STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Paul M. Burch, Circuit Court Judge

Appellate Case No. 2014-001668

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

ANTHONY E. ADKINS,

APPELLANT.

INITIAL BRIEF OF RESPONDENT

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II. **The trial judge properly declined to qualify a former law enforcement officer as an expert in the field of police investigation for the sole purpose of criticizing the investigation in Appellant's case where expert testimony on this topic was not necessary because it was not beyond the ordinary knowledge of the jurors and where Appellant cannot show prejudice from exclusion of the expert testimony since he was permitted to fully examine the witnesses on the alleged deficiencies in the investigation and allowed to fully discuss these deficiencies in closing argument.**

STATEMENT OF THE CASE

Appellant was indicted in July 2013 for criminal domestic violence of a high and aggravated nature and kidnapping. On July 21-23, 2014, Appellant was tried before the Honorable Paul M. Burch and a jury. The jury found Appellant guilty of both offenses, and Judge Burch sentenced Appellant to ten years for each offense, with the sentences to run concurrently. This appeal follows.

ARGUMENT

Background Facts

The victim and Appellant had been engaged in a romantic relationship for about ten years when they moved to Myrtle Beach, South Carolina, in July of 2010. (R. p. 47-48). For the majority of the time they lived in South Carolina, they lived at a trailer in Conway. (R. p. 50). On the evening of Monday, April 8, 2013, Appellant and the victim were at Appellant's condo in Myrtle Beach. (R. p. 50-51). Appellant had been drinking with some friends and "smoking crack, snorting pills up his nose." (R. p. 51). Later that night, Appellant, apparently believing the victim had cheated on him, jumped on the victim and began beating her with his fists, cauing the victim to sustain a bloody nose and bruises. (R. p. 51, lines 10-12; p. 53, lines 21-23). Appellant also threw the victim's phone across the room and then took the phone away from her. (R. p. 51, lines 12-13). Early the next morning, Appellant put clothes on the victim, wrapped her in a blanket to hide her injuries from the neighbors, and took her back to their trailer in Conway. (R. p. 51, lines 13-15; p. 56, lines 6-13). On the ride to Conway, Appellant called the victim names and threatened to "put [her] in the grave where [her] mom is." (R. p. 56, line 22 – p. 57, line 1).

When they arrived at the trailer in Conway, Appellant ripped the victim's clothes off and beat her with a golf club and various other objects. (R. p. 57). He also put her in a bathtub and dumped cigarette ashes on her. (R. p. 57, lines 7-8). The beatings continued through the next day, at which point Appellant also threatened the victim with a gun and later poured a bottle of soda over her head. (R. p. 58-59). The victim was unable to get away from Appellant during this time or call for help. (R. p. 59). Appellant

did allow her to use his phone one time so she could call in sick to work, but Appellant closely monitored this call. (R. p. 59, lines 6-15). During the time Appellant held her captive, he forced the victim to remain naked and refused to let her eat, drink, or bathe. (R. p. 59, lines 18-20). Appellant also disabled the victim's Jeep to prevent her from leaving. (R. p. 60, lines 13-16).

The abuse continued through Friday, at which point Appellant ran out of cigarettes. (R. p. 61). Appellant put clothes on the victim and told her they were going to the convenience store for cigarettes and to get ice for her face. (R. p. 61, lines 14-19). While Appellant was inside the store making his purchases, the victim snuck out of the vehicle, ran behind the store, and hid in some bushes. (R. p. 61-62). When she finally heard Appellant's vehicle leave the store, she ran to a nearby house and rang the doorbell. (R. p. 62). A man answered the door, called for his wife, and then called EMS for the victim. (R. p. 62, lines 7-9). The wife testified at trial that the victim was extremely distraught and crying, had numerous visible injuries, and that she stated she had been beaten by her boyfriend. (R. p. 75; p. 80-81). When law enforcement arrived, they took pictures of the victim's injuries. (R. p. 62-65). These photos were entered into evidence at trial without objection. (R. p. 62, lines 23-25). The victim told the responders that night that Appellant was the one who held her captive and caused her injuries. (R. p. 67).

The victim was admitted into Grand Strand Regional Hospital that night where she remained a patient over the weekend. (R. p. 67). A trauma surgeon was called in due to the severity of the victim's injuries. (R. p. 253; p. 257). This doctor noted that the victim did not have narcotics in her system and that she was dehydrated. (R. p. 261; p. 270-71). The following Monday, the victim's sister and her husband picked the victim

up from the hospital and took her back to West Virginia with them. (R. p. 67-68). The victim stated she had no further contact with Appellant after she left for West Virginia. (R. p. 68, lines 16-19).

I. The trial judge properly disallowed evidence of text messages purportedly sent by the victim to Appellant where Appellant failed to establish a valid basis for admission of any particular text messages and where Appellant cannot establish prejudice from the exclusion of the text messages.

Relevant Facts

After the defense presented its first witness, the court took a brief recess and sent the jury out. (R. p. 162). At that point, defense counsel announced that he was "going to do a PowerPoint" and asked that the clerk have the projector screen brought down. (R. p. 162, lines 14-19). The solicitor inquired as to whether or not defense counsel intended to show something to the jury and indicated she had not seen the presentation defense counsel had prepared. (R. p. 162, line 24 – p. 163, line 6). Defense counsel then stated he intended to "ask [the victim] if she texted my client certain statements." (R. p. 163, lines 7-8). He stated he would show the victim the statement and then ask her. (R. p. 163, lines 10-11). The solicitor responded that she had spoken to defense counsel about this issue and that the victim stated the phone number defense counsel was referring to was not her number. (R. p. 163, lines 12-13). The solicitor explained that defense counsel "has given me nothing to authenticate that is, indeed, her number or anything otherwise," and argued defense counsel should not be permitted to show the jury statements he cannot authenticate. (R. p. 163, lines 15-20). She further argued that such evidence had no relevance and was unduly prejudicial where the victim herself would say that she did not send the text messages and the phone number was not hers. (R. p. 163,

lines 15-19). The solicitor stated that the only way defense counsel could show the text messages to the jury was if the messages were placed in evidence; however, she argued, the text messages could not be placed in evidence where the victim denied she sent the messages and denied it was her phone number. (R. p. 163, lines 20-25).

In response, defense counsel argued that the text messages could be authenticated pursuant to Rule 901, SCRE, because he could present the "testimony of a witness with knowledge on the subject." (R. p. 164, lines 4-17). Counsel stated that he planned to call Appellant to testify that he received the texts and that he was aware that "these numbers belonged to these people." (R. p. 164, lines 18-21). Counsel cited a case from North Dakota and a case from Pennsylvania in support of his position that the context of the messages coupled with Appellant's testimony would be sufficient to authenticate the text messages. (R. p. 164-65). He stated it would be for the jury to determine whether or not the victim sent the text messages or not. (R. p. 165, lines 17-18).

The solicitor then argued the text message records were business records and that there had to be a chain of custody or they had to be self-authenticated. (R. p. 165, lines 19-24). She elaborated that she would expect the testimony of someone from the cell phone company to establish that the records were kept in the normal course of business, that they had not been tampered with, and that "this is the number that this person is assigned." (R. p. 166, lines 4-9). She argued that these requirements were in place to prevent "anybody typing up anything and bringing it in here and saying, well, I'm saying this is what it is, that should be good enough." (R. p. 166, lines 14-21). The solicitor stated that if the defense had the appropriate witness to authenticate the records, she

would be "fine with it," but the rules do not allow the records to come into evidence without proper authentication. (R. p. 167, lines 20-25).

Defense counsel responded by stating that the solicitor was "mixing up a whole bunch of different rules." (R. p. 168, lines 1-2). He explained that he was not introducing the documents as business records to "get around" the hearsay rule; instead, he contended, "it is inconsistent to what she said previously, and it is directly relevant to the case." (R. p. 168, lines 3-8). He then stated, "I think that – Rule 901 definitely governs the admission of the evidence," and the question is whether or not the defense can meet the requirements of Rule 901. (R. p. 168, lines 9-14). He argued that Rule 901(b)(6)'s example of a representative from the phone company coming in to testify was not required because the rule expressly states that the examples set forth therein are "by way of illustration and not by limitation." (R. p. 168, lines 14-21). He further argued that "every court I found where you couldn't necessarily find who the owner of the phone was through the company, where it is not a registered phone, has allowed this, Your Honor." (R. p. 169, lines 4-7). He stated again that the credibility of the evidence, including whether or not it was "forged," was an issue for the jury. (R. p. 169, lines 8-19).

After the solicitor reiterated her argument, emphasizing that the defense could not show the records had not been tampered with, defense counsel cited State v. Page, 406 S.C. 272, 750 S.E.2d 623 (Ct. App. 2013), which held that a voice mail message, which was left by a witness but the witness later claimed was untrue, was still relevant. (R. p. 172, lines 2-10). He contended the Page case was analogous because it stood for the proposition that even though the defense could not present phone records to "back up"

the fact that the victim sent Appellant text messages, they are still "relevant and admissible." (R. p. 172, lines 13-20). He argued that all that the rule required was "some evidence that the jury can reasonably say it is authentic." (R. p. 173, lines 1-2). In response, the solicitor told the judge that, after examining the records, "and I'm going to be honest, I have some serious concerns as to the fabrication of the records." (R. p. 174, lines 3-6).

At that point, per the judge's request, defense counsel provided the court with a "clean copy" of the text message records. (R. p. 174, lines 7-15). In response to the judge's question about where the records came from, defense counsel stated that the records were obtained from an investigator who "obtained [Appellant's] phone and pulled the messages directly from there." (R. p. 174, lines 20-24). He added that Appellant could further authenticate the text message records by "saying that the numbers belonged to [the victim] and they've had communication through that number." (R. p. 174, line 24 – p. 175, line 2). Defense counsel noted that the records spanned the dates of April the 7th or 8th through May 27th, from "before the event to after the event." (R. p. 175, lines 8-10).

After highlighting some factual issues pertaining to the timing of the text messages, and after asserting that although the victim admitted to sending the earlier text messages (the ones sent prior to the event giving rise to Appellant's charges) but denied sending the subsequent ones, the solicitor pointed out that the records provided by the defense did not depict a typical "dump" of a cell phone because they did not include pictures, phone calls, and a contact list. (R. p. 175-76). Defense counsel asserted that he

could proffer the testimony of his investigator to explain how the records were obtained. (R. p. 176, lines 20-23).

At that point, the trial judge expressed concern about the integrity of the text message records, pointed out that it is a criminal offense to file false documents in court, and stated that attempting to file what could be construed as a forged document is "serious business." (R. p. 176, line 24 – p. 4). The judge then instructed defense counsel to explain "how you are going to prove that those phone numbers are [the victim's]." (R. p. 177, lines 6-12). After counsel reiterated that he could call his investigator and Appellant, "which was sufficient in both the North Dakota case and the Pennsylvania case I cited to you," the judge stated that he disagreed and that counsel could not prove the authenticity of the documents. (R. p. 177, lines 13-21). Defense counsel responded that in his view, the rule did not require authenticity to be proven beyond a reasonable doubt; instead the rule required only "some reasonable enough evidence" that a jury could believe the documents were authentic. (R. p. 178, lines 3-9). At that point the judge asked the attorneys to join him in chambers for a discussion, and he subsequently released the jury for lunch. (R. p. 178-79).

After the break, the judge allowed the defense to proffer testimony supporting the authenticity of the text message records. (See R. p. 179-81). Defense counsel first called Appellant. Appellant testified that he had text messages that were "relevant" in this case from the victim and from her sister Tasha. (R. p. 181, lines 11-18). He stated he knew it was Tasha who was messaging him because of "the context," because she identified herself, and also because she had called him from the same number. (R. p. 181-82). Appellant stated he was able to recognize her voice. (R. p. 182, lines 3-10). Appellant

further testified he saved her number in his phone as "Tasha." (R. p. 182, lines 13-17). Regarding text messages from the victim herself, Appellant testified that the victim contacted him from multiple numbers and that she "kept changing her number" and was "harassing" both Appellant and his new girlfriend. (R. p. 183, lines 21-25). Appellant stated he finally "got [his] number changed" and then the text messages from the victim stopped. (R. p. 184, lines 2-4). Appellant testified he knew the messages were from the victim by the "context of the messages." (R. p. 184, lines 7-9). He explained that by "context" he meant "asking me what I'm doing," asking about his "personal organs," and sending him "naked pictures of herself and things of that sort." (R. p. 184, lines 10-13). Appellant stated he was familiar with the background of the pictures the victim sent and could tell they were taken at the victim's grandmother's house, where he had visited before. (R. p. 184, lines 16-24). However, he acknowledged on cross-examination that the victim's face was not in any of the photos. (R. p. 194, line 19 – p. 195, line 10).

Appellant claimed there were three separate phone numbers from which he received messages from the victim. (R. p. 185, lines 1-2). He testified that he assigned the victim's name to each number and saved them as "contacts" in his phone. (R. p. 189, lines 7-23). He stated the victim called a few times from each of the numbers asking for money and telling him she was coming back to him. (R. p. 185, lines 3-8). Appellant said he was familiar with the victim's voice and "definitely" recognized her voice when she called. (R. p. 185, lines 3-15). He testified on cross-examination that the victim left him some voice mails but that his cell phone provider "would erase them" after fourteen days. (R. p. 188, lines 19-24).

Appellant testified he notified his attorneys about these text messages as soon as he was released from jail. (R. p. 182, lines 18-22). He stated defense counsel never instructed him to "make up" the text messages and that he did not tamper with the text messages or delete any of them. (R. p. 183, lines 9-17). Appellant stated he gave his phone to defense counsel's investigator. (R. p. 183, lines 18-20).

Next defense counsel called Jather Stevens. Mr. Stevens testified that he was retained as an investigator for the defense in this case. (R. p. 203, lines 22-24). He stated Appellant provided him with his cell phone and he then "went through and pulled off all the cell phone messages – text messages and photographs from the cell phone." (R. p. 204, lines 3-11). Mr. Stevens explained that he plugged the cell phone into a computer and found software compatible with the phone that allowed the text messages and photographs to be "pulled." (R. p. 204, lines 14-21). Mr. Stevens testified that Defense Exhibit # 2 (which was also marked Court's Exhibit # 1) was a true and accurate copy of the records he received from Appellant's cell phone. (R. p. 205, lines 6-15). He stated he made no alterations to the text messages. (R. p. 205, lines 19-21).

Mr. Steven testified that he also investigated one of the numbers Appellant attributed to the victim and the number Appellant attributed to the victim's sister Tasha. (R. p. 206-07). He stated that both phones turned out to be prepaid "burner" phones that did not have any subscriber information associated with them. (R. p. 207, lines 4-11). On cross-examination, Mr. Stevens testified that the number Appellant attributed to the victim the month after the incident giving rise to the charges (843-465-8485) was "a wireless number out of Conway," not out of West Virginia where the victim relocated after the incident. (R. p. 213-14; see Court's Exhibit #1). He testified that the number

Appellant attributed to the victim's sister Tasha (304-719-6606) originated out of Charleston, West Virginia. (R. p. 215, lines 17-23; see Court's Exhibit # 1).

After Mr. Stevens finished his testimony, defense counsel indicated he had two further "short witnesses." (R. p. 222, lines 24-25). However, the trial judge stated he was going to make a decision now since he felt defense counsel was "not going to be able to prove the faults I have with trying to get this in." (R. p. 223, lines 1-4). The judge then asked the solicitor about some dates and times and where the victim was located at those times. (R. p. 223-25). After receving responses to his questions, the judge stated "[t]hat has nothing to do with how I'm ruling, but I would be taking her word against possibly a lot of other things." (R. p. 225, lines 3-5). He then ruled as follows:

> But, [Defense Counsel], you just don't have enough here to get it by. Let me say something. I'm about as liberal as any judge about getting evidence in, and it's gotten me into trouble, but this right here, there is no question in my mind, I just can't allow it in.

(R. p. 225, lines 5-10).

In response, defense counsel stated he wanted to place on the record that the defense was asserting the right to present relevant evidence under the Sixth Amendment and that the defense believed the evidence was relevant under Rule 608, Rule 404(a), and Rule 405 of the South Carolina Rules of Evidence and that it would meet the requirements of Rule 901. (R. p. 226, lines 8-17). He also stated he believed the evidence was "directly relevant as well going to impeachment and her state of mind." (R. p. 227, lines 1-3). Thereafter, the defense proceeded to present the remainder of its case, which included the testimony of the victim as well as that of an investigator with the solicitor's office and a doctor who treated the victim the night she was brought to the hospital. (See R. p. 227-73).

Discussion

No Valid Basis for Admission of the Text Messages

Appellant argues the trial judge erred in ruling that text messages he purportedly received from the victim and her sister were inadmissible on authenticity grounds. However, this Court need not reach the issue of the authenticity of the text messages. At trial, Appellant failed to articulate a valid basis for admission of any of the test messages. Authenticity, therefore, is a moot point, and the trial judge's exclusion of the text messages should be affirmed. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); Sec. & Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 88 (1943) ("[I]n reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.' The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate." (citations omitted)).

Although Appellant argued below that Rule 901, SCRE, governed the analysis and that the text messages were "admissible" under that rule, Rule 901, in fact, governs only the **authenticity** of the records. **Admission** of the records is governed by other rules, including (but not limited to) Rule 401, Rule 402, Rule 403, and Rule 802. In order for the records to constitute admissible evidence for the jury's consideration, Appellant needed to establish a proper basis for their admission, including, first of all, their basic relevance under Rule 401, SCRE. Further, obviously, the lengthy text message records

contained out-of-court statements. See Rule 801(c), 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."). Therefore, Appellant was required to point to particular statements within the records and establish that those statements either did not constitute hearsay under Rule 801, SCRE, or that they fell within a specified exception to the hearsay rule. See Rules 803 & 804, SCRE; see also State v. Santiago, 370 S.C. 156, 163, 634 S.E.2d 23, 29 (Ct. App. 2006) (a proffer is required to preserve the issue of whether evidence was properly excluded).

The most Appellant did below was tell the trial judge that he planned to "ask [the victim] if she texted [Appellant] **certain statements.**" (R. p. 163, lines 7-8). And although he later argued that the text message records were "inconsistent to what [the victim] said previously," (R. p. 168, lines 6-8), that they were relevant for "impeachment," (R. p. 227, line 2), and that they were relevant under Rules 608, 404(a), and 405 (R. p. 226, lines 12-14), Appellant never pointed to any particular statements – in the **hundreds** of statements contained in the text message records – and explained to the judge why those particular statements were admissible under which rule(s).[1] Significantly, Appellant **never** explained how text messages from **the victim's sister** – clearly rank hearsay – would be relevant or admissible, especially considering the victim's sister was not present for trial and was not called as a witness by either party. Since Appellant failed to sufficiently proffer and explain which particular text messages

[1] Notably, there are several text messages purportedly from the victim which are, in fact, **highly consistent** with her trial testimony, such as the texts indicating that Appellant beat her with a "golf club and fist" and stating that the victim would never forgive Appellant for "what u did to me." (See Court's Exhibit # 1, 5/18/13 Texts, 1:02:03 -1:09:13). Additionally, the victim mentioned Appellant's drug use in the text messages, which also tends to corroborate her version of events. (See, e.g., Court's Exhibit # 1, 5/18/13 Texts, 1:10:03).

would be admissible and why, the collateral issue of the authenticity of the text message records is a moot point and the trial judge's ruling disallowing the text messages must be affirmed.[2] See State v. Carlson, 363 S.C. 586, 608, 611 S.E.2d 283, 294 (Ct. App. 2005) ("The burden is on the appellant to provide a sufficient record for review." (ciations omitted)); State v. Hutto, 279 S.C. 131, 132, 303 S.E.2d 90, 91 (1983) (dismissing the appeal due to appellant's failure to create a complete record for review); State v. Mitchell, 330 S.C. 189, 193-94, 498 S.E.2d 642, 644-45 (1998) (finding no reversible error where defense counsel failed to create a sufficient record below); see also Atlantic Coast Builders, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." (citation omitted)).

Appellant Cannot Establish Prejudice

Even assuming the trial judge somehow erred in excluding the text messages despite the fact that Appellant set forth no valid basis for the admission of any particular messages, and assuming for argument's sake that his ruling regarding authenticity was incorrect, Appellant is still not entitled to reversal of his convictions because he cannot establish prejudice from exclusion of the text messages. See State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003) (to warrant reversal, the appellant must prove both abuse of discretion *and* resulting prejudice); State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991) (appellate courts will generally not set aside a judgment based on

[2] In his Brief, Appellant belatedly attempts to explain which of the victim's statements he sought to impeach. (See Brief of Appellant, p. 6). Critically, however, Appellant did **not** do so below before the trial judge. (See R. p. 163-227). Note also that even in Appellant's belated explanation in his Brief, he still does not point to any particular text messages and explain why they were admissible as impeachment evidence.

insubstantial errors not affecting the result). First, Appellant cannot show prejudice because, as discussed above, Appellant failed to establish the specific manner in which he sought to impeach the victim. In other words, he failed to specify the trial testimony of the victim which he wished to impeach and failed to specify which particular text messages would be used to do so. The impeachment value of the text message records cannot, therefore, be determined without this Court having to "grope in the dark." Cf. Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011) ("However, "[e]very ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to '**grope** in the **dark**' to ascertain the precise point at issue."). Since Appellant failed to create an appropriate record below, he cannot establish prejudice on appeal.

Second, even assuming for argument's sake that all of the text messages from the victim were admissible, their admission would have more likely helped the State rather than Appellant. At one point in the text messages the victim stated that Appellant beat her with a "golf club and fist" and that the victim would never forgive Appellant for "what u did to me." (See Court's Exhibit # 1, 5/18/13 Texts, 1:02:03 -1:09:13). Significantly, Appellant did **not** respond by denying that he beat the victim. Clearly, the fact that the victim made such a comment to Appellant in a private conversation – and Appellant did not deny it – confirms the victim's trial testimony and thus strengthens the State's case, outweighing any possible impeachment value of any other text messages contained in the records.[3] See, e.g., State v. Ferguson, 300 S.C. 408, 410-11, 388 S.E.2d

[3] Note also that defense counsel thoroughly impeached the victim with other evidence, including a police report which was admitted into evidence. (R. p. 228-38). See State v. Cooper, 312 S.C. 90, 92, 439 S.E.2d 276, 277 (1994) (error in excluding impeachment evidence was harmless where the witness was

642, 644 (1990) (no reversible error in excluding impeachment evidence where "more damaging" evidence was presented).

Third, Appellant cannot show prejudice from exclusion of the text messages because the evidence of his guilt was overwhelming. The victim unequivocally and consistently identified Appellant – her boyfriend of ten years – as the person who committed the crimes against her. (R. p. 47-62; p. 137, lines 1-2). The State presented photographic evidence of the victim's injuries, and presented testimony from Joyce Jones, a totally independent witness with no ties to either the victim or Appellant, corroborating the victim's extensive injuries, her extremely distraught state, and the fact that the victim immediately identified Appellant as the person who hurt her. (See R. p. 62-65; p. 74-77; see State's Exhibits # 1-7, Photographs). Indeed, **Appellant did not dispute at trial that the victim had been "beaten up."** (R. p. 42, lines 1-3; p. 46, lines 19-21; p. 308, lines 5-8; p. 313, lines 7-8; p. 324, lines 21-22). See State v. Key, 256 S.C. 90, 97, 180 S.E.2d 888, 891 (1971) (holding that, in a harmless error analysis, "undisputed testimony is more conclusive than testimony which is in dispute"); see also State v. Jenkins, 412 S.C. 643, 652, 773 S.E.2d 906, 910 (2015) (in concluding admission of DNA evidence implicating the defendant was harmless beyond a reasonable doubt, the court found "abundant, independent evidence" of the defendant's guilt including the victim's lengthy and detailed testimony and the physical evidence of the victim's injuries). Appellant's bald assertion that he was not the one who did it fell flat when, despite presenting a defense, he failed to articulate any theories about why the victim would falsely accuse him of this crime or about who else could have committed the

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"thoroughly impeached" with other evidence), *overruled on other grounds by* Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001).

crime. (See R. p. 307-26). Accordingly, because Appellant cannot show prejudice from the exclusion of the text message records, he is not entitled to relief on this ground. See State v. McLeod, 362 S.C. 73, 84-85, 606 S.E.2d 215, 221 (Ct. App. 2004) (finding that even assuming it was error to exclude certain impeachment evidence, the error would be harmless given the overwhelming evidence against the defendant).

II. The trial judge properly declined to qualify a former law enforcement officer as an expert in the field of police investigation for the sole purpose of criticizing the investigation in Appellant's case where expert testimony on this topic was not necessary because it was not beyond the ordinary knowledge of the jurors and where Appellant cannot show prejudice from exclusion of the expert testimony since he was permitted to fully examine the witnesses on the alleged deficiencies in the investigation and allowed to fully discuss these deficiencies in closing argument.

Relevant Facts

Near the end of the defense case, Appellant's counsel sought to present the testimony of Neil Frebowitz, a retired law enforcement officer, as an expert witness in the field of "police investigation." (R. p. 274). The State requested a hearing outside of the presence of the jury. (R. p. 274, lines 8-11). Defense counsel stated he could perform the expert qualification in front of the jury, since "[h]e's a cop of 40 years" and "I think he'll be an expert on investigation." (R. p. 274, lines 19-20). The State responded that Mr. Frebowitz is an officer no longer with the Horry County Police Department who "has never been qualified as an expert, even on the cases that he worked, so I'm unsure why he would be qualified as anything on a case that he did not work." (R. p. 274, line 22 – p. 275, line 2). Appellant's counsel responded that "[h]e reviewed it, and now he's in a new career as an expert, just like doctors that retire." (R. p. 275, lines 3-5). The judge stated

he was requiring a proffer of the testimony because he did not wish to "mess up the record this far in the trial." (R. p. 275, lines 6-7).

Mr. Frebowitz then testified he began his law enforcement career in 1974 as a desk officer in "Springfield Township, Montgomery County." (R. p. 275-76). In 1978, he moved to Washington, D.C., to become a patrol officer with the Metro Police Department. (R. p. 276-77). Mr. Frebowitz testified that within three years he was promoted to sergeant and then supervised the patrol section and managed an investigative unit. (R. p. 277). He retired from the Metro Police as a "watch commander." (R. p. 278). In 2004, Mr. Frebowitz moved to Horry County, where he planned to retire but instead joined the Horry County police force as a patrol officer. (R. p. 279-81). In 2006, he was promoted to the rank of corporal. (R. p. 281). His duties included supervising crime scenes. (R. p. 281). In 2008, Mr. Frebowitz was reassigned to the violent crimes unit of the detective division. (R. p. 282). In that unit, Mr. Frebowitz focused on murder and sexually-based offenses. (R. p. 282, lines 17-18). During the approximately six years he worked on violent crimes with the Horry County police force, Mr. Frebowitz visited about forty crimes scenes per year. (R. p. 283, lines 1-9). His duties included ensuring the uniformed patrol officers had established "the appropriate protocols," making sure crime scenes were not disturbed, and ensuring that the crime scene units were summoned and that evidence was collected according to best standards and practices. (R. p. 283, lines 11-19). Mr. Frebowitz retired in March of 2014. (R. p. 282-84). He testified he was a police officer for almost forty years. (R. p. 284, lines 2-7).

On cross-examination, Mr. Frebowitz testified that while he was with the Metro Police in Washington, D.C., he was a "uniform officer" for twenty-five years rather than

a detective or crime scene investigator. (R. p. 285-86). He also clarified that as a detective with the Horry County police, he held a "supervisor rank" but was not a supervisor over other detectives. (R. p. 287, lines 15-22). He further testified that at the present time, he was a "background investigator retained by the United States Government." (R. p. 288, lines 3-4). He stated it was his responsibility to investigate the backgrounds of people applying for jobs of a sensitive nature in government. (R. p. 288, lines 9-14). Finally, he testified that he had been qualified as an expert one time, when he was with the Metro Police, to discuss his experience with a computer program that led to a person's arrest. (R. p. 289, lines 6-24). However, he had never been qualified as an expert in crime scenes or investigations. (R. p. 289, lines 20-22).

At the conclusion of Mr. Frebowitz's testimony, defense counsel requested that Mr. Frebowitz be qualified as an expert in crime scene investigation. (R. p. 292, lines 6-7). Defense counsel relied primarily upon Mr. Frebowitz's forty years of experience in law enforcement, his supervisory experience in the Metro Police, and the approximately 240 crimes scenes he had visited in Horry County over the last six years. (R. p. 292, lines 6-13). The State responded that Mr. Frebowitz's experience in law enforcement, while certainly respectable and commendable, did not qualify him as an expert in crime scenes or investigations. (R. p. 292, lines 14-23). The State also pointed out that Mr. Frebowitz had never been qualified as an expert in those fields before. (R. p. 292, lines 23-25). Defense counsel replied that Rule 702 is "actually a low standard" and that Mr. Frebowitz met the knowledge, skill, experience, education, and training requirement. (R. p. 293, lines 18-22). He also stated that Appellant had the constitutional right to present relevant evidence regarding "the State's inability to meet their burden," that he had the

right under South Carolina law to argue spoliation of evidence since the State "failed to preserve the evidence," and that he had the right to rebut the previous officer's testimony concerning the police department procedures. (R. p. 293-94). He stated Mr. Frebowitz might also be able to testify about "whether or not a video might have been able to be received" and what the proper procedures are for acquiring a search warrant for Appellant's house and securing the house. (R. p. 294, lines 11-16).

The State responded by pointing out that the only time an expert witness is necessary is when there is an issue of fact outside the scope of common knowledge and understanding of the jury, and here, there was no testimony Mr. Frebowitz could offer as an expert that would be relevant to the issue of whether Appellant was guilty of the charged crimes. (R. p. 294, lines 19-25).

The judge first noted that trial courts in the United States have been heavily criticized regarding "the shift of trying defendants for what they are charged with, to trying everybody else, especially law enforcement." (R. p. 295, lines 2-7). He further stated that while he respected Mr. Frebowitz's law enforcement career since he was "in it a long time [him]self" and "followed almost the same path," Mr. Frebowitz would not be qualified in the field of "criminal investigation to testify in this regard." (R. p. 295, lines 10-17). The judge told counsel he was free to make the points he was trying to make regarding what the police failed to do in the investigation and could "certainly comment on that" in his argument to the jury. (R. p. 295, lines 18-23). After defense counsel took exception to the ruling, the judge pointed out that the South Carolina Supreme Court has "really tightened down on our ability to qualify expert witnesses" and that what the defense was trying to do was "just out of the question." (R. p. 296, lines 2-9). He also

noted that "[i]n 23 years on this bench, I have never had anything like that come up to try to qualify somebody for police investigation." (R. p. 296, lines 22-25). He declined defense counsel's request to proffer further testimony from Mr. Frebowitz regarding "what he would have testified to in court." (R. p. 296, lines 10-18).

The next morning, the solicitor stated she wanted to put two cases on the record, State v. Myers, 301 S.C. 251, 391 S.E.2d 551 (1990), and McDill v. Mark's Auto Sales, 367 S.C. 486, 626 S.E.2d 52 (Ct. App. 2006). (R. p. 303-304). She explained that these cases stand for the proposition that expert testimony is necessary only when there is an issue of fact outside the scope of common knowledge and understanding of a jury or a piece of evidence that cannot be understood without explanation and opinion, and that an expert opinion is only proper when the subject matter is scientific, technical, or requires other specialized knowledge. (R. p. 304, lines 1-13). She also pointed out that expert testimony should be relevant to the defendant's guilt and meet the requirements of Rule 403, SCRE. (R. p. 304, lines 13-15). Defense counsel reiterated that he believed Rule 702 allowed the expert testimony. (R. p. 305, lines 9-10). The judge stated he stood by his decision disallowing the expert testimony. (R. 304-305).

Applicable Law

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. at 48, 625 S.E.2d at 220. Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010); State v.

Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). Likewise, the decision as to whether to admit or exclude expert testimony rests within the trial judge's sound discretion and will not be reversed on appeal absent a prejudicial abuse of that discretion. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006); see State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009) ("A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion."). "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. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

"Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge." Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). Pursuant to the South Carolina Rules of Evidence, expert testimony is admissible under the following circumstances:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE. A witness can properly be qualified as an expert where "the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge." State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 467 (Ct. App. 1998). "[A]ll expert testimony under Rule 702, SCRE, imposes on the trial courts an affirmative

and meaningful gatekeeping duty." State v. White, 382 S.C. at 270, 676 S.E.2d at 686. Thus, "[a]ll expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." Id.; see also State v. Tapp, 398 S.C. 376, 388, 728 S.E.2d 468, 474 (2012).

Discussion

Appellant argues the trial judge erred in failing to qualify Mr. Frebowitz, a "40-year law enforcement veteran," as an expert witness on police investigation and/or crime scene investigation. (See Brief of Appellant, p. 9). To the contrary, the trial judge did not err by refusing to qualify Mr. Frebowitz as an expert where "police investigation" is not a field of expertise beyond the scope of the jury's common knowledge, and where expert testimony presented for the sole purpose of criticizing the police investigation bore little relevance on the issue of Appellant's guilt and was unnecessary and cumulative where Appellant's counsel was permitted to thoroughly cross-examine the State's witnesses regarding the alleged deficiencies in the investigation and was allowed to emphasize these deficiencies in his closing argument.

First, as discussed above, expert testimony is only needed where the subject matter of the testimony is beyond the ordinary knowledge of the jurors. Police officers are not generally qualified as expert witnesses unless they have some specialized knowledge or training in a specific scientific field, such as fingerprinting, accident reconstruction, or dog-tracking. See, e.g., State v. Anderson, 407 S.C. 278, 285-86, 754 S.E.2d 905, 908-909 (Ct. App. 2014) (officer properly qualified as expert in fingerprint analysis); McDill v. Mark's Auto Sales, Inc., 367 S.C. 486, 490-92, 626 S.E.2d 52, 55-56

(Ct. App. 2006) (discussing qualifying an officer as an expert in accident reconstruction); State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) (affirming qualification of an officer as an expert in dog-tracking). Tellingly, none of the police officers who were called to testify by the State in Appellant's case were qualified as experts. It would be nonsensical to have an officer testifying for the defense qualified as an expert when the State's officers were not themselves qualified as experts.

Routine police investigation is simply not beyond the ordinary knowledge of the jurors. Therefore, for the same reasons forensic interviewers should not generally be qualified as experts, police officers should also not generally be qualified as experts where the moving party cannot show that expert testimony is necessary for the particular subject matter. Cf. State v. Anderson, Op. No. 27558 (S.C. Sup. Ct. filed Aug. 5, 2015) (Shearouse Adv. Sh. No. 30 at 39) ("Appellant also contends the circuit court erred in qualifying Witness Smith as an expert in forensic interviewing, arguing that South Carolina courts do not recognize this type of expertise, and that a forensic interviewer is restricted to testifying to facts. We agree." (citations omitted)). Here, Appellant sought to bolster his case by presenting testimony from a former police officer "improperly imbued with the imprimatur of an expert witness." State v. Whitner, 399 S.C. 547, 559, 732 S.E.2d 861, 867 (2012); see also State v. Kromah, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013) (noting that "although an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts" and stating that "[t]he label of expert should be jealously guarded by the court and never loosely bandied about."). The trial judge properly disallowed this procedure, and his refusal to qualify

Mr. Frebowitz as an expert should be affirmed.[4] See McDill, 367 S.C. at 491, 626 S.E.2d at 55 ("Just as a trial court has broad discretion in qualifying a witness as an expert, which this court may not overturn on appeal, a trial court also has broad discretion in deciding not to qualify a witness as an expert."); Rule 220(c), SCACR (the appellate court may affirm the evidentiary rulings of the trial court based upon any grounds appearing in the record).

Second, even assuming the trial judge somehow committed error, Appellant could not have suffered any prejudice where he was permitted to fully cross-examine the officers regarding the alleged deficiencies in the investigation and allowed to fully discuss these deficiencies in closing argument. See, e.g., State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991) (appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result). Appellant sought to qualify Mr. Frebowitz as an expert for the sole purpose of providing "his opinions on evidence collection" and "discuss[ing] deficiencies in the investigation." (Brief of Appellant, p. 11). However, Appellant had already very clearly made his point – that the investigation was flawed – through other witnesses. (See R. p. 91-95; p. 101-107; p. 117-41; p. 227-73).

Appellant cross-examined Officer Kenneth Mossi regarding his failure to locate Appellant that night, his failure to make a report of his activities, his failure to recognize the address on West Homewood Road as a major crime scene, and his failure to obtain a search warrant for that address. (R. p. 101-107). Additionally, Appellant called Officer

[4] Additionally, the trial judge's ruling should be affirmed because Appellant failed to offer any testimony establishing the threshold requirement that Mr. Frebowitz was individually reliable, i.e., that he was "able to draw reliable results" from the procedures he applied. See State v. Chavis, 412 S.C. 101, 108, 771 S.E.2d 336, 339 (2015).

Joe VanVorrhis as a defense witness and examined him about his failure to recognize the offense against the victim as a major crime, his failure to ensure a detective was called to the alleged crime scene, his failure to obtain a videotape from the gas station from which the victim escaped Appellant's custody, his failure to include certain activities in his reports, his failure to mark the address at West Homewood Road as a crime scene and attempt to obtain evidence from that address, and his failure to investigate allegedly inconsistent statements made by the victim. (R. p. 121-41; p. 157-62). Appellant also called the victim, a solicitor's office investigator, and a doctor who examined the victim and used their testimony to emphasize the deficiencies in the investigation. (R. p. 228-38; p. 242-73).

Furthermore, in closing argument, Appellant argued extensively about how the alleged deficiencies in the investigation should cause the jury to have a reasonable doubt about Appellant's guilt. (See R. p. 307-26). Defense counsel pointed out that the State failed to call the lead investigator as a witness and that the only officer called by the State was an officer who never met the victim and was unable to locate Appellant on the night in question. (R. p. 307-308). Counsel argued that the testimony of the State's own investigator and the doctor who examined the victim contradicted the victim's own version of events. (R. p. 308-309). Counsel pointed out that the officers failed to show Appellant was even in Horry County on the night in question, failed to secure a search warrant for the crime scene, failed to collect any evidence from the crime scene or from the victim's employee records to corroborate the victim's testimony, and failed to obtain a videotape from the convenience store where the victim escaped from Appellant. (R. p. 315-16; p. 320-21). Counsel also contended that the police failed to investigate the

glaring inconsistencies in the victim's version of events. (R. p. 316-20). Finally, and perhaps most significantly, counsel argued as follows:

> [E]ver since the OJ trial there has been an air in our country that we should not say the police did a bad job. We should look the other way. Judge Ito allowed them to question the investigative techniques in that case. **If there had been an expert here for you, what might he have said? Might he have said that the police work was inappropriate? Might he have said that the crime scene was never secured? Might he have told you that there is no forensic evidence other than her statement that it had been? Police work was not professional in this case.** The officer that sat here that I called to the stand told you victims lie. He knows that to be a fact in his experience. Victims lie. You are going to render a verdict today, a verdict that my client will live with for the rest of his life. It will be a verdict that I will live with. I want it to be a verdict that you all can live with. God bless you. God bless America. Thank you.

(R. p. 325, line 24 – p. 326, line 17) (emphasis added).

The trial judge's refusal to qualify Mr. Frebowitz as an expert witness in police investigation could not possibly have prejudiced Appellant in light of defense counsel's examination of the witnesses and his closing argument very clearly outlining the alleged deficiencies in the investigation. See Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 557, 658 S.E.2d 80, 86-87 (2008) (error in refusing to qualify a witness as an expert was harmless where the proposed expert testimony would have been cumulative); cf. State v. Myers, 301 S.C. 251, 256-58, 391 S.E.2d 551, 554-55 (1990) (finding the defense was prejudiced by the trial judge's failure to qualify one of its witnesses an expert where the solicitor conceded that blood-spatter analysis was a field of expertise yet he extensively discussed the question of blood spatters and their interpretation in closing argument and the jury was therefore "bombarded with the solicitor's non-expert views" on the topic); cf. State v. Frazier, 357 S.C. 161, 167, 592 S.E.2d 621, 624 (2004) (exclusion of expert testimony regarding the unreliability of eyewitness identifications

was not harmless error because the identification of the defendant was crucial to the State's case where it was the only evidence placing him near the scene of the crime). Again, in this case, an expert witness was simply not needed to convey Appellant's points to the jury. Moreover, as discussed previously, the evidence against Appellant was simply overwhelming. See, e.g., State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003) (any possible error is harmless where there is overwhelming evidence of the defendant's guilt). Accordingly, Appellant is not entitled to relief on this ground.

CONCLUSION

For the reasons discussed above, the State requests that this Court affirm Appellant's convictions and sentences.

Respectfully submitted,

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September 23, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Paul M. Burch, Circuit Court Judge

RECEIVED
SEP 23 2015
SC Court of Appeals

Appellate Case No. 2014-001668

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

ANTHONY E. ADKINS,

APPELLANT.

PROOF OF SERVICE

The undersigned attorney hereby certifies that the **Initial Brief of Respondent** and **Designation of Matter** in the above-referenced case has been served upon **Tristan M. Shaffer**, Axelrod & Associates, PA, 4701 Oleander Drive, Myrtle Beach, South Carolina, 29577, this **23rd** day of **September, 2015.**

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September 23, 2015

The Honorable Jenny A. Kitchings
Clerk of Court, S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: State of South Carolina v. Anthony E. Adkins
Appellate Case No. 2014-001668

Dear Ms. Kitchings:

Enclosed please find the **Initial Brief of Respondent,** along with the **Designation of Matter** and **Proof of Service,** in the above-referenced appeal, which I am serving on opposing counsel today.

Thank you for your attention to this matter, and please do not hesitate to contact me at (803) 734-3713 should there be any questions or concerns.

Sincerely,

Christina Catoe Bigelow
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