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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Jocelyn J. Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ONTARIO LAMAR STALEY,

APPELLANT

APPELLATE CASE NO. 2024-002003

INITIAL REPLY BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Senior Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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1. **The trial judge erred in admitting documents from a website when the State failed to authenticate the documents.**

The judge erred in admitting the records, State's Exhibits #19, #20, #21, and #22, from Skip the Games, an adult website, because the State failed to authenticate the records. During pretrial the State argued State's exhibits #20, #21, and #22 were admissible pursuant to S.C. Code §19-5-520, and Rules 902 and 803(6), SCRE. (Tr. p. 13, lines 5-11). State's #19 is a purported certification of business records from Samuel Hancock [Hanka], a purported customer service manager for Skipthegames.eu and contact for law enforcement. State's #20 and #21 are excel spreadsheets providing metadata for advertisements posted on Skipthegames.eu associated with email addresses attributed to Appellant. The spreadsheets were provided to Agent Fey from Hancock [Hanka]. State's #22 is an email from Hancock [Hanka] to Agent Fey providing phone numbers associated with email addresses attributed to Appellant. The judge initially had concerns about the admissibility of the documents stating:

> With this, though, skipthegames.eu, I've seen the certification, and I don't know that it satisfies this court, that it meets the requirements of Rule 803 and 902 of the South Carolina Rules of Evidence or South Carolina Code Section 195520. I mean, it –the statute does refer to a certification of the custodian or other qualified person, but I – I guess the difficulty I have is that I –I can't verify the authenticity of that document.
>
> And I –I promise you this is not a slide against you, but – or a suggestion in any way whatsoever—but for all I know, you scribbled a signature on that in your office. You know, an affidavit where someone has notarized it, where there was a witness to it or something like that –a notary verifies the – the identity of the person making the signature and then attest that they saw that person sign the document, why it's just a better practice. That piece of paper doesn't tell me that.
>
> And again, not suggesting that you've done that. You could have emailed some intern at Skip the Games who forgot to do their job and they scribbled something up and sent it to you. I only mention that not because those are necessarily what happened here, but to demonstrate the lack of veracity of the unsworn document. And so I'm not going to exclude that category of stuff per se at this point, but

based only on what I know now, where there are contemporaneous objection, I would sustain the objection.

So maybe you can cure it or beef it up in some way, but you're not there yet as far as I'm concerned. So that can be revisited at the time it is presented.

(Tr. p. 20, line 4- p. 21, lines 1-7).

During trial the State proffered the testimony of Agent Fey. (Tr. pp. 373- 385). Agent Fey testified, "Having done this through training experience for as long as I've been working these cases at SLED, we have developed a partnership and, through my experience also with HSI, we know that the targeted point of contact for this particular company, Skipthegames.eu , is an individual by the name of Samuel Hancock – he's a customer service manager who runs all the legal requests. He very quickly responds to a request." (Tr. p. 378, lines 11-19). Agent Fey verified that the official company name was skipthegames.eu. (Tr. p. 380, lines 7-10). The agent testified, "Because their servers are actually held in overseas accounts. They do have an office here in the United States in Los Angeles, but the actual company is based outside the United Sates." (Tr. p. 380, lines 10-13). The prosecutor asked, "So they are officially – you know, this isn't usually used in a criminal sense but domiciled overseas?" (Tr. p. 380, lines 14-15). The agent answered, "That's correct." (Tr. p. 380, line 16).

Counsel for Appellant continued to object to the admission of the evidence. (Tr. pp. 385-387). The State argued State's exhibit #19, the certification from Hancock [Hanka], satisfied the requirements of the statute. (Tr. p. 388, lines 3-11). Importantly, Hancock, [Hanka], did not testify at trial. The State failed to call any custodian of records from Skipthegames.eu. Appellant relies on the arguments made in the initial brief against the admission of the documents because the State failed to authenticate the documents. At trial the State relied on S.C. Code § 19-5-520, and Rules 902 and 803(6), SCRE, to authenticate the documents. S.C.

Code Ann. § 19-5-520 only applies to foreign records in civil cases. Rule 902, SCRE, does not apply to foreign business records. Rule 902(3), SCRE, does not apply because the records from Skipthegames.eu are not foreign **public** documents. Rule 803(6) requires the testimony of the custodian or other qualified witness. The State failed to call a custodian or other qualified witness.

For the first time on appeal the State now argues State's exhibits #19, #20, #21, and #22, were properly authenticated pursuant to Rule 901(b)(1) and (b)(4), SCRE. The certification, the spreadsheets and the email from Skipthegames.eu, State's #19, #20, #21, and #22, are business records of Skipthegames.eu. The records cannot be authenticated through the testimony of Agent Fey pursuant to Rule 901(b), SCRE.

Rule 901, SCRE, provides, in part:

> (a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> (1) *Testimony of Witness With Knowledge.* Testimony that a matter is what it is claimed to be.
>
> (4) *Distinctive Characteristics and the Like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

Agent Fey did not have the requisite knowledge to testify that the business records provided by Hancock [Hanka] were legitimate business records from Skipthegames.eu. Agent Fey did not have the requisite knowledge about the metadata provided by Hancock [Hanka] to authenticate it. The email address format and server of Hancock [Hanka] and the email address format and server of another purported Skipthegames.eu employee is not a sufficient distinctive characteristic to establish that Hancock [Hanka] is an employee of Skipthegames.eu. Agent

Fey's testimony failed to provide a sufficient foundation from which the jury could reasonably find that the Skipthegames.eu accounts were registered to Appellant. The email addresses and phone numbers did not contain sufficient distinctive characteristics to show that the accounts were registered to Appellant.

The business records from Skipthegames.eu do not contain the distinctive characteristics found in the printouts of Facebook messages in State v. Green, 427 S.C. 223, 233, 830 S.E.2d 711, 715 (Ct. App. 2019), aff'd as modified, 432 S.C. 97, 851 S.E.2d 440 (2020). In Green the South Carolina Court of Appeals wrote:

> We find the content of the messages was distinctive enough that a reasonable jury could find Galarza wrote them. Numerous facts link the Facebook messages to Galarza and, consequently, Green: the use of the screen name "Ruby Rina," which Holman testified was Galarza's; reference to "Julissa" on the messages, which testimony showed was Galarza's sister's name; Ruby Rina's invitation to her home, which she stated was at 108 Queens Circle; Victim's reference to Ruby Rina as "Karina," Galarza's real first name; 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 Victim disappeared shortly after Ruby Rina invited him to 108 Queens Circle, where his blood was later discovered. Taken together, these circumstances serve as sufficient authentication to meet the low bar Rule 901(b)(4), SCRE, sets. See United States v. Siddiqui, 235 F.3d 1318, 1322–23 (11th Cir. 2000) (emails authenticated by circumstantial evidence related to content, including reference to defendant's nickname and facts known only to limited group); *see generally* Grimm et. al., *Authenticating Digital Evidence*, 69 Baylor L. Rev. 1 (2017).

427 S.C. at 233, 830 S.E.2d at 715–16. The circumstances relied upon to authenticate the Facebook messages in Green pursuant to Rule 901(b)(4), SCRE, are not present in the business records from Skipthegames.eu.

In People v. N.T.B., 457 P.3d 126, 131 (Colo. Ct.App. 2019), cited in the initial brief of Respondent, the Colorado Court of Appeals wrote, "Whether the investigating officer's testimony provided a sufficient foundation from which the jury could reasonably find that the Dropbox and Comcast records were what the prosecution purported — documents generated by

these entities — presents a close question." The Colorado Court of Appeals found Rule 901, CRE, was satisfied writing, "The prosecutor made an offer of proof that the investigating detective would testify that he caused search warrants to be issued and served on Dropbox and Comcast; these entities provided him with the records in response to the warrants; and N.T.B. acknowledged to the detective that he owned a Dropbox account tied to his work email address. So, the investigating detective had sufficient personal knowledge indicating that the Dropbox and Comcast records were authentic. *See* CRE 901(b)(1)." People v. N.T.B., 457 P.3d at 133. Appellant in the present case did not acknowledge that he owned accounts with Skipthegames.eu. The documents in the present case cannot be authenticated pursuant to Rule 901(b)(1), SCRE.

Although a close call on authentication pursuant to CRE 901(b)(1), the Colorado Court still excluded the documents for containing inadmissible hearsay writing, "In the end, the trial court correctly held that the Dropbox and Comcast records contained inadmissible hearsay, essential to the prosecutor's 'possesses or controls' theory, which it could not admit without testimony from the records custodians or an affidavit." People v. N.T.B., 457 P.3d at 134. The Colorado Court of Appeals noted:

> The Dropbox account identification number, activity log, and associated IP address, as well as the Comcast records connecting the IP address to the physical address where N.T.B. resided, were offered for the truth of the information. Through these records, Dropbox and Comcast asserted that these accounts existed, the Dropbox account was associated with N.T.B.'s email address, videos had been uploaded into that account at various times from a specific IP address, and the IP address was assigned to a Comcast account at a residential street address. Simply put, what these records *say* provided essential links between N.T.B. and the videos in the Dropbox account.

457 P.3d at 133.

In the present case, State's #20, #21, and #22, the excel spreadsheets providing metadata for advertisements posted on Skipthegames.eu associated with email addresses attributed to

Appellant and the phone numbers associated with email addresses attributed to Appellant were business records and, pursuant to Rule 803(6), should not have been admitted without testimony from a records custodian from Skipthegames.eu. The documents contained inadmissible hearsay. The certificate, State's #19, in the present case is not sufficient because the South Carolina Rules of Evidence do not have a corresponding Rule 902(11) like Colorado and the Federal Rules of Evidence, as discussed in the initial brief. The certificate is additionally not sufficient because, as discussed in the initial brief, the records from Skipthegames.eu are foreign records, not domestic records. Agent Fey testified that the company was not based in the United States and domiciled overseas. (Tr. p. 380, lines 10-16). S.C. Code Ann. § 19-5-520 only applies to foreign records in civil cases. The statute does not apply in this criminal case.

The judge erred in admitting the foreign business records, State's #19, #20, #21, and #22. The error in admitting the documents was not harmless. The records were critical in connecting Appellant to the advertisements for sexual services containing photos of minors.

2. **The trial judge erred in admitting three additional sexually explicit photographs of two minor teenage girls with the adult female co-defendant without conducting a Rule 403 analysis when the probative value of the photographs was substantially outweighed by the needless presentation of cumulative evidence.**

State's exhibits #14, #15, and #16 should have been excluded pursuant to Rule 403, SCRE, as needlessly cumulative. The advertisement for sexual services posted on Skipthegames.eu and entered over objection[1] as State's exhibit #5 included six photographs. (Tr. p. 144, lines 1-7). In addition to the six photos included in the advertisement, six additional photos were admitted, over objection[2] as, State exhibits #6, #7, #8, #9, #10, #11. (Tr. p. 150, lines 4-13). The additional six photos were not new photographs, but 8 x 10 color enlargements of the photos included in the advertisement. State's exhibit #6, is an 8 x 10 color photograph, from the advertisement, of the adult female co-defendant, Naneka Perry, with Minor #1, and Minor #2. (Tr. p. 150, lines 21-25). In closing argument, the prosecutor told the jury that State's #6 qualified as sexually explicit nudity. (Tr. p. 539, lines 11-12). In the brief Respondent writes that State's exhibit #6, "Shows [Minor#1"s] face and partial nudity while she is engaged in a sex act with Perry. However, [Minor #2's] face is not visible." (BOR p. 41). Captain Heidi Jackson with the Richland County Sheriff's Office identified Minor #2 in State's exhibit #6. (Tr. p. 150, lines 21-25). Perry identified Minor #2 in State's exhibit #6. (Tr. p. 187, lines 16-20).

In addition to State's exhibit #6, the State moved to admit three more photos, State's exhibits #14, #15, and #16. (Tr. p. 190, lines 12-14). Like State's exhibit #6, these three exhibits

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[1] The objection pretrial to the advertisement appears to be based on lack of foundation or authentication. (Tr. pp. 104-107).

[2] The objection pretrial to the six additional photos appears to be chain of custody, foundation, and authentication. (Tr. pp. 108-110). Defense counsel did not object to the photos pursuant to Rule 403, SCRE.

were sexually explicit photos of the adult female co-defendant, Naneka Perry, with Minor #1, and Minor #2. Perry identified herself, Minor #1, and Minor #2 in the three additional photos, State's #14, #15, and #16. (Tr. p. 190, line 22 – p. 191, lines 1-12). When Minor #1 was asked by the State to identify who was pictured in State's #14, the prosecutor stated, "And I covered up the sensitive areas of this exhibit." (Tr. p. 246, lines 10-11).

Counsel for Appellant objected to the admission of the three additional photos stating, "Your Honor, we'd object on the accumulation pursuant to South Carolina rule of evidence 403." (Tr. p. 190, lines 15-17). The judge admitted all three photos over objection without conducting a Rule 403 analysis. (Tr. p. 190, lines 18-19). The trial judge erred. See State v. Phillips, 430 S.C. 319, 343, 844 S.E.2d 651, 663 (2020). (In the context of Rule 702, SCRE, "trial court must conduct an on-the-record balancing of probative value against the applicable Rule 403 dangers. The trial court should make specific findings as to each contested element or issue."); K.S. by & through Seeger v. Richland Sch. Dist. Two, 445 S.C. 111, 122, 912 S.E.2d 240, 246 (2025). ("The trial court did not conduct the Rule 403 balancing test on the record, as is required. State v. Phillips, 430 S.C. 319, 341, 844 S.E.2d 651, 662 (2020)."). Once the photographs were admitted in evidence the prosecutor then said, "The State is going to very briefly publish these to limit the exposure to the jury." (Tr. p. 190, lines 22-23).

State's exhibits #14, #15, and #16 were not specifically mentioned during the pretrial discussion about the admission of photos. (Tr. pp. 103-110). The State told the judge:

> The first photo is of - - and these are the photos that are associated with the ad. I would say the first one is graphic . . . And as there are four SCM charges, we are only seeking to enter in four graphic or photos to prove the necessary elements of the case. So those are the ones associated with the ad. And then we have three additional photos the State is seeking to introduce.

(Tr. p. 108, lines 9-15). The trial judge, however, appears to be focused on State's exhibit #5 when she ruled:

> A single post, it appears, has - - can have a number of photographs associated with it or contained within it, but there are several posts. So they've chosen one of those - - Court's Exhibit 1 is all of them. State's Exhibit 5 is just one of those. And –and so that's why I say they've appropriately limited it. They're not seeking to introduce Court's Exhibit 1 or what you have in your hand right now Mr. Hayes.
>
> They've only selected one of those postings, which does have several photographs or – or I don't want to say enhanced because I - - that sounds like a technical term that I may not be using appropriately, but they have printed the photographs from that ad - -

(Tr. p. 110, lines 3-16). The pretrial ruling is not a sufficient Rule 403 analysis with regard to State's exhibits #14, #15, and #16.

Under a proper 403 analysis, State's exhibits #14, #15, and #16 lacked probative value. State's exhibit #6 corroborated the testimony of Perry and Minor#1 without the need for the three additional sexually explicit photographs. State's #14 lacked probative value because the identity of Minor #2 was not in question as she was identified by Captain Heidi Jackson and by Perry. State's #15 lacked probative value because it was very similar to State's #6. Neither State's exhibit #15 or #16 added anything to the State's case that was not already provided in State's #6. There was sufficient testimony presented for the State to prove the elements of the crimes charged without the need to expose the jury to additional sexually explicit photographs of minors.

In State v. Collins, S.C. 409 S.C. 524, 763 S.E.2d 22 (2014), the defendant was convicted of involuntary manslaughter and, pursuant to S.C. Code § 47–3–710(A)(2)(a) and 760, of being the owner of a "dangerous animal" that attacked and injured a human being. In Collins the South Carolina Supreme Court wrote, "In order to support its assertions about the dangerous

propensities of the dogs, the manner and extent of the attack, and Collins's criminal negligence, the State also offered a group of photos taken of the victim by Proctor, the forensic pathologist, before he began the autopsy." 409 S.C. at 532, 763 S.E.2d at 27. In finding no error in the admission of the pre-autopsy photos the Court wrote:

> These are not ordinary dog bites with which most jurors would ever be familiar. Even the pathologist stated he felt compelled to document the injuries prior to the start of the autopsy because he had never come across a situation this extreme. Since there was no one else present at the time of the event, the photos aided the jury in evaluating the testimony offered by both the State and the defendant, especially as to determining the dangerous propensities of the dogs and whether or not Collins's conduct was criminally reckless.

State v. Collins, 409 S.C. 524, 536, 763 S.E.2d 22, 29 (2014). In contrast, the three additional sexually explicit photographs of the minors did not aid the jury in determining an element of the offenses charged. The three photographs were cumulative to State's exhibit #6 and other evidence presented by the State. The probative value of the three additional photographs is substantially outweighed by considerations of the needless presentation of cumulative evidence.

CONCLUSION

Based on the above arguments, this Court should reverse the convictions and remand for a new trial. Alternatively, based on argument number two, this Court should remand for a 403-balancing hearing.

Kathrine H. Hudgins
Senior Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of February, 2026.