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Jul 28 2022

SC Court of Appeals

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On July 13, 2022, this Court affirmed Appellant's convictions in an unpublished opinion.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]pppearance, 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.

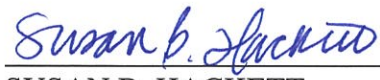
This Court ignored this evidence and relied on the deceased being skinny and unarmed to conclude no person of ordinary firmness and courage would have entertained the believe that he

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

Appellate Defender

This 28th day of July, 2022.

RECEIVED

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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,

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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
Appellate Defender

ATTORNEY FOR APPELLANT

From: [Stock, Chris](#)
To: [Julianna Battenfield](#); [SC - RANKIN BRANDY](#)
Cc: [Hackett, Susan](#)
Subject: Sanders, Gregory - Petition for Rehearing - 2018-000911
Date: Thursday, July 28, 2022 3:47:00 PM
Attachments: [Sanders, Gregory - Petition for Rehearing - 2018-000911 - AG Cover Letter.pdf](#)
[Sanders, Gregory - Petition for Rehearing - 2018-000911.pdf](#)

Ms. Battenfield,

Please find attached for service the Petition for Rehearing for Gregory Sanders' appeal which will be filed today with the Court of Appeals.

Thank you.

Chris

Chris Stock

Administrative Assistant
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(803) 734-1330