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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

On Petition for Writ of Certiorari to the Court of Appeals
APPEAL FROM HAMPTON COUNTY
Honorable Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2022-001227
Opinion No. 2022-UP-298 (S.C. Ct. App. filed July 13, 2022).

THE STATE, ...RESPONDENT,

v.

GREGORY SANDERS, ... PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

1. Did the Court of Appeals err in concluding a text message entered into evidence by the state was properly authenticated where the text message was allegedly written by a person who did not testify and the record contained no circumstantial evidence, such as appearance, contents, substance, internal patterns, or other distinctive characteristics, to show the message was what the state claimed?

2. Did the Court of Appeals err in concluding a text message entered into evidence by the state was harmless despite the fact that it was inadmissible hearsay where the state used the message to argue Petitioner was not without fault in bringing on the difficulty to defeat his claim of self-defense?

RESPONDENT'S QUESTIONS PRESENTED

1. Whether the Court of Appeals erred by affirming the trial court's authentication ruling because a jury could (and did) conclude the text message was what the victim's mother said it was: the man who texted her had called her moments before he sent the text from the same number, his number was programed into her phone, and she testified she recognized his voice on the call.

2. Whether the Court of Appeals correctly held the admission of a text message was harmless error where other clear and convincing evidence establishing Petitioner's guilt was overwhelming, the hearsay in the text message was cumulative evidence that no one disputed, and the State disproved all four elements of self-defense beyond a reasonable doubt at trial.

STATEMENT OF THE CASE

On May 7, 2016, Petitioner Gregory Sanders passed the victim's mother while walking to a store and yelled, "You better get a black dress because I'm going to kill your daughter." R. 66. Petitioner was angry about something the victim had done in Allendale previously. R. 66. Two days later, Petitioner burst into the apartment where the victim, Tyhira Harrington, lived and verbally berated her, then threw down a blue gang bandana, saying "it's on the five." R. 73, R. 88, R. 134-137, R. 177-178, R. 198. Later that day, a friend of the victim noticed someone was fiddling with the victim's doorknob and called to tell her. R. 140. A man named Johnny McKnight (who was in the apartment with the friend) also simultaneously called the victim's mother to report the same thing. He followed the call up with a text message: "I just seen Hard gf walkn behind da apts. He probably hidn 2. Tryn sum." R. 75, R. 459. (emphasis added).

Hours later, Petitioner held a gun less than two inches from the victim's head and fired, killing her. R. 301. The victim had been riding in a vehicle with her three friends when they came upon Petitioner and his girlfriend. R. 125, R. 183, R. 191. The friends got out but even though the victim and Petitioner were the only ones who approached each other, Petitioner told one of her friends, "Leave, you don't want to be a witness." R. 103, R. 128. Everyone else stood in the background. R. 103. 105-pound Ms. Harrington had not threatened Petitioner, made no advances toward Petitioner, and had no weapon with her. R. 103, R.121, R. 182-183. No one else at the scene did either. *Id*. Petitioner admitted he was at the scene and to the shooting at trial: the text message only served to confirm his presence at the apartments 20 minutes earlier.

Petitioner was indicted at the February 2016 term of the grand jury for Hampton County for murder and possession of a weapon during the commission of a violent crime. (2016-GS-25-00178, 2016-GS-25-00177; R. 460-465). The case was prosecuted by Assistant Solicitors

Tameaka Legette, Esq., and Bryan Hollen, Esq., and Petitioner was represented by Stephen T. Plexico, Esquire. R. 2. Petitioner proceeded to trial by jury from May 7 to 9, 2018, after which he was found guilty as charged. R. 454-455. The Honorable Carmen T. Mullen sentenced him to life without parole and five concurrent years for the weapon charge. R. 456-457.

Petitioner timely filed a notice of intent to appeal his convictions and sentence along with a supporting brief, and oral arguments were heard at the South Carolina Court of Appeals on November 10, 2021. The Court of Appeals affirmed through an unpublished per curium opinion on July 13, 2022. *State v. Sanders*, 2022-UP-298 (S.C. Ct. App. filed July 13, 2022). After his July 28, 2022 petition for rehearing was denied on August 12, 2022, Petitioner filed his petition for writ of certiorari with this Court. This Return of Respondent now follows.

STATEMENT OF FACTS

For purposes of this Return, Respondent relies on the summary of the facts of the crime, investigation, and trial as the South Carolina Court of Appeals set out in their direct appeal unpublished, per curium opinion:

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."

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 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.

State v. Sanders, Case No. 2022-UP-298 (S.C. Ct. App. filed July 13, 2022, reh'g denied August 12, 2022).

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, 847-848 (2006) (cleaned up) (emphasis added). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

"To warrant reversal based on wrongful admission of evidence, the complaining party must prove resulting prejudice." *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000) (emphasis added). "Whether an error is harmless depends on the circumstances of the particular case . . . [e]rror is harmless when it 'could not reasonably have affected the result of the trial.'" *State v. Key*, 256 S.C. 90, 180 S.E.2d 888 (1971).

ARGUMENT

First, in order for this Court to grant Petitioner a writ of certiorari, he must prove one of the requirements of Rule 242, SCACR, have been met. He has failed to do so. Petitioner claims he presents novel questions of law, but they aren't: Text messages are old news, and how to properly authenticate them in court has been litigated already. Authenticating text messages and authenticating social media posts are two very different things. Harmless error analyses concerning the admission of evidence by the trial court have also already been litigated. The unpublished opinion from the Court of Appeals was per curium: there was no dissent. The opinion is not in conflict with a previous decision from this Court. No substantial constitutional issues are directly involved, and no federal question looms. No intervening opinion has come out that would affect the Court of Appeals' decision since their opinion. This Court should deny the petition for writ of certiorari.

I.

The Court of Appeals correctly affirmed the trial court's authentication ruling because a jury could (and did) conclude the text message was what the victim's mother said it was: the man who texted her had called her right before he sent the text from the same number, his number was programed in her phone, and she testified she recognized his voice on the call.

Petitioner argues the Court of Appeals erred by affirming the trial court's authentication ruling.[1] The State disagrees and submits Petitioner's argument is without merit. In order for Petitioner to obtain relief from this Court, he must prove the trial court manifestly abused its discretion by finding the text was properly authenticated and that but for the authentication error he would have been found not guilty. This he has not and cannot do. The burden to authenticate a piece of evidence is extremely low: as long as a jury *could* conclude the evidence is what the

[1] The bench conference on the text message can be found at R. 90-93.

proponent claims it is and the trial court agrees a prima facie showing has been made, the ruling will not be disturbed. *State v. Anderson*, 386 S.C. 120, 687 S.E.2d 35 (2009); Rule 901(a), SCRE. No enhanced level of proof is needed, especially since the power of cross-examination was still alive and well at trial. *United States v. Davis*, 918 F.3d 397, 402 (4th Cir. 2019).

Here, the State made a prima facie showing that the text message was from the mother's friend Johnny McKnight: she said his number was programmed into her phone, she spoke to him on the phone and recognized his voice right before he sent the text, the message came from the same number, and she testified he was a friend of hers: that is the requisite personal knowledge contemplated by Rule 901(b)(1), SCRE. She still had the phone and could look at it and the text message still in it at the time of trial. That is more than enough of a satisfactory foundation for a jury to conclude the text was 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). A trial court requires only a prima facie showing that the "true author" is who the proponent claims it to be, and the showing may be made by direct or circumstantial evidence. *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014). The Court of Appeals correctly affirmed the trial court.

The defense argues this case is like *State v. Benton*, 435 S.C. 250, 865 S.E.2d 919 (Ct. App. 2021) (certiorari granted September 7, 2022). However, in *Benton*, <u>who</u> sent the text message was a material issue directly related to the defendant's guilt. Here, while Respondent firmly maintains the text message was properly authenticated (especially considering Petitioner did not argue at trial that someone else sent it), *who* sent the text message did not ultimately matter. The text only corroborated other evidence presented, which showed that Petitioner and his girlfriend were at the apartments half an hour before the shooting (a fact Petitioner does not dispute.) *How* the State used it at trial was cumulative to other evidence: The assertion that

Petitioner was at the apartment and was "hiding" or "tryn sum" paled in comparison to his threat to the victim's mother that he was going to kill her daughter, and the altercation he had with her in her apartment earlier that morning, among other things. This Court should deny the petition.

II.

The Court of Appeals correctly held the admission of a text message was harmless error where other convincing evidence establishing Petitioner's guilt was overwhelming, the hearsay in the text message was cumulative evidence that no one disputed, and the State disproved all four elements of self-defense beyond a reasonable doubt at trial.

Petitioner argues the Court of Appeals erred by finding the admission of the text message was harmless error because the content of the text (hearsay) materially served to defeat his claim of self-defense. Respondent disagrees and submits this argument is without merit. It is Petitioner's burden to show prejudice and he has not shown how the result of the trial would have been different but for the admission of this singular text, mostly because the text is cumulative to other evidence. *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011). Other clear and convincing evidence as to his guilt was also admitted such that he cannot prove prejudice.

The text was cumulative. Kywana Bradley testified she called the victim when she heard someone fiddling with their doorknob from inside her apartment at the same time the text was sent to the victim's mother. R. 139-140. Johnny McKnight was with Bradley in her apartment when she made the phone call to the victim, and Bradley testified to this. R. 140. Randy White, who was with the victim, testified she received a phone call and floored it back to her apartment and found Petitioner and his girlfriend outside of it right before the shooting (about 20 minutes after the text was sent.) R. 100-101. A woman named Daisy also testified the victim received a call that someone was at the back door, so the victim and her friends therefore returned to the apartment and found Petitioner there. R. 180. Multiple witnesses testified that Johnny McKnight was the one who drove the victim to the hospital after the shooting. R. 141.

The Court of Appeals properly affirmed the trial court by conducting the proper harmless error analysis and concluding the content of the text message was harmless error because the "evidence establishing Sander's guilt was overwhelming." *Sanders*, 2022-UP-298 at 6. "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." *State v. Vick*, 384 S.C. 189, 199, 682 S.E.2d 275, 280 (Ct. App. 2009). They went through the four elements of self-defense[2] and included facts and law showing how the State disproved each element at trial beyond a reasonable doubt apart from the text message. This demonstrated how Petitioner could not show prejudice. In order to prevail on this issue, he must show how the State failed to disprove each element apart from the text message and he has not done so.

(1) The defendant was without fault in bringing on the difficulty. Petitioner told the victim's mother a few days before the shooting that she had "better get you a black dress because I'm going to kill your daughter." He had also stormed into the victim's apartment earlier that day and thrown down the gauntlet – he threw a blue bandana down on the floor and said, "it's on the five." While the meaning of this was not testified to at trial, a reasonable hearer could draw his or her own conclusions. Difficulties were brewing before the final encounter that night.

(2 & 3) Possibly more persuasively, no person of ordinary firmness and courage would have entertained the belief that Petitioner or his girlfriend were in imminent danger of losing their lives or suffering serious bodily harm that night. The victim pulled up with three other friends near Petitioner and his girlfriend while they were walking. However, only the victim approached the Petitioner – the other three stayed quiet in the background. The victim did not

[2] From *State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011).

rush at Petitioner, threaten him, or brandish a weapon; the two merely argued. Her body was found in the middle of the street, showing that Petitioner was not cornered. She did not attempt to strike him. The victim was 105 pounds and short, and the Petitioner was considerably bigger than her. Petitioner, therefore, was not justified in using deadly force under our stand your ground laws.

(4) Petitioner also had other probable means of avoiding the danger. He was not trapped – he could have walked away. Petitioner did not dispute the victim was unarmed and did not maintain a belief that anyone else was armed besides himself. There was plenty of room to move around where the parties were standing. No one prevented him from leaving.

The Court of Appeals found that the inadmissible hearsay in the text message was harmless error because its admission did not affect the States' disproving of the elements of self-defense beyond a reasonable doubt. Therefore, a reasonable jury would not have found him not guilty had they not seen the text message. This Court should deny the petition.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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