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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County

Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TONY VERNON JORDAN,

APPELLANT

APPELLATE CASE NO. 2014-002554

AMENDED INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUE ON APPEAL 3

STATEMENT OF THE CASE 4

ARGUMENT

The trial judge erred in finding that text messages, obtained pursuant to a search warrant, met the hearsay exception as business records and were admissible at trial. 6

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Certain Underwriters at Lloyd's London v. Sinkovich, 232 F.3d 200, 204–05 (4th Cir.2000) 12

It's My Party, Inc. v. Live Nation, Inc., No. JFM–09–547, 2012 WL 3655470 at 5 (D.Md. Aug. 23, 2012) 13

Morisseau v. DLA Piper, 532 F.Supp.2d 595, 621 n. 163 (S.D.N.Y.2008) 13

People in Interest of R.D.H., 944 P.2d 660, 665 (Colo. App. 1997) 13

People v. Glover, 2015 WL 795690 (Colo. App. Feb. 26, 2015) 13, 14

State v. Duncan, 274 S.C. 379, 264 S.E.2d 421 (1980) 12

United States v. Cone, 714 F.3d 197, 219-20 (4th Cir. 2013) 12, 14

Statutes

S.C. Code §19-5-510 11

Rules

CRE 803(6) 13

CRE 902(11) 13

Rule 803(6) SCRE 12

STATEMENT OF ISSUE ON APPEAL

1. Did the trial judge err in finding that text messages, obtained pursuant to a search warrant, met the hearsay exception as business records and were admissible at trial?

STATEMENT OF THE CASE

In March of 2014, the Abbeville County Grand Jury indicted Appellant Jordan for murder and possession of a weapon during the commission of a violent crime, indictments #2014-GS-01-194, 195. On November 10, 2014, Appellant proceeded to jury trial before the Honorable Eugene C. Griffith, Jr. Patricia Bolen and Janna Nelson represented Appellant at trial. C. Yates Brown and Shannon Odom proseccuted the case. The jury found Appellant guilty. Judge Griffith sentenced Appellant to forty (40) years for murder and five (5) years for the weapons charge. A timely notice of intent to appeal was served on November 20, 2014. This appeal follows.

STATEMENT OF FACTS

The jury found Appellant guilty of the fatal shooting of his twenty five year old son Jeremy Jordan. Appellant told police that on the evening of November 11, 2013, he and Jeremy were on their way to Calhoun Falls in Appellant's Jeep to ask Billy Norris if Jeremy could borrow money to pay his child support. (Tr. p. 225, lines 3-8). The two began to argue. They stopped on a bridge and continued to argue outside of the Jeep. (Tr. p. 225, line 8). Jeremy took a swing at Appellant and then Appellant snapped and shot Jeremy in the back of the head. (Tr. p. 225, lines 8-11). Appellant told police where they could find the gun he used and where they could find the clothes he was wearing on the night of the shooting. (Tr. p. 225, line 18 – p. 226, lines 1-2).

The judge charged the jury with the law on voluntary manslaughter. The jury, however, found Appellant guilty of murder. At trial the State, over objection, introduced text messages obtained pursuant to a search warrant. The text messages were from Appellant's phone and included messages between Appellant and Jeremy, Appellant and his girlfriend, Audrey Todd, Appellant and Jeremy's mother and Appellant and his daughter Samantha Clinkscales.

ARGUMENT

The trial judge erred in finding that text messages, obtained pursuant to a search warrant, met the hearsay exception as business records and were admissible at trial.

Prior to trial Appellant objected to the admission of text messages obtained by law enforcement pursuant to a search warrant for Appellant's Verizon cell phone. (Tr. p. 94, line 12 – p. 95, lines 1-12). The objection was based on the fact that the text messages were inadmissible hearsay that did not meet an exception, were not relevant and were more prejudicial than probative. (Tr. p. 95, lines 8-12). The judge ruled on other pre-trial motions but withheld the ruling as to the text messages. (Tr. pp. 108-109).

During the trial the State called as a witness, Jennifer Dalmida, the records custodian for Verizon Wireless. (Tr. p. 333, lines 6-20). The State moved to admit text messages sent and received from Appellant's phone under the business records exception. (Tr. p. 336, line 7 – p. 337, lines 1-19). Appellant objected and the judge conducted an *in camera* hearing in regard to the text messages. (Tr. pp. 337-345). Appellant argued that the text messages did not constitute business records under the evidentiary rule or under State statute S.C. Code §19-5-520. (Tr. p. 338, lines 2-17). Appellant argued that both the messages received as well as messages sent constituted inadmissible hearsay. (Tr. p. 338, line 18 – p. 339, 340, lines 1-14). Appellant additionally argued that the text messages were irrelevant and unduly prejudicial. (Tr. p. 340, lines 3-14). The State argued that the text messages were admissible as records of regularly conducted activity of a business pursuant to Rule 803(6), SCRE. (Tr. p. 342, line 8 – p. 343, lines 1-9). The judge found that the text messages met the hearsay exception as business records. (Tr. p. 344, line 14-24; p. 345,

lines 15-16). The State then moved to admit the text messages and State's Exhibit #98 was admitted as a business record over objection. (Tr. p. 348, lines 15-19).

Ms. Dalmida testified that Verizon received a subpoena for telephone number 864-554-8876. (Tr. p. 334, lines 2-4). Investigator Wallace with the South Carolina Law Enforcement Division [SLED} testified earlier at trial that Appellant told her his phone number was 864-554-8876. (Tr. p. 197, lines 15-18). Ms. Dalmida testified about a text message from Appellant's phone number to phone number 864-828-3554 on November 8, 2013, three days before the shooting. (Tr. p. 350, line 7 – p. 351, lines 1-16). Ms. Dalmida did not know the names of the people sending or receiving the texts. (Tr. p. 350, lines 13-16). She testified to the content of the text message:

> Good morning, baby girl. Are you working today? We are going to see the lawyers this morning. Ms. Faye had to go back to the hospital last night. All T. ... This stuff is really weighing on Audrey, but I'm still right with her . I have been thinking if we are still doing good by Christmas 2014 I'm going . . . to ask her to marry me. That will be over a year.

(Tr. p. 350, line 20 – p. 352, lines 1-6).

Ms. Dalmida testified about another text message from Appellant's phone number on November 8, 2013, but this was to telephone number 864-391-1443. Ms. Dalmida testified that this message said, "Our problems are my problems. I here for you, baby. I love you." (Tr. p. 352, lines 304). Ms. Dalmida testified about a text message sent from phone number 864-391-1443 to Appellant's phone number on November 8, 2013, that read, "Please, please make sure Jeremy knows nothing at all. Someone just called and said he is telling Crystal and others all kind of stuff and it's going to be detrimental to Drew's defense. I can't have any obstacles helping my son." (Tr. p. 352, line 13 – p. 353, lines 1-16).

The next texts read to the jury by Ms. Dalmida were all on November 8, 2013, and were sent form Appellant's phone to phone number 864-391-1443. The first message read, "Baby, I told Jeremy nothing. What is he telling?" (Tr. p. 354, line 2). The second message read, "I love you and I'm going to get to the bottom of it. Yes ma'am. I'm mad as hell now. His ass is mine. I love you." (Tr. p. 354, lines 13-15). The third message reads, "You know I will do whatever you all need, to change the oil, paint the house, whatever, as long as I get to spend a little time with you. LOL. Told you I was crazy about you." (Tr. p. 355, lines 17-20). Appellant at this point renewed the objection to relevance. (TR. p. 355, lines 22-23). The judge overruled the objection. (Tr. p. 355, lines 24-25).

The next series of texts were on November 8, 2013, between Appellant's phone number and phone number 864-378-1744. Investigator Wallace testified earlier at trial that Appellant told her his son Jeremy's number was 864-378-1744. (Tr. p. 197, lines 13-14). Ms. Dalmida testified as to the content of the messages between Appellant's phone number and his son's phone number. (Tr. pp. 356-358). These messages involved getting a house key back from Crystal.

The next series of texts were on November 9, 2013, from Appellant's phone to phone number 864-391-1443. (Tr. pp. 358 – 364). Again, Ms. Dalmida testified as to the content of these messages without identifying the parties sending or receiving the texts. The jury only knew Appellant's phone number and his son Jeremy's phone number from earlier testimony. The other phone numbers were unidentified at this point in the trial.

The next text message referenced in Ms. Dalmida's testimony took place on November 10, 2013, from the Appellant's phone number to phone number 239-896-6412 and read, "I need to know something that has been on my mind for over 26 years. August

1987 we were sitting in a doctor's office in North Myrtle Beach. You found out you were pregnant with Jeremy and you asked me if this is Mark's baby would I still love you. Well, is he Mark's or mine? I just need to know, even though it won't change a thing." (Tr. p. 364, line 19 – p. 365, lines 1-5).

The next series of texts were also from November 10, 2013, but were between Appellant's phone and phone number 864-828-3554. (Tr. pp. 365 – 369) Ms. Dalmida testified as to the content of the text messages. These messages questioned the term of weeks involved in a normal pregnancy.

The next text testified to by Ms. Dalmida took place on the morning of the shooting, November 11, 2013, from Appellant's phone number to 864-391-1443. The text read:

> Good morning, beautiful, and hope you got some rest and well. As I told you I ain't running. I ain't going nowhere. I have always been a fighter. Not a quitter. Now you do still want in your life, right? I don't believe in fighting for a lost cause, but I don't think this is. I love you very much. You and your family are one of the best things that ever happened to me. We're going to make it through this. Wish we could do it together. I'm here. You are going to have to kick my ass to the curb. Please. I understand but can help if you will let me. Please. If you have done something, please let me know. If it Jeremy or Crystal, that problem solved. So baby please talk to me. You said the other day that you didn't feel right about being happy with all that is going on. How do the girls feel about. Just remember. I'm here and I ain't leaving you. Pain, my pain. I love you baby.

(Tr. p. 371, line 25 – p. 372, lines 1-15).

Ms. Dalmida then testified that phone number 864-391-1443 responded to Appellant's phone number, "I just need time right now to help my girls heal. They need me now more than ever and it's not fair making them share me right now. Please be patient. I've . . . failed Drew. I can't fail them." (Tr. p. 372, line 17 – p. 373, line 1). Ms. Dalmida then testified about the content of three other text messages from Appellant's phone to phone number to 864-391-1443. (Tr. pp. 373, lines 3-25).

The next text message Ms. Dalmida testified about took place on November 12, 2013, the day after the shooting, from Appellant's phone number to phone number 864-378-3104 stating, "Crystal, have you talked to Jeremy since last night? He ain't been home since 10:30. I'm wondering what you say. Starting to worry a little bit. Please call me back." (Tr. p. 374, lines 3-10).

Ms. Dalmida testified that the following text was sent from Appellant's phone to phone number 864-828-3554 on November 12, 2013, "Good morning. Call me when you get this. Your brother ain't at the house." (Tr. p. 374, lines 12-15). The last three text messages testified to by Ms. Dalmida on direct examination were also on November 12, 2013 and were between Appellant's phone and phone number 864-378-3104. The message from phone number 864-378-3104 asks if he has the Jeep and if a missing person report is being filed. The response from Appellant's phone was, "No." (Tr. p. 374, line 16 – p. 375, lines 1-3).

The judge erred in finding the content of the text messages met the business records exception to the rule against hearsay. The text messages constituted inadmissible hearsay and the error in admitting the text messages was not harmless. Later in the trial the State called Audrey Todd as a witness. Todd testified that at the time of the shooting her phone number was 864-391-1443. (Tr. p. 442, lines 8-17). Todd also testified about text messages between herself and Appellant. Krystal Collins was also called as a witness by the State later at trial. Collins testified that at the time of the shooting her phone number was 864-378-3104. (Tr. p. 458, lines 19-20). Collins also testified about text messages between herself and Appellant. The State did not call a witness in regard to telephone number 239-896-6412. The text to this number raised questions as to who may have been Jeremy's

biological father and was presumably sent to Jeremy's mother. Appellant's daughter, Samantha Clinkscales, was called as a defense witness and testified on cross examination that her phone number at the time of the shooting was 864-828-3554. (Tr. p. 476, lines 20-21). She also testified about text messages between herself and Appellant. The fact that three witnesses later testified about the text messages does not cure the prejudice from the admission of the improper hearsay. The State was allowed to present damaging evidence twice; once as inadmissible hearsay and a second time through testimony. Admitting the text message content twice unduly emphasized this evidence resulting in prejudice, especially in light of the fact that the State argued the content provided malice and motive to rebut the defense that the shooting was voluntary manslaughter and not murder.

The Uniform Business Records as Evidence Act, S.C. Code §19-5-510 provides, "A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." The text messages in question were not admissible pursuant to the Uniform Business Records as Evidence Act as the text messages were not made in the regular course of Verizon business. Ms. Dalmida testified that text messages were only available for retrieval generally within three to five days of when the text was sent. (Tr. p. 334, lines 19-22). The content of a text message from a phone is distinguished from a log of numbers called by that phone. The text messages in the present case are clearly distinguished from the records of firearms

transactions maintained by ATF and found admissible pursuant to the Act in State v. Duncan, 274 S.C. 379, 264 S.E.2d 421 (1980).

Rule 803(6) SCRE provides that business records are not excluded by the hearsay rule and defines business records as:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; *provided, however,* that subjective opinions and judgments found in business records are not admissible. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The text messages were not business records as texts were not kept in the course of the regularly conducted business activity of Verizon. In United States v. Cone, 714 F.3d 197, 219-20 (4th Cir. 2013), the Fourth Circuit, addressing e-mail in the context of the business records exception to the hearsay rule wrote:

> E-mails, however, present unique problems of recent vintage in the context of the business records exception. As one district court recently explained:
>
> Courts are in disagreement on whether emails can and should fall under the business records hearsay exception. The business records exception assumes that records containing information necessary in the regular running of a business will be accurate and reliable. See Certain Underwriters at Lloyd's London v. Sinkovich, 232 F.3d 200, 204–05 (4th Cir.2000). Email, however, is typically a more casual form of communication than other records usually kept in the course of business, such that it may not be appropriate to assume the same degree of accuracy and reliability. As email is more commonly used to communicate business matters both internally and externally, however, more formal paper records are becoming more unusual. It's My Party, Inc. v. Live Nation, Inc., No. JFM–09–547, 2012 WL 3655470 at *5 (D.Md. Aug. 23, 2012) (unpublished). The district court in that case excluded the e-mails on the basis that the "more specificity is required regarding the party's

> recordkeeping practices to show a particular email in fact constitutes a reliable business record." Id. While properly authenticated e-mails may be admitted into evidence under the business records exception, it would be insufficient to survive a hearsay challenge simply to say that since a business keeps and receives e-mails, then *ergo* all those e-mails are business records falling within the ambit of Rule 803(6)(B). "An e-mail created within a business entity does not, for that reason alone, satisfy the business records exception of the hearsay rule." Morisseau v. DLA Piper, 532 F.Supp.2d 595, 621 n. 163 (S.D.N.Y.2008). The district court's observation that the e-mails were kept as a "regular operation of the business" is simply insufficient on that basis alone to establish a foundation for admission under Rule 803(6)(B). Accordingly, because the e-mails could not, on this record, be admitted under an exception to the hearsay rule, the district court's failure to give the limiting jury instruction was error.

In People v. Glover, 2015 WL 795690 (Colo. App. Feb. 26, 2015) the Colorado Court of Appeals wrote:

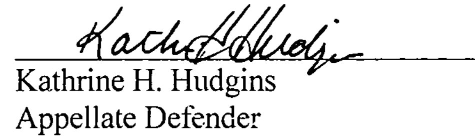
> In People in Interest of R.D.H., 944 P.2d 660, 665 (Colo. App. 1997), a division of this court discussed the application of the business records hearsay exception to statements made, as here, by individuals who were not part of the business itself:
>
> Statements by an outside party included within a business record are not necessarily granted the presumption of accuracy that attaches to statements made in the regular course of business because the outside party does not have a business duty to report the information. However, records containing such information are admissible when, as here, the information is provided as part of a business relationship between a business and an outsider and there is evidence that the business substantially relied upon the information contained in the records.
> *Id.* at 665.
>
> Here, even though an arguable business relationship exists between Facebook and its users, there was no evidence presented that Facebook substantially relies for any business purpose on information contained in its users' profiles and communications. Thus, as defendant correctly points out, the Facebook printouts were neither authenticatable under CRE 902(11) nor admissible under CRE 803(6).

Just as the e-mails in Cone and the Facebook posts in Glover did not meet the business records exception to the hearsay rule, the text messages in the present case do not meet the business records exception to the hearsay rule. The text messages were inadmissible hearsay. The error in admitting the text messages was not harmless. The State referenced the improperly admitted texts in closing argument. (Tr. pp. 510 – 511). The judge erred in admitting the text messages as business records.

CONCLUSION

Based on the above argument, the conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,



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This 30th day of September, 2015.