a phone call, hung up, and sped off towards the apartments. He stated they then saw Sanders and his girlfriend standing by a laundromat, and Harrington stopped and parked the car right in front of them. White testified the four of them got out of the car and Harrington started walking toward Sanders, who began backing up. According to White, after they got out of the car, Priester stayed close to the car but White followed Harrington as she advanced toward Sanders because he was trying to keep her from getting too close to Sanders. White testified Harrington was "full of rage" but the only people who were arguing were Harrington and Sanders. He stated no one tried to strike Sanders, no one was

standing in Sanders's way, and he could have walked away. White testified Sanders told him: "[G]o away; you don't want to be no witness." He stated Sanders "pulled out a gun and shot [Harrington] and then walked away with his girlfriend." White recalled he never saw Harrington with a weapon that night and never knew her to carry a weapon.

Alston testified he knew Harrington and Priester through White. Alston, although initially stating he did not remember much from the night of the shooting, testified that when Harrington stopped the car, he got out and went next door to see Bradley. He stated there was no fighting going on. He recalled he heard the gunshot but denied telling law enforcement he saw Sanders with a gun. Later during trial, Investigator Donald Hipp of the Hampton County Sheriff's Office testified he interviewed Alston, and during the interview, Alston stated he heard and saw Sanders shoot Harrington and walk away calmly.

Priester testified similarly to Bradley and Garvin as to Sanders's visit to Harrington's apartment earlier on the night of the shooting and recalled he had come to "clear his name." Consistent with White's testimony, Priester stated that while in the car with Harrington, Harrington received a call that someone was "at the back door trying to get in, shaking the back door" of Harrington's apartment. Priester testified Harrington drove back to the apartments and when she saw Sanders and his girlfriend near the laundromat, Harrington swung into the laundromat and they all got out of the car. Priester stated she tried to calm Harrington down because Harrington was angry and had been drinking all day. She recalled Sanders, his girlfriend, and Harrington were all standing in the street. Priester testified, "I guess he moved in the road to—to get what angle he would really want to shoot her at." Priester explained that when he moved, Sanders asked Harrington: "[A]ll these people out here, and how many people you think are gonna ride for you?" and then he shot her. Priester testified Sanders did not appear to be in fear of his safety at the time. She recalled that after he shot Harrington, he pointed the gun at her for a few moments and then ran away. Priester indicated Harrington was the only one confronting Sanders and his girlfriend. She testified Harrington had no weapon and made no reference to a gun.

Chief Mark Collins testified he arrested Sanders on May 10, 2016, and that during the arrest, he found a gun wrapped in a bundle of clothing near Sanders. Captain Alexander Williams testified he assisted with Sanders's arrest and gave Sanders *Miranda* warnings. Captain Williams recalled Sanders made a statement referring to his eye, which was bloodshot and "a little swollen," explaining his girlfriend caught him cheating.

Paul Greer, a firearms examiner with the South Carolina Law Enforcement Division (SLED) testified the projectile recovered from the wound to Harrington's head was fired by the gun found during Sanders's arrest. Ila Simmons, also with SLED, opined the gun had to have been within about two inches of Harrington's skin when it was fired. Similarly, Dr. Ellen Riemer, who performed Harrington's autopsy, opined the gunshot came from a distance of three or four inches up to a couple of feet from Harrington's head.

Sanders denied saying anything to Garvin about "buying a black dress" or threatening to kill Harrington. He testified he went to Harrington's earlier on the day of the shooting to "clear [his] name." Sanders stated Harrington punched him in the eye and Bradley, Harrington, and Priester "lynched" him inside the apartment. He claimed he fought his way to the door and left. Sanders testified he met up with his girlfriend afterwards and around midnight or 1:00 a.m., they left to walk home. Sanders explained that while they were walking home, a car drove past them, slammed on the brakes, backed up, and pulled up close to where they were. He stated all four of the occupants got out. Sanders testified Harrington said, "we about to f*** you all up." He recalled he stood in front of his girlfriend and started backing up. Sanders testified Harrington said she wanted to fight his girlfriend but because his girlfriend did not want to fight, Harrington said she wanted to fight Sanders. He stated Harrington then said, "I ain't worried about nothing, I got my iron in the seat" and he believed Harrington was referring to a gun. Sanders stated he did not really have an avenue of retreat because the car was in front of them and the laundromat was behind them. Sanders recalled he then told everyone to leave them alone and go home. He testified that in response, Harrington kept "running off at the mouth"; White was right beside her and every time she moved up, he moved up; Priester was on the other side of Harrington but did not move; and Alston was still standing beside the car. Sanders stated he was afraid that he and his girlfriend would be seriously injured because she was "short" and "real skinny" and they were outnumbered. He testified that when they "moved up and they got closer" he fired so that he and his girlfriend could get away. Sanders recalled that after he fired, White ran away, Priester stood there, and Alston ducked behind the car.

During cross-examination, Sanders admitted to shooting and killing Harrington. He stated he only fired once, and he identified the gun that matched the projectile taken from Harrington's body as his gun. Sanders explained he shot at Harrington because she was "the main one that was causing the whole everything" and "she was closer."

The jury found Sanders guilty as indicted, and the trial court sentenced him to life in prison for murder and five years' imprisonment for the weapon conviction, to run concurrently. This appeal followed.

ISSUE ON APPEAL

Did the trial court err in admitting the contents of a text message because the text message was inadmissible hearsay and the State failed to authenticate the text message?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Washington*, 379 S.C. 120, 123, 665 S.E.2d 602, 604 (2008). "The admission or exclusion of evidence is left to the sound discretion of the trial [court], whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Washington*, 431 S.C. 394, 405, 848 S.E.2d 779, 785 (2020) (quoting *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law[.]" *Id.* at 405-06, 848 S.E.2d at 785 (quoting *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)). "The improper admission of hearsay is reversible error only when the admission causes prejudice." *State v. Weston*, 367 S.C. 279, 288, 625 S.E.2d 641, 646 (2006).

LAW/ANALYSIS

A. Authentication

Sanders argues the State failed to authenticate the text message because it failed to show if and how Garvin knew McKnight or how she obtained his phone number. He asserts Garvin did not testify that she previously communicated with McKnight using the same phone number that sent the text message, and she did not testify that she recognized the text message as McKnight's writing style. Additionally, Sanders contends the signature on the text message, "GOD S GIFT," was not related to "Johnny," "McKnight," or his nickname, "Blaze." We disagree.

Evidence is not admissible unless it is properly authenticated. *See* Rule 901(a), SCRE ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding

that the matter in question is what its proponent claims."). Testimony from a witness with knowledge "that a matter is what it is claimed to be" can be sufficient to meet this requirement. Rule 901(b)(1), SCRE. "'[T]he burden to authenticate . . . is not high' and requires only that the proponent 'offer[ ] a satisfactory foundation from which the jury could reasonably find that the evidence is authentic.'" *Deep Keel, LLC v. Atl. Priv. Equity Grp., LLC*, 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015) (quoting *United States v. Hassan,* 742 F.3d 104, 133 (4th Cir. 2014)); *see also United States v. Davis*, 918 F.3d 397, 402 (4th Cir. 2019) (considering Federal Rule of Evidence 901 and holding the proponent was required to make "only a prima facie showing that the 'true author' is who the proponent claims it to be").

The trial court did not abuse its discretion by concluding the State offered sufficient evidence to satisfy the authentication requirement of Rule 901, SCRE. Garvin testified she received a text message from "Mr. Johnny McKnight" and stated McKnight was programmed into her phone under "Johnny Blaze." Garvin then identified a screenshot from her phone as the text message she received from McKnight. She also stated the screenshot of the text message had not been changed or altered and was a "fair and accurate" reflection of the text message she received from McKnight. When asked how she was able to recognize the exhibit containing the screenshot of the message, Garvin stated, "Because they [sic] programmed in my phone as Johnny Blaze, and the same text is in my phone." Standing alone, this would not be sufficient to satisfy Rule 901's authentication requirement. However, Garvin testified that prior to the admission of the text message, she received a phone call from and spoke to McKnight. Although the trial court excluded her testimony regarding the contents of that discussion, Garvin's statements regarding this prior conversation with McKnight that same night provided circumstantial evidence sufficient to support a finding that the text message was what she claimed it to be. *See e.g., State v. Benton*, 435 S.C. 250, 263, 865 S.E.2d 919, 926 (Ct. App. 2021) (noting the timing and distinctive characteristics of the text messages at issue—in addition to witness's identification of certain messages during his testimony—provided the circumstantial evidence necessary for authentication), *petition for cert. filed* (S.C. Dec. 20, 2021).

B. Hearsay

Sanders argues McKnight's text message was inadmissible hearsay because no hearsay exception applied. Specifically, he asserts the State did not argue or present evidence at trial indicating McKnight was unavailable to testify, and therefore, it cannot now argue the text message was admissible under Rule 804,

SCRE. Sanders further argues the text message was not admissible as a present sense impression, excited utterance, or then existing state of mind, emotion, sensation, or physical condition pursuant to Rules 803(1)-(3), SCRE. We agree.

"Hearsay is an out of court statement, offered in court to prove the truth of the matter asserted." *State v. Parvin*, 413 S.C. 497, 503, 777 S.E.2d 1, 4 (Ct. App. 2015) (quoting *State v. Townsend*, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct. App. 1996)); *see also* Rule 801, SCRE (providing the definition of hearsay and its scope). "Hearsay is not admissible except as provided by [the South Carolina Rules of Evidence] or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE. The exceptions to the general rule against hearsay include when a hearsay statement conveys the declarant's "present sense impression," or constitutes an "excited utterance" or "then existing mental, emotional, or physical condition." Rule 803(1)-(3), SCRE.

The trial court erred by admitting the text message into evidence because the message was hearsay with no applicable exception. McKnight's text message was hearsay because it was an out-of-court statement offered to prove the truth of the matter asserted: Sanders was behind Harrington's apartment. *See* 801, SCRE. Thus, the text message was inadmissible absent an applicable exception to the general rule. *See* Rule 802, SCRE ("Hearsay is not admissible except as provided by [the South Carolina Rules of Evidence] or by other rules prescribed by the Supreme Court of this State or by statute."). Additionally, the text message was not admissible under any hearsay exception. *See* Rule 803, SCRE (providing exceptions to the general rule against hearsay). We will address each exception in turn.

First, the text message was not admissible as a present sense impression. *See* Rule 803(1), SCRE (providing that a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" is admissible under the present sense impression exception to the general rule against hearsay). The second and third sentences of the text message—"He probably hidn 2. Tryn sum"—did not constitute a present sense impression because they did not explain or describe an event or condition that McKnight personally perceived. *See State v. Prather*, 429 S.C. 583, 611, 840 S.E.2d 551, 565 (2020) ("To qualify as a present sense impression: '(1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have personally perceived the event.'" (quoting *State v. Hendricks*, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct. App. 2014))). McKnight's statement that Sanders was hiding and

trying something was not an explanation about his claim to have seen Sanders's girlfriend behind Harrington's apartment. *See id.* ("To qualify as a present sense impression: '(1) the statement must describe or explain an event or condition . . . .'" (quoting *Hendricks*, 408 S.C. at 533, 759 S.E.2d at 438)). Rather, these statements conveyed McKnight's opinion that Sanders was likely with his girlfriend behind Harrington's apartment. Regardless, the first sentence of the text message did not require an explanation. Thus, the text message was not admissible as a present sense impression.

Next, McKnight's text message was not admissible as an excited utterance because the message did not indicate he witnessed a "startling event or condition" or "was under the stress of excitement caused by [an] event or condition" when he sent the text message to Garvin. *See id.* at 611, 840 S.E.2d at 565-66 ("For a statement to be an excited utterance: '(1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition.'" (quoting *Washington*, 379 S.C. at 124, 665 S.E.2d at 604)); *see also* Rule 803(2), SCRE (providing an excited utterance is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition").

Finally, McKnight's text message was not admissible under Rule 803(3), SCRE, as a then existing mental, emotional, or physical condition because the message constituted a statement of McKnight's belief rather than a statement of "intent, plan, motive, design, mental feeling, pain, [or] bodily health." *See* Rule 803(3), SCRE (providing an exception to the hearsay rule for a "statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact").

Based on the foregoing, we find the trial court erred in admitting McKnight's text message into evidence; however, as we discuss below, we hold any error in admitting the text message was harmless.

C. Harmless Error

We hold admitting the content of the text message was harmless error because the evidence establishing Sanders's guilt was overwhelming. *See State v. Page*, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008) ("Error is harmless whe[n] it could not reasonably have affected the trial's outcome."); *State v. Vick*, 384 S.C.

189, 199, 682 S.E.2d 275, 280 (Ct. App. 2009) ("An insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.").

We acknowledge the State had the burden of disproving self-defense, and we find the State met this burden. *See State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) ("[W]hen a defendant claims self-defense, the State is required to disprove the elements of self-defense beyond a reasonable doubt.").

> A person is justified in using deadly force in self-defense when:
>
> (1) The defendant was without fault in bringing on the difficulty;
>
> (2) The defendant . . . actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;
>
> (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief . . . ; and
>
> (4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

Id. (quoting *State v. Wiggins*, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998)).

The evidence showed the State disproved the elements of self-defense beyond a reasonable doubt and Sanders's guilt was conclusively proven such that no other rational conclusion could be reached. As to the element of fault in bringing on the difficulty, both Garvin and Williams testified they encountered Sanders a few days prior to the shooting when he told Garvin, "[Y]ou better get you a black dress, because I'm going to kill your daughter." Additionally, Bradley testified she heard someone trying to get into Harrington's apartment, and when Harrington returned soon afterwards, Sanders and his girlfriend were near the apartments.

As to his belief that he was in imminent danger of losing his life or suffering serious bodily harm, Sanders testified he was "scared" that he and his girlfriend would be hurt or seriously injured during the confrontation with Harrington. However, we find the evidence conclusively showed no person of ordinary firmness and courage would have entertained the same belief. Priester, White, and Marquis testified they all exited the vehicle when Harrington pulled up in front of the apartments near the laundromat. Although their testimonies were conflicting as to who remained close to Harrington as she approached Sanders and his girlfriend, they testified consistently that Harrington was unarmed and no one tried to strike Sanders. Sanders also testified no one hit him. Moreover, although Sanders indicated Harrington implied she had a gun in the car, he never stated he saw anyone with a weapon or believed anyone was armed. Additionally, the pathologist who conducted the autopsy testified Harrington weighed 105 pounds and was about five feet, six inches tall. White described Harrington as "skinny" and "tall" and described Sanders as "short" and having "a little muscle, a little weight." Sanders's testimony did not contradict the evidence of Harrington's slight weight, that Harrington was neither armed nor appeared to be armed, or that White, Priester, or Alston were not armed nor appeared to be armed. Sanders testified Alston stayed near the car, White was near Harrington, and Priester was on the other side of Harrington "but just standing there." Further, based on his testimony, Harrington was the only one who made a threatening statement. The foregoing evidence conclusively showed no person of ordinary firmness and courage would have entertained the belief that he was in imminent danger of death or serious bodily injury under the same circumstances so as to justify the use of deadly force.

As to whether Sanders had any other probable means of avoiding the danger, the evidence also conclusively showed he could have avoided the danger without using deadly force. Even according to Sanders's testimony, no one other than Harrington—who weighed only 105 pounds—was threatening him with violence, and he did not dispute that Harrington was unarmed. Further, there is no indication in the record that Sanders believed any of the other three to be armed. Both Priester and White testified everyone was in the street when the shooting occurred, and White stated there was plenty of room to move around. In addition, photographs from the scene demonstrate this, and State's Exhibits 8-10 show a large pool of blood in the middle of the street between the laundromat and the apartments. The photographs also show a large, open area, and White testified no one prevented Sanders from leaving. Therefore, the evidence conclusively showed Sanders could have avoided the danger without using deadly force by simply leaving.

Based on the foregoing, we hold the trial court's error in admitting the hearsay evidence was harmless because it could not reasonably have affected the outcome at trial.

CONCLUSION

Accordingly, Sanders's convictions and sentences are

AFFIRMED.

WILLIAMS, C.J., MCDONALD, J., and LOCKEMY, A.J., concur.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

GREGORY SANDERS,

APPELLANT

APPELLATE CASE NO. 2018-000911

Appeal from Hampton County

Carmen T. Mullen, Circuit Court Judge

Opinion No. 2022-UP-298

PETITION FOR REHEARING

On July 13, 2022, this Court affirmed Appellant's convictions in an unpublished opinion. State v. Sanders, 2022-UP-298 (S.C. Ct. App. filed July 13, 2022). Pursuant to Rule 221(a), SCACR, Appellant now files this petition for rehearing based upon significant factual and legal points overlooked or misapprehended by this Court in rendering its decision.

On appeal, Appellant challenged the trial court's ruling that a text message was admissible as evidence to be considered by the jury against Appellant. This Court held that although the text message was properly authenticated, it was inadmissible hearsay. Nevertheless, this Court concluded the erroneous admission of the text message was harmless. In this petition for rehearing,

Appellant challenges this Court's conclusions regarding authentication and harmless error; Appellant agrees the text message was inadmissible hearsay.

Relevant facts

On May 10, 2016, Marilyn Garvin, the deceased's mother, and her boyfriend, Samson Williams, were moving out of the deceased's apartment and into an apartment of their own. R. 74, ll. 4-12. During the evening of May 10, 2016, Garvin went to her new apartment. R. 74, ll. 13-22. While at her new apartment, she received a phone call from Johnny McKnight saying that "Hard and his girlfriend [were] on the back of [the deceased's] apartment fiddling with the door." R. 75, ll. 6-12. When the solicitor asked Garvin about the text message, defense counsel objected to the question as eliciting hearsay, and the judge sustained the objection and struck the testimony. R. 75, ll. 13-18.

Undeterred, the solicitor next asked if Garvin received a text message from anyone. R. 75, ll. 20-21. Garvin explained she received a text message from "Mr. Johnny McKnight. Johnny [is also] known as Johnny Blaze." R. 75, l. 20. She further explained that she had "Mr. McKnight programmed" into her phone "under Johnny Blaze." R. 76, ll. 1-3. According to Garvin, she called the deceased and told her what McKnight allegedly said to her. R. 77, ll. 10-14; R. 77, ll. 21-22. Garvin claimed the deceased had no reaction and simply hung up the phone. R. 77, ll. 23-24.

During the examination, the solicitor instructed Garvin not to say "what he said." R. 77, l. 15. While this instruction appeared to demonstrate the solicitor's understanding that what McKnight said to Garvin via text message was inadmissible hearsay and was not authenticated, the solicitor then sought to introduce the message into evidence. R. 77, l. 25 – R. 78, l. 2. Defense counsel immediately objected, explaining the text message itself was hearsay and unauthenticated

because the sender was unknown. R. 78, ll. 3-6; R. 78, ll. 11-13. The state defended its request for admission by arguing, "she knows that it was her phone, and it - - the text message came to her phone." R. 78, ll. 7-9. Ultimately, the trial judge allowed the text message to be admitted into evidence. R .78, l. 23 – R. 79, l. 7; R. 459.

Subsequently, Garvin read the text message to the jurors: "I just seen Hard girlfriend walking behind apartment. He's probably behind her to[o] trying something." R. 79, ll. 23-25. According to Garvin, the message meant "that Hard was trying, him and his girlfriend, trying to lure [her] baby out the house." R. 80, ll. 1-5. The solicitor then had Garvin repeat that in response to receiving the text message, she called the deceased and said, "Johnny just text me and said that Hard and his girlfriend - - Mr. Sanders and his girlfriend was going back behind your apartment." R. 80, ll. 20-24.

Not Authenticated

The proponent of evidence must satisfy "[t]he requirement of authentication or identification as a condition precedent to admissibility." Rule 901(a), SCRE. This requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Id. While the burden is not high, the proponent must offer a satisfactory foundation to permit the jury to conclude the evidence is authentic. Deep Keel, LLC v. Atlantic Private Equity Group, LLC, 413 S.C. 58, 64-65, 773 S.E.2d 607, 610 (Ct. App. 2015)(citing United States v. Hassan, 742 F.3d 104, 133 (4th Cir. 2014)).

This Court held the state properly authenticated the text message by showing the text message "contained distinctive characteristics and the like." See Rule 901(b)(4), SCRE. This Court relied on Garvin's testimony that "she received a phone call and spoke to McKnight." According to this Court, "Garvin's statements regarding this prior conversation with McKnight

that same night provided circumstantial evidence sufficient to support a finding that the text message was what she claimed it to be." Appellant respectfully disagrees.

Pursuant to Rule 901(b)(4), SCRE, "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances" may serve to authenticate evidence. Recently, this Court addressed the authentication of social media messages through circumstantial evidence. State v. Green, 427 S.C. 223, 830 S.E.2d 711 (Ct. App. 2019), aff'd as modified State v. Green, 432 S.C. 97, 851 S.E.2d 440 (2020). This Court held the state authenticated Facebook messages despite neither the sender nor the recipient testifying. Id. at 232-233, 830 S.E.2d at 715-716. Rather, a witness testified that a co-defendant, who was not on trial, used the name "Ruby Rina" on Facebook. Id. at 228, 830 S.E.2d at 713. The witness claimed he saw the co-defendant and the defendant "laughing while texting." Id. Later that day, the deceased arrived at the co-defendant's home. Id. Subsequently, the police found the deceased's body. Id. The police learned of the messages from the deceased's father. Id. at 227, 830 S.E.2d at 712. The father claimed he had the deceased's Facebook password and viewed the messages after the deceased went missing. Id. Among the messages was an invitation from Ruby Rina to the deceased on the day of his death for a sexual rendezvous at her home. Id. at 227, 830 S.E.2d at 712-713.

This Court held "the content of the messages was distinctive enough that a reasonable jury could find [co-defendant] wrote them." Id. at 233, 830 S.E.2d at 715. According to this Court,

> Numerous facts link[ed] the Facebook messages to [co-defendant] and, consequently, Green: the use of the screen name 'Ruby Rina,' which [a witness] testified was [co-defendant]'s; reference to 'Julissa' on the messages, which testimony showed was [co-defendant]'s sister's name; Ruby Rina's invitation to her home, which she stated was at 108 Queens Circle; [the deceased]'s reference to Ruby Rina as [co-defendant] ...; comments throughout the messages about Ruby Rina's erstwhile boyfriend that were consistent with her relationship with Green; the timing of the messages; and the tragic fact that [deceased] disappeared shortly

> after Ruby Rina invited him to 108 Queens Circle, where his blood was later discovered.

Id. at 233, 830 S.E.2d at 715-716. This Court held that "[t]aken together, these circumstances serve as sufficient authentication to meet the low bar Rule 901(b)(4), SCRE, sets." Id. at 233, 830 S.E.2d at 716.

Shortly after deciding Green, this Court addressed the authentication of text messages. State v. Benton, 435 S.C. 250, 865 S.E.2d 919 (Ct. App. 2021). The state introduced text messages allegedly sent and received by Benton. Id. at 261, 865 S.E.2d at 924. There was even evidence in the record that others used Benton's phone to send messages. Id. This Court held "sufficient distinctive characteristics and accompanying circumstances existed to authenticate the text messages." Id. at 261, 865 S.E.2d at 925. Although this Court noted the trial court erred by stating the fact that the messages were sent from Benton's phone provided sufficient proof to establish Benton was the author, this Court found the timing, distinctive characteristics, and a witness's identification of certain messages provided the circumstantial evidence necessary for authentication. Id. at 263, 865 S.E.2d at 926.

This Court explained that "[d]uring the time Benton concede[d] he was in possession of his phone, he frequently sent text messages to a phone number saved in his phone as 'My Love.'" Id. at 263-264, 865 S.E.2d at 926. Leading up to the day of the alleged crime, Benton frequently sent messages to this person using similar language. Id. at 264, 865 S.E.2d at 926. Also during that time period, there were text messages from Benton's phone to others involved in the alleged crime; thus, this Court concluded, "[t]he contents of the text messages to [his love interest] provide[d] circumstantial evidence from which a reasonable jury could find Benton was in possession of his phone and sent the text messages to others during this same period. Id.

Other jurisdictions addressing authentication of text messages and social media posts have noted the difficulty of authenticating these forms of evidence. Holding a printout of a MySpace page was not authenticated, the Maryland Court of Appeals noted the significant challenges presented from authenticating social media posts due to the ease of creating fictitious accounts. Griffin v. State, 19 A.3d 415, 420-424 (Md. 2011). Likewise, the Mississippi Supreme Court explained "[t]he authentication of social media poses unique issues regarding what is required to make a prima facie showing that the matter is what the proponent claims." Smith v. State, 136 So.3d 424, 432 (Miss. 2014). See also United States v. Vayner, 769 F.3d 125 (2nd Cir. 2014) (holding a profile page was not authenticated); Commonwealth v. Mangel, 181 A.3d 1154, 1162 (Pa. Super. Ct. 2018) (discussing the "additional challenges" presented by "[s]ocial media evidence" "because of the great ease with which a social media account may be falsified, or a legitimate account may be accessed by an imposter"); Com. v. Williams, 926 N.E.2d 1162, 1172-1173 (Mass. 2010) (finding error in the admission of messages sent via MySpace where there was no evidence of the identity of the sender of the messages).

Here, contrary to this Court's holding, the state failed to authenticate the text message contained within State's Exhibit #25. This Court relied upon Garvin's testimony "she received a phone call from and spoke to McKnight." This Court held that "Garvin's statements regarding this prior conversation with McKnight that same night provided circumstantial evidence sufficient to support a finding that the text message was what she claimed it to be." Therefore, this exact exchange between the solicitor and Garvin is critical:

> Q. Did anything else happen after you got to your apartment? Did you get any other phone calls?
>
> A. Oh. Yeah, I got a call from Johnny - - Johnny McKnight saying - - calling and said that Hard and his girlfriend was on the back of my daughter apartment fiddling with the door. And then, I called her and I told her. She just still - -

R. 75, ll. 6-12. At this point, defense counsel objected, the state consented, and the testimony was stricken from the record. R. 75, ll. 12-15. After Garvin testified that she received a text message from Johnny McKnight "known as Johnny Blaze," the solicitor asked if the text message went to her phone. R. 75, ll. 20-24. Garvin testified, "It came to my phone." R. 76, l. 25.

This Court's opinion presupposes – and requires – that Garvin used the same phone for the phone call with McKnight as the text message. However, the record is devoid of *any* evidence that the phone on which Garvin received a voice call from McKnight was the same phone on which she received the text message. Similarly, there is no evidence in the record that the name programmed in her phone, "Johnny Blaze," for McKnight was the name that appeared when she took the phone call. Garvin did not even testify that she could recognize McKnight's voice – in order to identify the caller – based on any prior experience with McKnight.

She never indicated that she communicated with Blaze using that phone number or that she recognized the style of writing. In fact, the writer of the text message used a signature of "GOD S GIFT," not anything related to "Johnny," "McKnight," or "Blaze." This was a far cry from what is required to authenticate evidence. The state simply failed to show how Garvin knew the author of the text message. Appellant respectfully requests this Court rehear this matter pursuant to Rule 221(a), SCACR, to address the significant factual and legal points overlooked or misapprehended when this Court rendered its opinion.

Hearsay & not harmless

As previously noted, Appellant agrees with this Court's analysis concerning hearsay. Appellant agrees the trial judge erred in admitting the text message because it was hearsay and did not fall within any of the hearsay exceptions. Nevertheless, Appellant respectfully disagrees with this

Court's determination that admission of the text message was harmless. Appellant respectfully requests this Court rehear and reconsider whether the admission of the message was harmless.

This Court held "admitting the content of the text message was harmless error because the evidence establishing [Appellant]'s guilt was overwhelming." Appellant disagrees.

The South Carolina Supreme Court recently clarified when evidence is considered overwhelming regarding guilt of the accused. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). The Court explained that "for the evidence to be 'overwhelming' ... the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong." Id. at 191, 810 S.E.2d at 845.

In the instant matter, it was undisputed that Appellant killed the deceased. The question was whether Appellant was justified in using deadly force. This Court concluded that the evidence showed the state disproved the elements of self-defense beyond a reasonable doubt without consideration of the text message. Appellant respectfully disagrees.

The state relied upon the text message in closing argument to claim Appellant was at fault for bringing on the difficulty. R. 389, l. 24 – R. 390, l. 15. As the solicitor explained, the text message, which was communicated by Garvin to the deceased, showed that Appellant was "behind the house, trying something." R. 390, ll. 11-15; R. 390, ll. 19-24. According to the solicitor, this meant Appellant "started the whole thing." R. 390, l. 19; R. 390, l. 25 – R. 391, l. 2. The state went so far as to claim that Appellant "started it" "when he was trying to get in her house." R. 391, ll. 16-19.

Furthermore, Appellant respectfully disagrees with this Court's conclusion that the evidence "conclusively showed no person of ordinary firmness and courage would have entered the same belief" – being scared when confronted by the deceased and her crew. Earlier in the day

on May 10, 2016, the deceased punched Appellant. R. 136, ll. 22-24; R. 137, ll. 19-21; R. 334, ll. 14-22; Defense Exhibit #1. Her friends, Kywana Bradley and Yhantyse "Daisy" Priester, joined in to help the deceased. R. 136, ll. 22-24; R. 137, ll. 19-21; R. 334, ll. 14-22; Defense Exhibit #1.

That night, Appellant and his girlfriend, Javasha Forrester, were walking down the street, going home. R. 101, ll. 14-18; R. 337, l. 12 – R. 338, l. 1. A car drove past then, slammed on brakes, backed up, and then pulled into a parking lot within inches of the pair. R. 101, ll. 22-25; R. 180, ll. 10-13; R. 193, ll. 12-24; R. 338, ll. 10-24. From the car emerged Harrington, Priester, and two young men named Randy White and Marquis Alston. R. 102, ll. 11-17; R. 110, ll. 23-25; R. 181, ll. 7-8; R. 338, ll. 18-19; R. 339, ll. 14-18.

Harrington was in "full effect" and immediately started threatening Appellant and Forrester. R. 101, l. 24 – R. 102, l. 2; R. 107, ll. 2-8; R. 194, ll. 8-11; R. 340, ll. 1-11. Even according to White, Harrington was "full of rage." R. 107, l. 25; R. 181, l. 22. Harrington wanted to fight and was intent on doing violence. R. 111, ll. 1-4; R. 117, ll. 1-3; R. 125, ll. 13-15; R. 180, ll. 14-15; R. 199, l. 25 – R. 200, l. 1. Appellant put Forrester behind him to shield her from Harrington and the two backed up. R. 102, ll. 3-4; R. 110, ll. 23-25; R. 111, ll. 16-19; R. 112, ll. 12-15; R. 187, ll. 3-5; R. 340, ll. 12-18. Harrington's boyfriend, Randy White, was "right beside" Harrington as she continued to approach Appellant and Forrester. R. 111, ll. 20-24; R. 125, ll. 16-18; R. 341, ll. 3-8; R. 341, ll. 18-22. Harrington's other compatriots were not far behind them. R. 341, l. 23 – R. 342, l. 1. When Forrester repeatedly assured Harrington that she did not want to fight, Harrington turned her ire toward Appellant. R. 180, ll. 15-16; R. 183, ll. 5-7; R. 191, l. 22; R. 341, ll. 9-13. Harrington even told Appellant that she had a gun in her car. R. 341, ll. 13-15.

This Court ignored this evidence and relied on the deceased being skinny and unarmed to conclude no person of ordinary firmness and courage would have entertained the believe that he

was in imminent danger of death or serious bodily injury. Appellant respectfully requests this Court rehear the matter to consider this evidence and the undisputed evidence that the deceased was threatening Appellant and his girlfriend.

This Court also determined "the evidence ... conclusively showed he could have avoided the danger without using deadly force." This Court ignored the evidence in the record that Appellant could not "simply leav[e]." Appellant explained that there was a building behind him and the foursome had him cornered. R. 342, ll. 2-7. In short, he had no avenue of retreat. R. 342, ll. 2-12. Despite Appellant's repeated requests that the foursome, led by Harrington, leave them alone, the group continued its advance. R. 343, ll. 9-22. At that point, Appellant did the only thing he could do – he pulled his gun and shot Harrington. R. 345, ll. 15-17. Appellant and Forrester then ran to safety. R. 345, l. 18 – R. 346, l. 7. Appellant respectfully requests this Court rehear this matter based on the material evidence overlooked or misapprehended by this Court in arriving at its conclusion.

The state's evidence against Appellant to disprove self-defense beyond a reasonable doubt was far from conclusive so as to be considered overwhelming evidence of guilt. Instead, the evidence showed the deceased physically assaulted Appellant earlier in the day on May 10, 2016, and her friends helped her. The evidence showed the deceased and three other people confronted Appellant while he and his girlfriend were walking down the street. Further, the evidence showed the deceased threatened the deceased and his girlfriend – she was ready for a fight. Finally, the evidence showed Appellant had no means of escape. Based on these reasons, Appellant respectfully requests this Court rehear the matter to address these significant points overlooked or misapprehended by this Court in arriving at its conclusion regarding harmless error.

Respectfully Submitted,

Susan B. Hackett

SUSAN B. HACKETT
Appellate Defender

This 28th day of July, 2022.

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Jul 28 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Hampton County

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GREGORY SANDERS,

APPELLANT

APPELLATE CASE NO. 2018-000911

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon Julianna E. Battenfield, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is juliannabattenfield@scag.gov; and Gregory Sanders, #314824, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 28th day of July, 2022.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

The South Carolina Court of Appeals

The State, Respondent,

v.

Gregory Sanders, Appellant.

Appellate Case No. 2018-000911

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

H. Bruce Williams J.

Stephanie P. McDonald J.

James E. Lockemy A.J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Melody Jane Brown, Esquire
Susan Barber Hackett, Esquire
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Julianna E. Battenfield, Esquire
The Honorable Carmen T. Mullen