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

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by allowing the state to introduce the contents of a text message allegedly written by a person who did not testify because (1) the text message was inadmissible hearsay for which there was no exception and (2) the state failed to authenticate the text message, and the erroneous admission of the text message permitted the state to use the contents of the message to argue that Appellant was not without fault in bringing on the difficult to defeat his claim of self-defense?

STATEMENT OF THE CASE

On February 6, 2017, the Hampton County grand jury indicted Appellant for possession of a weapon during the commission of a violent crime (2016-GS-25-177) and murder (2016-GS-25-178). R. 460-465. On May 7-9, 2018, the state, represented by Tameaka Legette and Bryan Hollen, called the case for trial before the Honorable Carmen T. Mullen and a jury. R. 1-2. Stephen T. Plexico represented Appellant. R. 2. The jury found Appellant guilty as charged. R. 454 l. 21 – R. 455, l. 2. Judge Mullen sentenced Appellant to life imprisonment without the possibility of parole for murder and to five years imprisonment for the weapon. R. 456, l. 21 – R. 457, l. 4; R. 460-465. She ordered the sentences to be served concurrently. R. 457, l. 5; R. 460-465.

STANDARD OF REVIEW

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. at 429–30, 632 S.E.2d at 848.

STATEMENT OF FACTS

Appellant and Tyhira Harrington were friends. R. 132, ll. 16-20; R. 172, ll. 13-18. On May 10, 2016, Appellant was aware that there were rumors going around Estill that were damaging his friendship with Harrington. R. 333, l. 21 – R. 334, l. 2. As a result, Appellant went to visit with Harrington to clear his name. R. 136, ll. 13-14; R. 177, ll. 1-2; R. 333, l. 25 – R. 334, l. 13. Harrington had been drinking all day. R. 181, ll. 22-23; R. 192, ll. 2-23. Initially, the two engaged in a civil discussion, however, Harrington punched Appellant and her friends, Kywana Bradley and Yhantyse "Daisy" Priester, joined in to assist Harrington. R. 136, ll. 22-24; R. 137, ll. 19-21; R. 334, ll. 14-22; Defense Exhibit #1. Eventually, Appellant was able to get out of Harrington's apartment. R. 334, ll. 23-24.

Later that evening, 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.

Appellant was scared. R. 339, ll. 1-2; R. 344, ll. 6-7. 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. 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.[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 at she had a gun in her car. R. 341, ll. 13-15.

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.

[1] Marquis Alston claimed that when the car stopped he got out and went to the home of a friend who lived nearby. R. 154, ll. 10-12; R. 155, ll. 17-24; R. 157, ll. 1-7. Yhantyse Priester claimed that she sent Alston and Randy White to get Kywana Bradley to calm Tyhira Harrington. R. 181, ll. 7-11.

ARGUMENT

The trial judge erred by allowing the state to introduce the contents of a text message allegedly written by a person who did not testify because (1) the text message was inadmissible hearsay for which there was no exception and (2) the state failed to authenticate the text message, and the erroneous admission of the text message permitted the state to use the contents of the message to argue that Appellant was not without fault in bringing on the difficult to defeat his claim of self-defense.

Relevant facts

Marilyn Garvin, the deceased's mother, lived with the deceased in Fairwood Apartments in Estill. R. 59, l. 24 – R. 60, l. 22. Garvin claimed that on May 7, 2016, Appellant made threats to her related to the deceased. R. 66, ll. 3-21. Garvin sent the deceased a text message relaying what she claimed Appellant said. R. 67, l. 1 – R. 71, l. 3; R. 458. In the message, Garvin indicated she was the deceased's "ride or die" and that Appellant "better recognize" that all it would take would be "a phone call." R. 70, l. 24 – R. 71, l. 3. Garvin explained that she meant that she "would be behind" the deceased regardless. R. 71, l. 22 – R. 72, l. 3.

On May 10, 2016, Garvin 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 apartment. R. 74, ll. 13-22. While at her 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. However, 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. Thereafter, an off-the-record bench conference ensued. R. 78, ll. 17-20. Ultimately, Judge Mullen 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 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.

During the next break, Judge Mullen permitted the parties to put their arguments regarding the admissibility of the text message on the record. R. 91, ll. 14-18. Defense counsel explained that he objected to the admission of the text message because although Garvin claimed the message was from "Johnny McKnight," the message indicated it was from "Johnny Blaze." R. 91, ll. 19-22. This exemplified how the message had not been authenticated by the state. Additionally, trial counsel objected to the admission of the text message as hearsay. R. 91, ll. 22-24. Trial counsel explained that the change in technology had not altered the evidentiary rules – "If she could not read a letter from him in prior [to] texting days, or she could not quote what he said," then "she should [not] be able to reprint it and read it out of a text." R. 92, ll. 5-8.

The state argued the text message was not hearsay because it was "reliable":

> She knew Mr. McKnight; she had his phone number in her phone; he sent the text; she still has that phone; and she's able to look at it. And it is basically part of the hearsay law, the main problem with hearsay that we have is that it's not reliable. This is written down, it can't be misconstrued, and can only be read the way it is, which is exactly what she did.

R. 92, ll. 14-24. Turning to the authentication argument, the stated admitted that it is "always the issue with text messages" that "[y]ou can't say that a particular person had a phone any particular time." R. 93, ll. 6-9. However, the state claimed that failing did not "go to the authentication." R. 93, ll. 9-10. According to the state, it was "a jury argument, as far as whether or not Mr. McKnight sent that text." R. 93, ll. 10-11.

The state then used this text message and the corresponding phone call to argue that Appellant's claim of self-defense was disproved because the text message showed Appellant was not "without fault in bringing on this 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.

Discussion

The trial judge erred when she permitted the state to introduce inadmissible hearsay regarding a text message purportedly written by a witness who did not testify and where the state failed to authenticate the message.

Hearsay

"Hearsay is not admissible." Rule 802, SCRE. "'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." Rule 801(c), SCRE. While there are multiple exceptions to the rule against hearsay, see Rule 803, SCRE, Rule 804, SCRE, none of those exceptions were articulated by the state to support its argument for admission and an analysis of the exceptions show that none were satisfied.

An examination of the South Carolina Rules of Evidence, and the case law interpreting those Rules reveals the testimony did not fall within one of the exceptions. The exceptions found within Rule 804, SCRE, require the declarant be unavailable. The state never presented any evidence or argument to show the purported declarant – Johnny McKnight a.k.a. Johnny Blaze – was unavailable. Therefore, the state may not avail itself of the exceptions contained within Rule 804, SCRE, on appeal. The exceptions provided for by Rule 803, SCRE, apply regardless of the availability of the declarant; thus, those are the only exceptions the state may use on appeal. Nevertheless, none of those exceptions apply.

Present sense impression

The Rules of Evidence permit the introduction of statements "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" as an exception to the bar against hearsay. Rule 803(1), SCRE. "There are three elements to the foundation for the admission of a hearsay statement 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." State v. Hendricks, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct. App. 2014); see also, United States v. Mitchell, 145 F.3d 572, 576 (3rd Cir. 1998). The state failed to present evidence to satisfy any of the three elements.

By the Rule's very language, the proffered statement must describe or explain an event or condition. The South Carolina Supreme Court held a statement by an alleged victim that he planned to meet the defendant for a drug deal was not admissible as a present sense impression because the statement was "regarding a *future* event and not a statement regarding something contemporaneously perceived." State v. Griffin, 339 S.C. 74, 78 n. 3, 528 S.E.2d 668, 670 n. 3 (2000)(emphasis in original). Importantly, the statement must not concern an opinion or draw a conclusion; rather, the statement must "explain, elucidate or in some way characterize the nature of the event." State v. Blackburn, 271 S.C. 324, 328, 247 S.E.2d 334, 337 (1978) (explaining how a statement would not be admissible under the present sense impression of Rule 803 of the Federal Rules of Evidence due to conclusory nature).

In State v. Burroughs, 328 S.C. 489, 499, 492 S.E.2d 408, 413 (Ct. App. 1997), this Court held a statement given nearly ten hours after the alleged incident was not made while the declarant was perceiving the event or condition, or immediately thereafter, as required by the Rule. The South Carolina Supreme Court made clear that in order for a statement to fall within the present

sense impression exception, the record must contain evidence of when the event or condition occurred in order to establish the statement was made while the declarant was perceiving the event or condition or immediately thereafter. State v. Garcia, 334 S.C. 71, 77 n. 4, 512 S.E.2d 507, 510 n.4 (1999).

This Court has emphasized that the declarant actually perceive the event or condition described. In State v. Hendricks, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct. App. 2014), this Court held statements during a 911 call by a mother concerning her daughter's allegations of rape were not a present sense impression because the mother did not perceive the rape. The Supreme Court likewise emphasized the necessity that the declarant actually perceive or witness the event or condition in State v. Davis, 371 S.C. 170, 180 n. 9, 638 S.E.2d 57, 63 n. 9 (2006) where the record contained insufficient evidence that the declarant witnessed the shooting.

While the first sentence of the text message, "I just seen hard gf walkn behind da apts," likely described an event actually perceived by the declarant, actually described an event in the past, and possibly satisfied the contemporaneity requirement due to the use of the word "just," the second sentence failed to satisfy the present sense impression exception's requirements. The second sentence concerned the declarant's opinion as indicated by the use of the word "probably." In fact, the second sentence put forth the declarant's opinion that Appellant was *probably hiding and trying something*, for which there was no evidence. Furthermore, the first sentence referred simply to "da apts," which Garvin claimed referred to the deceased's apartment specifically, but for which there was no evidence to support. The text message failed to satisfy the present sense impression exception, and the state failed to present evidence or argument to support the exception.

Excited Utterance

The Rules of Evidence provide an exception for the admissibility of excited utterances as well. 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" and may be admitted at trial as an exception to the hearsay rule. Rule 803(2), SCRE. "The rationale behind the excited utterance exception to the hearsay rule is that the startling event suspends the declarant's process of reflective thought and, consequently, reduces the likelihood of fabrication." State v. Davis, 371 S.C. 170, 178, 638 S.E.2d 57, 62 (2006) (citing State v. Dennis, 337 S.C. 275, 284, 523 S.E.2d 173, 177 (1999)). The Supreme Court has identified three elements a trial court must consider when determining whether a statement has the spontaneous quality necessary for admission as 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." State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008). "[S]tatements which are not based on firsthand information, such as where the declarant was not an actual witness to the event, are not admissible under the excited utterance exception to the hearsay rule." State v. Davis, 371 S.C. 170, 179, 638 S.E.2d 57, 62 (2006) (citing State v. Hill, 331 S.C. 94, 99, 501 S.E.2d 122, 125 (1998)).

In State v. Burroughs, 328 S.C. 489, 496, 492 S.E.2d 408, 411 (Ct. App. 1997), "the trial court allowed the police officer who first took the victim's statement and a nurse who examined the victim in the emergency room to testify about the victim's statements to them describing the assault." This Court held that "the testimony was hearsay and amounted to impermissible bolstering of the victim's trial testimony." Id. This Court also noted that the statements did not amount to an excited utterance because there was "a great deal of time for reflection" before the

victim made the statements to the police officer and nurse. Id. at 500, 492 S.E.2d at 413. In State v. Whisonant, 335 S.C. 148, 515 S.E.2d 768 (Ct. App. 1999), this Court held the admission of the victim's statements to her stepmother regarding details of the assault under the excited utterance exception to the hearsay rule was reversible error where a considerable time period had passed between the assault and the statement giving the victim time to reflect. This Court further held the stepmother's testimony was cumulative because it mirrored that of the victim and improperly bolstered the victim's story in the minds of the jury. Id. at 156, 515, S.E.2d at 772.

In State v. Davis, 371 S.C. 170, 178-81, 638 S.E.2d 57, 61-63 (2006), the Court found that the trial court committed reversible error in admitting the co-defendant's statements, as an excited utterance, that his brother had shot the victim because the victim had taken a swing at his brother. In addition to a lack of evidence that the co-defendant was under the stress or excitement of the shooting when he made the statement, the Davis Court found that the record did not support the conclusion that Hill witnessed the shooting. 371 S.C. at 180, 638 S.E.2d at 63. Thus, the Court ruled: "Because there is no evidence Hill actually saw Paul get shot, Hill's statement is not admissible under the excited utterance exception to the hearsay rule." Id.

There was simply no "startling" event described by the text message. According to the text message, the author "just seen hard gf walkn behind da apts." The message fails to describe anything startling or why seeing someone walking would be startling. The second sentence of the text message, "[h]e probably hidn 2. Tryn sum," does not describe an event or condition at all. It puts forward an unknown person's opinion for which there was no evidence or basis. The state failed to put forth any evidence or argument that the text message satisfied the excited utterance exception to the rule against hearsay. Quite simply, the text message was not an excited utterance.

State of mind

"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 remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will" is not hearsay. Rule 803(3), SCRE. As an example, the Court held "a statement by the victim that he or she planned to meet the defendant at the time or place of the murder is admissible under Rule 803(3) as evidence of the declarant's then-existing state of mind." State v. Griffin, 339 S.C. 74, 78, 528 S.E.2d 668, 670 (2000).

In State v. Garcia, 334 S.C. 71, 76, 512 S.E.2d 507, 509 (1999), the South Carolina Supreme Court explained that "while the present state of the declarant's mind is admissible as an exception to hearsay, the reason for the declarant's state of mind is not." This Court held testimony by two witnesses concerning what an alleged sexual assault victim said did not "fit within the exception provided in Rule 803(3)." Vail v. State, 402 S.C. 77, 87, 738 S.E.2d 503, 508-509 (Ct. App. 2013). One witness testified the alleged victim told her Vail was mad at her for telling the witness she and Vail had sex. Id. at 87, 738 S.E.2d at 508. Another witness testified the alleged victim was very upset Vail had left their church, that everyone would hate her because they would know she was the reason he left, and that she was really upset because she had given her virginity to Vail. Id. at 87, 738 S.E.2d at 508-509.

Perhaps the best known case interpreting Rule 803(3), SCRE, is State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006). Weston was charged with killing his mother, whose body was never found. Weston, 367 S.C. at 282, 625 S.E.2d at 643. Mother's friend, Suzanne Allen, testified that prior to Weston moving in with Mother, Mother "was a happy person, cheerful, and fun to be with."

Id. at 285, 625 S.E.2d at 644. Allen also testified that Mother was "'very unhappy'" concerning Weston. Id. Finally, Allen testified that Mother told her she intended to ask Weston to leave her home. Id. at 286, 625 S.E.2d at 645. Weston's sister and Mother's daughter, Toni Franchey, testified that Mother seemed "more nervous and anxious than normal" during the two-week period before her disappearance. Id. According to Franchey, Mother "just seemed more anxious and just uncertain," including that she requested no one touch anything in Weston's room because she "was afraid." Id. This Court held the testimony "was properly admitted" because the witnesses "did not give a reason" for Mother's fear. Id. at 287, 625 S.E.2d at 646. Rather, the witnesses "testified only" that Mother "was afraid of Weston." Id. The Court determined that holding "that a witness may testify to the fact that the decedent was afraid, but not that the decedent was afraid of the defendant" was "simply too constrained a reading of Garcia." Id. at 287-288, 625 S.E.2d at 646.

Recently, this Court had the opportunity to examine Rule 803(3), SCRE. State v. Hughes, 419 S.C. 149, 796 S.E.2d 174 (Ct. App. 2017). Hughes was accused of his killing his mother. Id. at 151, 419 S.C. at 175. Two days before her death, Hughes was released from the county jail after pleading guilty to forging two checks written on the deceased's bank account. Id. He received a probationary sentence. Id. Margo Green, the deceased's friend, testified that shortly before her death, the deceased was upset that Hughes was released without her knowledge and she would have to be very careful now as a result. Id. at 154, 796 S.E.2d at 177. Green also testified the deceased said she slept better when Hughes was in jail, that she was always afraid and on guard when he was not in jail. Id. at 154-155, 796 S.E.2d at 177. Ben Leaphart testified the deceased "indicated she was uncomfortable around Hughes, had some verbal confrontations with him, and was concerned about his 'drug use and his lifestyle.'" Id. at 155, 796 S.E.2d at 177. Max Few testified that the deceased asked him to watch out for her because Hughes was out of jail and she feared he would

kill her. Id. Finally, Marion Beachum testified the deceased was deathly afraid of Hughes and feared he would kill her. Id.

This Court held the trial court "erred in admitting some of the challenged testimony," but determined Hughes was not prejudiced from the inadmissible hearsay. Id. at 156, 796 S.E.2d at 178. This Court explained the statements "were inadmissible because they not only revealed [the deceased]'s state of mind, they described the reasons for her state of mind." Id. at 157, 796 S.E.2d at 178.

The text message did not describe the author's then existing state of mind, emotion, sensation, or physical condition. The first sentence purported to describe an observation by the author. The second sentence ran afoul of the state of mind exception because it was a statement of belief. The text message could not be considered a statement of the declarant's state of mind based on the very language used.

Authentication

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)).

One of the most common ways for the proponent to authenticate evidence is through the testimony of a witness with knowledge that the "matter is what it is claimed to be." See Rule 901(b)(1), SCRE. Another way to authenticate evidence is by showing the evidence contains

"distinctive characteristics and the like." Rule 901(b)(4), SCRE. "Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances" may serve to authenticate evidence. Id.; see also State v. Anderson, 386 S.C. 120, 129, 687 S.E.2d 35, 39-40 (2009) (finding a master fingerprint card authenticated where an expert explained the prints on the master card were taken at a correctional facility on a specific date, and assigned a unique state identifying number).

Examining an authentication issue related to a social networking post, the Maryland Court of Appeals delved into how social networking sites work – and do not work. Griffin v. State, 19 A.3d 415, 420-421 (Md. 2011). Particularly, the court recognized that "anyone can create a fictitious account and masquerade under another person's name or can gain access to another's account by obtaining the user's username and password." Id. at 421. "The potential for fabricating or tampering with electronically stored information on a social networking site, thus poses significant challenges from the standpoint of authentication of printouts of the site." Id. at 422.

The court found a printout of a MySpace page was not authenticated. Id. at 423-424. The court explained the "picture of [the individual], coupled with her birth date and location, were not sufficient 'distinctive characteristics' on a MySpace profile to authenticate its printout, given the prospect that someone other than [the individual] could have not only created the site, but also posted the ... comment." Id. at 424. According to the court, "the potential for abuse and manipulation of a social networking site by someone other than its purported creator and/or user" requires "a greater degree of authentication than merely identifying the date of birth of the creator and her visage in a photograph on the site" when what is offered is "a printout of an image from such a site." Id.. See also Lorraine v. Markel American Ins. Co., 241 F.R.D. 534

(D. Md. 2007) (laying out a "roadmap" for authentication of electronically stored information).

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). "Creating a Facebook account is easy." Id. "Not only can anyone create a profile and masquerade as another person, but such a risk is amplified when a person creates a real profile without the realization that third parties can 'mine their personal data.'" Id. "Friends and strangers alike may have 'access to family photos, intimate details about one's likes and dislikes, hobbies, employer details, and other personal information,' and, consequently, 'the desire to share information with one's friends may also expose users to unknown third parties who may misuse their information.'" Id.

Tremendous concerns over authentication exist due to the ease of fabricating and tampering with electronically stored information. Id. at 432-433. Therefore, the mere fact that an electronic communication purports to originate from a certain person's account is insufficient to authenticate that person as the author of the communications. Id. at 433. "[S]omething more than simply a name and small, blurry photograph" is needed to identify the Facebook account as belonging to the purported user. Id.

The court held the state failed to provide sufficient evidence that the Facebook messages were from the defendant because the only information tying the account to the defendant was the name and a "very small, grainy, low-quality photograph." Id. at 434. "No other identifying information from the Facebook profile, such as date of birth, interests, hometown, or the like was provided." Id. Despite the defendant's girlfriend's testimony the defendant sent the messages to her, the court found this was not sufficient. Id. The court explained the state "utterly failed to provide any information as to the basis of her purported knowledge." Id.; see also

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").

The Supreme Judicial Court of Massachusetts held a trial court erred in permitting the prosecution to introduce messages sent via MySpace. Com. v. Williams, 926 N.E.2d 1162, 1172 (Mass. 2010). A witness testified that she received MySpace messages from the defendant's brother telling her not to testify against the defendant. Id. The witness explained the account showed a picture of the brother and showed the user's name was "doit4it." Id. According to the court, the contents of the messages indicated the sender was familiar with the witness and the pending criminal cases against the defendant and wanted to keep the witness from testifying. Id. The court explained there "was insufficient evidence to authenticate the messages." Id. There was no testimony regarding how secure the web page was or who could access the web page. Id. "While the foundational testimony established that the messages were sent by someone with access to [brother]'s MySpace Web page, it did not identify the person who actually sent the communication." Id. at 1172-1173.

The Appellate Court of Connecticut concluded a defendant failed to authenticate authorship of electronic messages sent to him purportedly from a state's witness using Facebook. State v. Eleck, 23 A.3d 818, 820-824 (Conn. App. Ct. 2011). After the witness provided damaging testimony against the defendant, he sought to impeach her credibility by asking if she had spoken with the defendant." Id. at 820. The witness admitted to seeing the defendant, but claimed she had not spoken to him "in person, by telephone or by computer." Id. Counsel showed the witness a printout of an exchange of electronic messages between the defendant's

Facebook account and another account bearing her name. Id. She identified the user name on the account as hers, but denied sending the messages. Id. She also claimed that someone had "hacked" into her Facebook account and changed her password rendering her no longer able to access the account. Id. The defendant testified that he downloaded and printed the exchange of messages from his computer. Id. at 821. He testified that he recognized the user name as belonging to the witness and that the user name's profile contained photographs and other entries identifying the witness as the account holder. Id.

Although the court found the witness's testimony about the "hacking" "dubious," particularly considering the messages were sent prior to the alleged hacking, the court noted the testimony highlighted "the general lack of security of the medium and raise[d] an issue as to whether a third party may have sent the messages" using the witness's account. Id. at 824. The court determined "that the fact that [the witness] held and managed the account did not provide a sufficient foundation for admitting the printout, and it was incumbent on the defendant, as the proponent, to advance other foundational proof to authenticate the proffered messages did, in fact, come from [the witness] and not simply from her Facebook account." Id. The court also found the content of the messages too vague to support the defendant's position that circumstantial evidence established the witness as the author. Id. The messages did not "reflect distinct information that only [the witness] would have possessed regarding the defendant or the character of their relationship." Id.

The Texas Court of Criminal Appeals also expressed concerns regarding authenticating electronic writings. Tienda v. State, 358 S.W.3d 633 (Tex. Crim. App. 2012). The court explained "computers can be hacked, protected passwords can be compromised, and cell phones can be purloined." Id. at 642. The court observed "[t]hat an email on its face purports to come

from a certain person's email address, that the respondent in an internet chat room dialogue purports to identify himself, or that a text message emanates from a cell phone number assigned to the purported author – none of these circumstances, without more, has typically been regarded as sufficient to support a finding of authenticity." Id. at 641-642. Nevertheless, the court found the circumstantial evidence presented in the case before it sufficient to authenticate the MySpace page and information contained therein as being authored by the defendant. Id. at 642. That evidence included numerous photographs of the defendant, including his unique tattoos and distinctive eyeglasses and earring, references to a specific death, references to a specific gang, references to a particular shooting, and evidence of defendant having been on a monitor for a year and a photograph on MySpace of him wearing a monitor. Id. at 645. See also, Parker v. State, 85 A.3d 682, 688 (Del. 2014) (finding Facebook posts allegedly from the defendant authenticated where the substance of the post referenced the altercation that was the subject of the criminal charge, the post was created on the same day as the altercation occurred, and the alleged victim in the case testified to seeing the post and sharing the post).

One of the leading cases concerning the authentication of social media postings is United States v. Vayner, 769 F.3d 125 (2nd Cir. 2014). The district court permitted the government to introduce a profile page from a Russian social networking site, which was similar to Facebook. Id. at 127. A Special Agent with the State Department's Diplomatic Security Service identified the printout from VK.com as "from 'the Russian equivalent of Facebook,' and noted that the page purported to be the profile of 'Alexander Zhiltsov' (an alternate spelling of Zhyltsou's name), and that it contained a photograph of Zhyltsou." Id. at 128. The agent noted that under the heading for "contact information," the profile listed "'Azmadeuz' as 'Zhiltsov's' address on Skype. Id. Additionally, the page showed that "Zhiltsov" worked at Martex International and

Cyber Heaven, which were places where the state's key witness indicated the defendant worked. Id. The agent admitted he had only a "'cursory familiarity' with VK, had never used the site except to view this single page, and did not know whether any identity verification was required in order for a user to create an account on the site." Id. at 128-129.

The Second Circuit held the district court abused its discretion by admitting the VK web page because the government failed to authenticate the document. Id. at 131. The court explained that information about Zhyltsou appeared on the VK page, including his name, photograph, and details about his life that were consistent with the state's key witness. Id. at 132. However, the government presented "no evidence that Zhyltsou himself had created the page or was responsible for its contents." Id. "[T]he mere fact that a page with Zhyltsou's name and photograph happened to exist on the Internet at the time of Special Agent Cline's testimony does not permit a reasonable conclusion that this page was created by the defendant or on his behalf." Id. While distinctive characteristics of a document alone may provide circumstantial evidence sufficient for authentication, all of the information on the VK page tying it to Zhyltsou was also known by the state's key witness, and probably many others, "some of whom may have had reasons to create a profile page falsely attributed to the defendant." Id. Except for the VK page itself, "no evidence in the record suggested that Zhyltsou even had a VK profile page, much less that the page in question was that page." Id. at 132-133. The government failed to present any evidence that identification verification was necessary to create such a page with VK, which may have helped determine whether the page actually belonged to Zhyltsou. Id. at 133.

The Fourth Circuit Court of Appeals recently addressed authentication of Facebook pages. United States v. Hassan, 742 F.3d 104, 132-133 (4th Cir. 2014). The Fourth Circuit affirmed the trial court's ruling that the Facebook pages "were self-authenticating under Federal

Rule of Evidence 902(11)." Id. Although South Carolina does not have a Rule 902(11) in its Rules of Evidence, nor does it have any equivalent, the discussion of how the Fourth Circuit analyzed the issue is instructive because the court also addressed authentication under Rule 901(a), FRE, which is similar to South Carolina's authentication rule.

Specifically, "Rule 902(11) authorizes the admission in evidence of records that satisfy the requirements of Rule 803(6)(A)-(C), 'as shown by a certification of the custodian ... that complies with a federal statute or a rule prescribed by the Supreme Court.'" Id. at 133. After explaining that the government had satisfied Rule 902(11), FRE, by provision of a certification of the records custodian of Facebook, and that the documents were self-authenticating, the district court and the Fourth Circuit required the government to prove the Facebook pages were linked to the defendants, pursuant to Rule 901, FRE. Id. at 132-133. Both the district court and the Fourth Circuit found Rule 901(a), FRE, satisfied by "tracking the Facebook pages and Facebook accounts" to the defendants' "mailing and email addresses via internet protocol addresses." Id. at 133. See also United States v. Recio, 884 F.3d 230, 236-237 (4th Cir. 2018) (finding a Facebook post authenticated where the government presented "a certification by a Facebook records custodian, showing that the Facebook record containing the post was made 'at or near the time the information was transmitted by the Facebook user,'" the user name associated with the account was the defendant's, one of four email addresses associated with the account included the defendant's full name, more than one hundred photos of the defendant were posted to the account, and one of the photos posted to the timeline was accompanied by text wishing the defendant a "happy birthday").

However, the Third Circuit concluded that Facebook chat logs could not authenticated under Rule 902(11), FRE, because they were not the kinds of documents properly understood as

records of a regularly conducted activity under Rule 803(6), FRE. United States v. Browne, 834 F.3d 403, 409 (3rd Cir. 2016). According to the Third Circuit, "any argument to the contrary misconceives the relationship between authentication and relevance, as well as the purpose of the business records exception to the hearsay rule." Id. Evidence is relevant "only if it is what the proponent claims it is, i.e., if it is authentic." Id. The court explained that in the case before it, "the relevance of the Facebook records hinge[d] on the fact of authorship." Id. at 410. Therefore, to authenticate the messages, the government was "required to introduce enough evidence such that the jury could reasonably find, by a preponderance of the evidence that [the defendant] and the victims authored the Facebook messages at issue." Id. The records custodian affirmed "only that the communications took place as alleged between the named Facebook accounts." Id. This was not sufficient. Id.

The Third Circuit also explained the government's "theory of self-authentication" was "predicated on a misunderstanding of the business records exception." Id. The purpose of the business records exception was "to capture records that are likely accurate and reliable in content, as demonstrated by the trustworthiness of the underlying sources of information and the process by which and purposes for which that information is recorded." Id. However, Facebook did not "purport to verify or rely on the substantive contents of the communications in the course of its business." Id. "At most, the records custodian employed by the social media platform can attest to the accuracy of only certain aspects of the communications exchanged over that platform, that is, confirmation that the depicted communications took place between certain Facebook accounts, on particular dates, or at particular times." Id. at 410-411. According to the court, that was "no more sufficient to confirm the accuracy or reliability of the contents of the Facebook chats than a postal receipt would be to attest to the accuracy or reliability of the

contents of the enclosed mailed letter." Id. at 411. The court concluded "the Facebook records [were] not business records under 803(6) and thus [could not] be authenticated by way of Rule 902(11)." Id.

Next, the court considered whether the government authenticated the Facebook chats via Rule 901(a), FRE. The court explained:

> The authentication of electronically stored information in general requires consideration of the ways in which such data can be manipulated or corrupted, and the authentication of social media evidence in particular presents some special challenges because of the great ease with which a social media account may be falsified or a legitimate account may be accessed by an imposter.

Id. at 412 (internal citations omitted). Nonetheless, the Third Circuit concluded the government "provided more than adequate evidence to support the disputed Facebook records reflected online conversations that took place between" the alleged individuals "such that the jury could reasonably find the authenticity of the records by a preponderance of the evidence." Id. at 413 (internal quotations omitted). Four witnesses who participated in the Facebook chats did not identify the records, but did offer "detailed testimony about the exchanges" over Facebook. Id. The testimony "was consistent with the content of the four chat logs." Id. Three witnesses testified that "after conversing with the Button Facebook account ... they met in person with Button – whom they were able to identify in open court as [the defendant]." Id. The court found this "powerful evidence not only establishing the accuracy of the chat logs but also linking them to [the defendant]." Id. Additionally, when the defendant spoke to the police, he made "significant concessions that served to link him to the Facebook conversations." Id. The defendant's testimony was consistent with the personal details the Facebook user provided throughout his Facebook conversations with the four witnesses. Id. at 414. Finally, the court observed the government "supported the accuracy of the chat logs by obtaining them directly

from Facebook and introducing a certificate attesting to their maintenance by the company's automated systems." Id. at 414-415.

The Fifth Circuit Court of Appeals found Facebook messages and text messages properly authenticated by a witness with knowledge in United States v. Barnes, 803 F.3d 209, 217 (5th Cir. 2015). The messages were purportedly between a witness and a defendant. The witness testified she had seen the defendant use Facebook, she recognized his Facebook account, and the Facebook messages matched the defendant's manner of communicating. Id. Further, the witness testified the defendant could send text messages from his cell phone, she had spoken to the defendant on the phone number that was the source of the text messages, and the content of the text messages indicated they were from the defendant. Id. While the witness could not testify to certainty that the defendant authored the messages, the court explained that "conclusive proof of authenticity [was] not required for the admission of disputed evidence." Id.

The state failed to authenticate the text message contained within State's Exhibit #25. According to Garvin, she received a text message from "Mr. Johnny McKnight. Johnny known as Johnny Blaze." R. 75, ll. 20-22. The text message was received on her phone. R. 75, ll. 23-25. She claimed she had "Mr. McKnight programmed into [her] phone" "under "Johnny Blaze." R. 76, ll. 1-3. Garvin asserted that she could recognize the text message "[b]ecause they programmed in my phone as Johnny Blaze, and the same text is in my phone." R. 77, ll. 3-5. She asserted the text message was still on the phone in her possession. R. 77, ll. 6-9. This was the entirety of the state's presentation on authentication. This was a far cry from what is required to authenticate evidence – particularly, electronically stored evidence, where the potential for fabricating and tampering is so great. The state failed to show how Garvin knew the author of the text message. Garvin claimed she had a number programmed in her phone for someone

under the name of "Johnny Blaze." She further claimed that "Johnny Blaze" was an alias used by Johnny McKnight. She never explained how she knew Blaze or McKnight or how she obtained the telephone number for him. It appeared she indicated the phone number for Blaze had been programmed into her phone by someone else when she said "they programmed." 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." The state failed to authenticate the text message, and the judge erred by permitting the state to introduce it.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

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ATTORNEY FOR APPELLANT

This 23rd day of May, 2019.