STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Abbeville County
Eugene C. Griffith, Jr. Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

v.

TONY VERNON JORDAN,

Appellant

Appellate Case No. 2014-0002245

INITIAL BRIEF OF RESPONDENT AND DESIGNATION OF MATTER

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

I. 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?

RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Tony Vernon Jordan, was indicted at the March 28, 2014 term of the Court of General Sessions for Abbeville County for murder and possession of a weapon during the commission of a violent crime. Indictment 2014-GS-01-0194 (murder), Indictment 2014-GS-01-0195 (possession of a weapon during the commission of a violent crime. ROA p. _ -_. The charges arose from the November 11, 2013 shooting death of Jeremy Jordan whose body was found on the Little River Bridge.

On November 10-14, 2014, the case was tried before the Honorable Eugene C. Griffith, Jr. Circuit Court Judge and a jury. The Appellant was present and represented by Patricia H. Bolen and Janna Nelson of the Eighth Circuit Public Defenders Office. The State of South Carolina was represented by Assistant Solicitors C. Yates Brown and Shannon Odom of the Eighth Circuit Solicitor's Office. On November 14, 2014, the Appellant was convicted by a jury of each indictment. On that date, Judge Griffith sentenced the Appellant to forty (40) years for murder and five (5) years concurrent on the weapons charge.

The Appellant, through counsel Bolen, made a timely notice of appeal by service upon the Solicitor's Office on November 20, 2014. This appeal follows.

STATEMENT OF THE FACTS

The state's theory of the case.

This involves the tragic death of Jeremy Jordan. On November the 11, 2013, Tony Jordan, put a gun to the back of his 25-year-old son's head and pulled the trigger. They were out the Little River Bridge, on Old Calhoun Falls Road in Abbeville County. Tony Jordan had driven them both out there and they both got out of the vehicle. After shooting his son, he fell to the ground. Appellant pulled his son's hoodie over his face and dragged him and he tried to throw him over the age of the bridge, but he couldn't do it based upon his son's size. He tried to flip

him between the rail on the curb of the bridge which did not work and Jeremy got stuck. His body was wedged between the curb and the railing. Appellant left his son out there that cold night all alone with his lifeless body dangling on the edge of the bridge.

A couple hours later a passerby, a lady who was driving by and she sees Jeremy. She just sees what she thinks is a body. Law enforcement is called. They come out to the scene and they see this man with his face covered with a pool of blood around him. They also see bloody footprints near the body. They see some blood on the railing of the bridge. It looks like maybe somebody had stuck their hand in the blood. Bloody fingerprints suggesting that somebody bracing himself on the bridge, shoving Jeremy trying to get him to go through. They begin their investigation. Tony Jordan over the next few days attempts to hide the murder weapon, the clothes he was wearing and makes false statements to law enforcement and friends and family. Ultimately the officers are able to develop Mr. Jordan as the suspect. They arrest him and he gives a ultimately give a statement admitting he shot the victim.

Much of the state's theory of the case additionally comes from the evidence set forth within the argument before this Court.

The evidence

On November 12, 2013, Shantera Brown and John N. Napier discovered the body of the victim, Jeremy Jordan, on a bridge around 12:02 am. Tr.p. 130-137. His body was found with a sweatshirt hood over his face. Tr.p. 140. The Coroner, James R. Ashley was called to crime scene and, after investigators were finished, sealed Victim in a body bag and sent him to Anderson County Morgue. He states that soon after, he received a call from Appellant stating that his son was missing. Tr.p. 263-267. Ashley states that he told Appellant that his son had

been killed - shot in the head. He states that Appellant responded with: "in the head? Tr.p. 266-267.

The Appellant, the victim's father had initially reported that his son was missing. In an interview with Investigator Melissa Skipper Wallace of SLED, they were able to identify the victim as the Appellant's son. On November 12, Appellant came to the Sherriff's Office and was interviewed again and he described problems he had with Jeremy. Tr.p. 203-207. He claimed that Jeremy was not paying his bills and unable to keep a steady job. Tr.p. 203, 207. Appellant told Wallace that he had owned a firearm, but claimed he sold it in the past to an unidentified person. Appellant claimed to her that he and Jeremy were the only ones who drove the vehicle and asserted that Jeremy had cleaned out the vehicle weeks. As to the weapon, Appellant claimed that he last fired it about a month prior. Tr.p. 204. As to the day of the incident, Appellant claimed that he got up at 4:30 to shower, walked the dog, went to the hospital for blood work, went to Lynn's Café for breakfast and returned to the hospital for an additional test, returned to Lynn's where he approached officer about Jeremy being missing. Tr.p. 204-205. He claimed that Jeremy had driven the vehicle three times on the 11th. Tr.p. 206.

In a subsequent interview with SLED Agent Wallace, the Appellant admitted shooting the victim. Tr.p. 217-226.[1]

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[1] SLED Agent Wallace testified that that Defendant drafted the statement after being *Mirandized.* The statement articulates various grievances Defendant had against Victim, his son, who he says cheated and stole and was constantly in need of his and his daughter's support. In the statement, as read by Wallace, Defendant admits to getting into an argument with Victim during a car ride and, once stopped, shooting Victim after he cursed and took a swing at him. Tr.p. 217-224.

Defendant gave an additional oral statement, in which he disclosed the location of the murder weapon and the clothes he was wearing (admitting to previously lying about which clothes he had worn) when he shot Victim. Wallace states that Defendant stated that he didn't usually keep a round in the chamber of his gun, but he didn't have to chamber a round when he shot Victim. She testifies that Defendant also stated that he smashed Victim's phone so it wouldn't ring and that Victim gurgled blood after he was shot. Wallace states that Defendant told her

After that information, law enforcement was able to locate clothes and shoes that Appellant wore that night and the victim's smashed cell phone. Tr. p. 226-230.

The Pathologist testified that the victim's apparel and tattoos when he examined him. He stated that there was a gunshot wound to the back of his head. Tr.p. 272. He explained that the gun was close to Victim when it shot him, but not touching his head. Tr.p. 272-274. He states that based on the pattern produced by the gases emanating from the blast of the gun, he believes the shot to have been fired "execution style." He describes a picture of the entrance wound for the Jury. He states that Victim had bruises and scrapes on his face. Woodard states that the skid marks on Victim's face and bruises on his ankles suggest that this is how he was dragged. Tr.p. 276-277.

Officer John Shrier , is a police officer with the Abbeville City Police Department. The day after the shooting, Shrier saw Defendant at the Hickory Point gas station and Appellant asked him whether the police had located his son. He says that Appellant told him a story about waking up and not seeing the victim sleeping on the couch. He states that several hours later, Appellant spoke to police again at a café. Shrier states that Defendant stated that the victim had not used Facebook since 9:00 am the past day. Tr.p. 284-290.

Officer Eric Prince with the Abbeville City Police Department stated that he saw Appellant at the Hickory Point gas station on November 12, 2013 around 4:30 where Appellant asked him if police had seen his son. Tr.p. 291. He states that Appellant told him that sometimes Jeremy went on walks and that he had been having child support problems. He states that he then saw Appellant later at Lynn's Café, where Appellant was eating breakfast and stated that the

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that the gun was in a toy box and the smashed phone in a creek and he was wearing green and black Nike shoes when he shot him. Tr.p. 225-226.

victim had not called or posted on Facebook. Officer Prince stated he had learned the name Ashton which was tattooed on the body at the bridge. Tr.p. 292. Appellant stated to him at the café that about his son's children and learned that he had a child named Ashton. Tr.p., 292-293. Officer Prince stated that later that morning, Audrey Todd called him about her concerns about the case and he then called the Sheriff's Department. Tr.p. 294. [2]

[2] Angela Schoch is Victim's mother and Appellant's ex-wife. She testified that her former phone number was 239-896-6412. Tr.p. 305-309.

ARGUMENT

I. The trial judge did not abuse his discretion in admitting relevant text messages obtained by law enforcement pursuant to a search warrant of the Appellant's cell phone records from Verizon Wireless. The text messages were admissible under the Uniform Business Records as Evidence Act, S.C. Code Ann. §19-5-510 exception to the hearsay rule and Rule 803(6) of the South Carolina Rules of Evidence.

a. A number of the text messages were not "hearsay" inasmuch as they were not introduced for the truth of the matter asserted but to show either the effect on the hearer or pretext by a false statement.

b. Further, any alleged error in the admission is non-prejudicial where evidence of similar nature about critical text messaging were presented by the recipients of the texts from the Appellant – Audrey Todd, Krystal Collins and Samantha Clinkscales.

In the appeal before this Court, Appellant Tony Jordan asserts that he is entitled to a new trial because the prosecution introduced, over his objection as hearsay, evidence of text messages sent and received by Appellant's cell phone with the Jeremy Jordan (the victim). Jeremy's mother, Appellant's girlfriend and Appellant's daughter. He contends that the content of text message were inadmissible as hearsay. The State asserted at trial that the text message evidence was admissible as a business records pursuant to the Uniform Business Records as Evidence Act, S.C. Code Ann. §19-5-510 as an exception to the hearsay rule and the South Carolina rules of evidence, Rule 803(6), SCRE. App. 336-337. Judge Eugene Griffith, after an in camera proceeding, admitted the evidence of the text messages under the business record exception. Tr.p. 344-345. The evidence was then admitted a State Exhibit #98. Tr.p. 348. ROA _. State Exhibit #98. ROA _-_. Respondent submits that the trial judge did not abuse his discretion in the admission. The appeal is without merit and must be dismissed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson,* 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001); *State v. Wood,* 362 S.C. 520, 525, 608 S.E.2d 435,

438 (Ct.App. 2004). We are bound by the trial court's factual findings unless they are clearly erroneous. *See State v. Abdullah,* 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct.App. 2004) ("On appeal from a suppression hearing, this court is bound by the circuit court's factual findings if any evidence supports the findings."). "This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." *Wilson,* 345 S.C. at 6, 545 S.E.2d at 829. The admission or exclusion of evidence is left to the sound discretion of the trial judge. *State v. Gaster,* 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error, which results in prejudice to the defendant. *State v. Hamilton,* 344 S.C. 344, 353, 543 S.E.2d 586, 591 (Ct.App. 2001), *overruled on other grounds by State v. Gentry,* 363 S.C. 93, 610 S.E.2d 494 (2005). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Pittman,* 373 S.C. 527, 570, 647 S.E.2d 144, 166–67 (2007).

All relevant evidence is admissible. *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000); Rule 402, SCRE. Under Rule 401, SCRE, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. *State v. King*, 349 S.C. 142, 561 S.E.2d 640 (Ct.App. 2002); see also Rule 401, SCRE (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); *In the Matter of the Care and Treatment of Corley*, 353 S.C. 451, 577 S.E.2d 451 (2003) (evidence is relevant if it tends to establish or make more or less probable the matter in controversy).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; *see also State v. Cooley*, 342 S.C. 63, 536 S.E.2d 666 (2000) (although evidence is relevant, it should be excluded where danger of unfair prejudice substantially outweighs its probative value). A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. *State v. Hamilton*, 344 S.C. 344 at 357, 543 S.E.2d 586 at 593 (Ct. App. 2001) *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).. The appellate court's review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment. Id. at 358, 543 S.E.2d at 593. *See Aleksey*, 343 S.C. at 35, 538 S.E.2d at 256 (trial judge is given broad discretion in ruling on questions concerning relevancy of evidence, and his decision will be reversed only if there is a clear abuse of discretion).

HOW THE ISSUE WAS RAISE RAISED BELOW

Pretrial Hearing

The Appellant initially made a pretrial motion concerning the admissibility of text messages from the Appellant's cell phone. Tr.p. 94-109. Appellant contended that the binder of text messages recovered were inadmissible as hearsay and claimed they did not fall within any recognized rule. Tr.p. 94, l. 10-20. Appellant further asserted the messages were not relevant because they do not go to any element of the crime. Tr.p. 94, l. 21-24. Appellant contended that the State's assertions about relevance of the messages was speculation where the messages occurred from a week prior to the incident to the day after the incident. Appellant stated these are not relevant and hearsay without an exception. Tr.p. 95, l. 6-12.

The prosecution urged that the text messages were relevant was because the messages show the crime was premeditated. Tr.p. 96, l. 10-15. Solicitor Brown contended that the appellant knew what he was planning on doing. Particularly He asserted that there was a text to his ex-wife where he describes going back in time 26 years to August 1987 when they were in the doctor's office at Myrtle Beach when she found out she was pregnant with Jeremy and he say "and you asked me if this is Mark's baby would you still love me?" and then the day before the Jeremy's death he's texted his ex-wife, "well, is this Mark's or mine." Tr.p. 96, l. 16-23. Solicitor Brown also noted where he sends texts to Audrey Todd. Brown pointed out another text to "let me know if its Jeremy of Crystal that has the problem – if its Jeremy or Crystal, that problem is solved" on the morning before the death and messages to people on the morning of the 12th on whether they had seen Jeremy and that he's missing.. Tr.p. 97, l. 1-6. Solicitor Brown urged that it was relevant and reflected he was trying to cover up his tracks. Tr.p. 97, l. 11-15.

Solicitor Brown urged that the texts are between different people, but were primarily initiated by Appellant, reflective of the frame of mind he was in. An example was a couple days before the 11th (when the murder occurred) where Audrey Todd had heard Jeremy talking about her son's murder case. Todd sends a text to Appellant and asserts that she heard that Jeremy and Crystal were talking about her son's case and "we don't need to have any obstacles or anything in the way of his defense" and that "it could jeopardize his defense" and Appellant responds: "that makes me mad as hell. His ass is mine" and then later sends a text that if the problem is Jeremy of Crystal "that problem is solved." Tr.p. 97, 19- p. 98, l. 13.[3]

[3] Admissible as nonhearsay admissions by a party-opponent. See Rule 801(D)(2), SCRE.

Counsel Bolen for the Appellant disputed that claim of relevance of the text messages asserting the witnesses who sent the texts, not the state should declare what they mean. Tr.p. 99, l. 10-15. She point out the text about Jeremy or Crystal and "the problem is solved" was sent about 12 hours before the incident. Tr.p. 99, l. 16-20. She asserted that there was nothing sent by her client is the messages that suggested a threat or an indication that he was planning to do anything to the victim or anyone else. Tr.p. 99, l. 19-25.

Solicitor Brown stated that it was their intent to get the custodian or a law enforcement agent to read the messages once they were introduced as a business record. Tr.p. 100, l. 11-15.[4] Counsel Bolen contended that they wanted this addressed pre-trial because they did not want the State to address the texts in their opening statement. Tr.p. 102, l. 8-13.

Judge Griffith stated that he would defer ruing on the texts message issue until they were introduced during the trial. However, he urged that the State stay away from them in their opening and just argue generically. Tr.p. 108, l. 13-24.

The Trial

During the trial, the State called Jennifer Dalmida, the records custodian for Verizon Wireless initially before the jury. She stated that she received a search warrant for the cell phone number 864-554-8876.[5] Tr.p. 334. She stated that records are kept electronically through a computer database. She said the records kept are of calls made or received in the network, text messages sent and received, text content, cell tower information and web pages accessed. Tr.p.

[4] During the trial, these were read by the Verizon Wireless custodian, Jennifer Dalmida.

[5] Investigator Melissa Wallace Skipper of SLED testified that Appellant had told her that his cellphone number was 864-554-8876. Tr.p. 197, l. 15-18. The Appellant during his interview with law enforcement also gave them the victim's cellphone number. (864-378-1744). Tr.p. 197, l. 14).

334, l. 7-13. She stated that text messages are kept for approximately 3 to 5 days by Verizon after being sent but could go up to 10 days based upon capacity. She testified the records reflect the actual date and time that the message was received and sent on our network.

She identified State Exhibit #98 as all the text content from November 7, 2013 through November 12, 2013 for that number belonging to the Appellant. Tr.p. 335, l. 9- p. 337, l. 17. She testified that Verizon has designated text switches that only handle text messaging traffic. She stated that once they receive an order for a specific subscriber telephone number, Verizon goes to those switches individually and pull the information in the timeframe. Tr.p. 336. The information Verizon keeps includes the number who originated the message, the number who received the message, the time the message was sent, and the actual context of the message. Id. She stated that these are messages kept in the ordinary course of business. Tr.p. 336, l. 5-17.

Solicitor Brown then moved State Exhibit #98 into evidence under the business records exception. Tr.p. 337, l. 15-19.

In Camera Proceeding

Counsel Bolen objected to the introduction of the text messages as hearsay and urged that it did not fall within any hearsay exception. Tr.p. 338, l. 2-5. The Appellant conceded that the log of incoming and outgoing calls or text messages would fall within the Uniform Business as Evidence Act exception, but asserted that the actual texts did not. Counsel contended that messages not sent by Appellant would be hearsay, as well as messages sent by him. She

generally contend (without specification) that they did not fall within a party-opponent rule [6] and under a Rule 403 analysis were not relevant. Tr.p. 338.

Counsel asserted that the text messages, some which were sent four days prior to the crime, were not admissions of anything. She contended if so, this would open up anything anyone said as being admissible. Tr.p. 339, l. 1-10.

Counsel rejected the business records exception argument, contending no South Carolina law was on point based upon the developing area of technology. Tr.p. 339, l. 11-16. She opined that other states had rejected it and contended that in *U.S. v. Cone*, 714 F.3d 197 (4th Cir. 2013) concerning business emails and content as falling outside of the exception since the content of the text message is inadmissible hearsay. Tr.p. 340.

The State contended that the text message compilation exhibit fell within the exception to the hearsay rule for as regularly conduct activity of Verizon Wireless and the individual text content are kept in the regular course of business by Verizon. He urged under the rule, it was data compilation of the date something was sent, the originating and receiving numbers and the texts. Tr.p. 342, l. 11-18. The State stated that it squarely fits within Rule 803(6) and Rule 901(6), SCRE concerning telephone as authentication. Tr.p. 343, l. 3-9.

Counsel Bolen responded that Ms. Dalmida testified that although logs are kept, the actual text content is kept for a lesser period of up to three to five days. Tr.p. 343, l. 10—18,. She contended that this supported her position that Verizon did not keep the item in the regular course of business. Tr.p. 343, l. 12-18. Counsel Bolen closed by contrasting the issue with the limited admissibility of medical records because they are hearsay. Tr.p. 344, l. 5-9.

[6] This reference concerns admissions by a party–opponent as non-hearsay, not Rule 403.

Judge Admits Exhibit Under Rule 803 (6) and 901(6)

Judge Griffith admitted State Exhibit #98 over objection and as business record exception to hearsay under Rule 803(6) and alternately as self-authentication of a telephone call under Rule 901(6). In his oral order, he concluded:

> Basically my understanding of the rules, the records kept in the ordinary course of business for Verizon Wireless is what Ms. Dalmida has testified to. That is regularly kept in Verizon's business. She is the records custodian and has provided the number of the Defendant. I think there is an exception. The hearsay as a business record. I think they can probably be admitted also under the context under self-authentication. The body is kept. It's a record, although a temporary record. It can be admissible. The book has a full compilation of the numbers.

Tr.p. 344, l. 14-24.[7]

The Evidence before the jury

Evidence of the content of the text messages was presented to the jury through Ms. Dalmida. Dalmida testified that the records indicate all messages sent and received by the number 864-554-8876 (Defendant's number). Dalmida testified that the summary accurately reflected the content of the original messages. She read a text from Defendants number to 864-828-3554 (Samantha Clinkscales, Appellant's daughter). The text states: "**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. This stuff is really weighing on Audrey, but I'm still right with her. I have been thinking that if we are still doing good by Christmas 2014 I'm**

[7] In his Initial Brief of Appellant, the Appellant does not specify any particular "text message" in his argument that he has issue with. State Exhibit #98 includes numerous communications between the Appellant and other persons. Many of the messages discussed at trial were allegedly sent by Appellant , and so were admissible as nonhearsay admissions by a party-opponent. See Rule 801(D)(2), SCRE. Messages referencing many items were admitted not for the truth of the matter asserted, but to give context to Appellant's responses. As such, they were not hearsay. See Rule 801(C), SCRE. Other messages in the records presented to the jury were arguably inadmissible hearsay (absent SCRE Rule 803(6) and the business records act), but their admission was harmless in light of the overwhelming evidence of Appellant's guilt. Many of the messages in State Exhibit #98 were introduced only for context but not for the truth of the matters asserted and are therefore not hearsay.

going to ask her to marry me. That will be over a year." The text was sent 11/8/2013 at 8:32. Tr.p. 350, l. 20- 351, l. 14. State Exhibit 98, p. 21.[8]

The next message is from Defendant's phone to 864-391-1443 (Audrey Todd). It states: **"Our problems are my problems. I here for you, baby. I love you."** Tr.p. 352, l. 3-4. State Exhibit 98, p. 44. The next text was sent from 864-391-1443 to Defendant's phone on 11/8/2013 at 17:53. It stated: **"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 is going to be detrimental to Drew's defense. I can't have any obstacles helping my son."** Tr.p. 353, l. 13-16; State Exhibit 98, p. 61, 64. The next text come from Defendant to 864-391-1443, sent 11/8/13 at 17:55. It stated: **"Baby, I told Jeremy nothing. What is he telling?"** Tr.p. 354, l. 2-3.

Dalmida reads the next text sent on 11/8/2013 from Defendant to 864-391-1443 (Todd) at 18:01. It reads: **"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."**[9] Tr.p. 354, l. 13-15; State Exhibit 98, p. 49.

The next text was sent on 11/8/13 at 19:03 from Defendant to 864-391-1443. It states: **"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, l. 17-20; State Exhibit 98, p. 24. [Relevance objection, Tr.p. 355, ll. 22-25].

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[8] Respondent notes that no specific objection was presented to the testimony of Ms. Dalmida as to any particular text message as hearsay when it was introduce. However, at one point, counsel for the Appellant generally objected to an admission "under relevance." Tr.p. 355, l. 22-25.

[9] Admissible as nonhearsay and admissions by a party-opponent. See Rule 801(D)(2), SCRE.

The next text was sent on 11/8/2013 at 19:18 from Defendant to 864-378-1744 (victim Jeremy's telephone number). It states: **"When you see Crystal get my house key. If you all ain't together she don't need a key."** Tr.p. 356, l. 10-12; State Exhibit 98, p. 41. The next text, sent from 864-378-1744 to Defendant on 11/8/13 at 19:19, reads: **"Okay, LOL. You going to start treating her like you do Kelsy just cause we're having an argument."** Tr.p. 356, l. 21-22; State Exhibit 98, p. 42. The next text, sent from Defendant to 864-378-1744 on 11/8/13 at 19:22, reads: **"No. If you all going to be together she can keep the key. Why would she need it if you all ain't together."** Tr.p. 357, l. 7-8; State Exhibit 98, p. 51. The next text, sent from 864-378-1744 to Defendant on 11/8/13 at 19:23, states: **"Then give us a chance to see what we're going to do. I mean, we've been together two years."** Tr.p. 357, l. 18-19; State Exhibit 98, p. 57. The next text, sent from Defendant to 864-378-1744 on 11/8/13 at 19:27, reads: **"Whatever, fool."** Tr.p. 358, l. 4; State Exhibit 98, p. 58.

The next text, sent on 11/9/13 at 20:55 by Defendant to 864-391-1443 (Audrey Todd), states: **"Baby, as you know, I don't believe in apologizing when I do something wrong. I believe in making it right and trying not to let it happen again. I guess . . . "Here for a moment. I was being very selfish and just thinking about my feelings. I will try not to let it happen again. No promises though. It is very hard." When I love someone as much as I love you. But anyway, I going to take Zoe for one of our very long walks and then I'm going to bed. Just please remember I'm here if you need me. Text or call when you want to. I love you very much. Good night. Hope you all have a good night. I love you."** Tr.p. 360, l. 8-18; State Exhibit 98, pp. 84, 73, 73, 85.

Dalmida reads the next text, sent on 11/9/13 at 21:23 from Defendant to 864-391-1443 (Todd), stating: **"Please remember you don't have to do this by yourself. Like I said the**

other day, your pain, my pain. I love you very much, and when you hurt I hurt, so please Let me help. IDK if maybe the other men that were in your past life didn't believe the way I do, or didn't love the way I do. Maybe I'm wrong and just don't know how to love. I don't know. But I'm here if you need me. I love you very much." Tr.p. 361, l. 23-362, l. 5; State Exhibit 98, 74.

The next text, sent on 11/9/13 at 23:13 from Defendant to 864-391-1443 (Todd), states: **"Honey, I want to be your rock. I got you a shoulder to cry on. I want to be the one that holds you up. I got to thinking while I was walking maybe I don't know how to love. I do know one thing. I never thought I could ever have feeling like I did for my first wife, and this time I don't those feelings can't compare to the strong feelings I have for you. I have never felt like this before. At first it scared the hell out of me and maybe I ain't never been scared one of nothing. But I know this is true love. I just hope I know what to do with it. I have never been so in love that it makes me silly. I love you."** Tr.p. 363, l. 17-364, l. 2; State Exhibit 98, pp. 76, 75, 76, 75.

The next text, sent on 11/10/13 at 8:26 from Defendant to 239-896-6412 (ex-wife Angela Schoch)[10], states: **"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, l. 25- p. 365, l. 5; State Exhibit 98, pp. 112, 12,

[10] Angela Schoch testified this was her telephone number. Tr.p. 307, l. 6-14).

The next text sent on 11/10/13 at 8:32 from Defendant to 864-828-3554 (Clinkscales), states: **"Normal number of weeks pregnant, 40. What?"** Tr.p. 365, l. 13; State Exhibit 98, p. 113. The next text sent on 11/10/13 at 9:29 from 864-828-3554 to Defendant states **"Why?"** Tr.p. 365, l. 17; State Exhibit 98, p. 121. The next text sent on 11/10/13 at 9:30 from Defendant to 864-828-3554, states: **"Just wondering."** Tr.p. 365, l. 21-22; State Exhibit 123. The next text sent on 11/10/13 at 9:31 from 864-828-3554 to Defendant, state: **"Who was saying they're pregnant."** Tr.p. 366, l. 1-2; State Exhibit 98, p. 113. The next text sent on 11/10/13 at 9:33 from Defendant to 864-828-3554, states: **"Nobody."** Tr.p. 366, l. 6; State Exhibit 98, p. 115. The next text sent on 11/10/13 at 9:38 from 864-828-3554 to Defendant, states: **"Then why you asking."** Tr.p. 366, l. 10-11; State Exhibit 98, p. 128. The next text sent on 11/10/13 at 9:40 from Defendant to 864-828-3554, states: **"Never mind, honey. I'll just take somebody that knows."** Tr.p. 366, l. 14-15; State Exhibit 98, p. 121. The next text sent on 11/10/13 at 9:42 from 864-828-3554 to Defendant, states: **"It's 40 weeks."** Tr.p. 366, l. 19; State Exhibit 98, p. 115-116. The next text sent on 11/10/13 at 9:43 from Defendant to 864-828-3554, states: **"Thank you very much."** Tr.p. 366, l. 23; State Exhibit 98, p. 121. The next text sent on 11/10/13 at 9:44 from 864-828-3554 to Defendant, states: **"Chloe was two weeks early and she was 38 weeks, so that would mean 40 is full term."** Tr.p. 367, ll. 2-4; State Exhibit 98, p. 128-129. The next text sent on 11/10/13 at 9:47 from Defendant to 864-828-3554, states: **"Okay, thank you."** Tr.p. 367, l. 8; State Exhibit 98, p. 124.

The next text was sent 11/10/13 at 9:49 from 864-828-3554 (Clinkscales) to Defendant, stating: **"Welcome. Now will you tell me why you needed to know."** Tr.p. 367, l. 12-13; State Exhibit 98, p. 123. The next text sent on 11/10/13 at 9:50 from Defendant to 864-828-3554, states: **"No."** Tr.p. 367, l. 12-13; State Exhibit 98, p. 116. The next text sent on 11/10/13 at 9:53

from 864-828-3554 to Defendant, states: **"Why not?"** Tr.p. 367, l. 21; State Exhibit 98, p. 129. The next text sent on 11/10/13 at 9:54 from Defendant to 864-828-3554, states: **"No need to. Just thinking about something that happened over 25 years ago. That's all."** Tr.p. 367, l. 25- p. 368, l. 2; State Exhibit 98, p. 122.

Ms. Dalmida reads the next text message sent on 11/10/13 at 9:56 from 864-828-3554 (Clinkscales) to Defendant, stating **"With Jeremy? Or another kid?"** Tr.p. 368, l. 6, 10; State Exhibit 98, p. 122, 129. The next text sent on 11/10/13 at 9:59 from Defendant to 864-828-3554, stated: **"Why does it matter. It's nothing. You all have a good day."** Tr.p. 368, l. 14-15; State Exhibit 98, p. 114. The next text sent on 11/10/13 at 10:03 from 864-828-3554 to Defendant, stating **"Obviously it is bc you're asking about it."** Tr.p. 368, l. 19-20; State Exhibit 98, p. 116. The next sent on 11/10/13 at 10:04 from Defendant to 864-828-3554, stating: **"Just happened to think about. That's all. Too much time on my hands I guess."** Tr.p. 368, l. 22-25; State Exhibit 98, p. 116-117. See Tr.p. 369, l. 4-17.

The next text sent on 11/11/13 at 6:47 from Defendant to 864-391-1443 (Audrey Todd) , states: **"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've always been a fighter. Not a quitter."** Tr.p. 370, l. 9-13; State Exhibit 98, p. 137. The next text sent on 11/11/13 at 6:47 from Defendant to 864-391-1443, states: **"Now do you 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 are going to make it though. This wish we could do it together. I'm here. You're going to have to kick my ass to the curb. Please. I understand but can help if you will let me. Please. If have done something wrong please let**

me know. Is it Jeremy or Crystal. That problem is solved.[11] **So baby please talk to me. You said the other day that you didn't feel right being happy with all that is going on. Do the girls feel about. Just remember, I'm here and I ain't leaving. You pain, my pain. I love you, baby."**[12] Tr.p. 371, l. 25- p. 372, l. 15; State Exhibit 98, p. 137,136, 136-137, 135-136, 136 141-142.

The next text sent on 11/11/13 at 6:54 from 864-391-1443 (Todd) to Defendant, states: "**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, l. 19- p. 373, l. 1; State Exhibit 98, p. 151, 137.

The next text sent on 11/11/13 at 7:00 from Defendant to 864-391-1443 (Todd), states: **"Honey, I understand. I just need to know that you still love me. I ain't going nowhere. I'm not asking for you time, just for your feeling. I love you very much. I'm here with you need me. A text what every just as long as I know you still care. I love you.**" Tr.p. 373, l. 3-14; State Exhibit 987, p. 138, 137. The next text was sent on 11/11/13 at 7:02 from Defendant to 874-391-1443, stating: **"Oh, and you didn't fail Drew and you've done all you could. I love you."** Tr.p. 373, l. 18-19; State Exhibit 98, p. 140, 141. The next text was sent 11/11/13 at 7:23 from Defendant to 864-391-1443, stating **"Okay. I need a promise. When you are ready you will tell me. I'm going to text you three to four times a day to let you know I'm here and I love you. That will be okay. Right?"**[13] Tr.p. 373, l. 23 – p. 374, l. 1; State Exhibit 98, p. 142.

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[11] Admissible as nonhearsay admissions by a party-opponent. See Rule 801(D)(2), SCRE.

[12] Not hearsay since not for the truth of the matter asserted. Rule 801 (c) (hearsay definition). Also, See Rule 801(2).

[13] Not hearsay since not for the truth of the matter asserted. Rule 801 (c) (hearsay definition). Also, See Rule 801(2).

The next text sent on 11/12/13 at 4:32 from Defendant to 864-554-8876 (Krystal Collins), states: **"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."**[14] Tr.p. 374, l. 6-10, State Exhibit 98, p. 161.[15] The next text sent on 11/12/13 at 4:55 from Defendant to 864-828-3554, states: **"Good morning. Call me when you get this. Your brother ain't at the house."**[16] Tr.p. 374, l. 14-15; State Exhibit 98, p. 153. The next text sent on 11/12/13 at 5:55 from 864-378-3104 (Collins) to Defendant, states: **"Does he has the Jeep?"** Tr.p. 374, l. 19; State Exhibit 98, p. 161-162. The next text sent on 11/12/13 at 5:59 from 864-378-3104 to Defendant, states: "**You going to do a missing person thingy or just wait on him to come home**?" Tr.p. 374, l. 23-24; State Exhibit 98, p. 162. The last text presented by the State was sent on 11/12/13 at 6:01 from Defendant to 864-378-3104, stating: **"No."** Tr.p. 375, l. 3; State Exhibit 98, p. 162.[17]

Similar Evidence Presented from Recipients Todd, Clinkscales and Collins

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[14] Admissible as nonhearsay admissions by a party-opponent. See Rule 801(D)(2), SCRE. Pretext text message – not hearsay since not for the truth of the matter asserted. Rule 801 (c) (hearsay definition).

[15] Pretext text message – not hearsay since not for the truth of the matter asserted. Rule 801 (c) (hearsay definition). Also, See Rule 801(2).

[16] Pretext text message – not hearsay since not for the truth of the matter asserted. Rule 801 (c) (hearsay definition). Also, See Rule 801(2).

[17] During the cross-examination of Ms. Dalmida, the defense presented additional texts. Tr.p. 375-378. Defense reads a text sent on 11/8/13 from Defendant to 864-554-8876, stating: **"Need to go to West Carolina and get Ashton unless you all want to get Ashton for me."** Tr.p. 375-376. Defense then reads a text sent on 11/8/13 at 12:04 from 864-554-8876 to Defendant, stating: **"Okay, I'll see."** Tr.p. 376, l. 1-2. The next text Defense reads was sent on 11/08/13 at 9:39 from Defendant to 864-828-3554, stating: **"Hey, baby girl. I'm fixing to go get your brother a biscuit. Would you like me to get you one?"** Tr.p. 376, l. 9-11. The Defense next reads a text from 11/07/13 at 16:26 from Defendant to 864-828-3554, stating: **"We were right. Crystal shit him not giving money for child support. That means jail. Went to DSS and filled out papers to get him for child support."** Tr.p. 376, l. 20-23. Defense reads a text sent on 11/11/13 at 6:49 from Defendant to 864-391-1443, stating: **"Kick my ass to the curb. Please, I understand, but can help if you will let me. Please. If I have done something wrong please let me know . . . is it Jeremy."** Tr.p. 377, l. 16-20. Finally, Defense then reads a text from 11/11/13 at 6:49 from Defendant to 864-391-1443, stating: **"Is it Jeremy or Crystal? That problem is solved."** Tr.p. 378, l. 1-5.

Audrey Todd testified she once worked with Appellant's daughter (Samantha Clinkscales) and Jeremy's fiancé (Crystal Collins) at the Abbeville Nursing Home. Through this association, she became close friends with Appellant when he came to visit at the nursing home. Tr.p. 442. She states that she would commonly text Appellant. Tr.p. 443. She states her phone number is 864-391-1443. Todd's relationship with Defendant blossomed into a romance by October 31. Tr.p. 443, l. 20-23. However, she stated on November 1, there was a tragic incident with her son and the frequent texts from the Appellant continued. She described receiving over 50 texts from him on November 9 when she was driving from Abbeville to Simpsonville and she asked Jordan to give it time. She stated she wanted to limit contact to her immediate family, including her mother, and her direct family. Tr.p. 444. She asked Jordan to give her time numerous times, because her family was grieving over the November 1 incident. Tr.p. 444, l. 15-24. She described feeling suffocated by the Appellant's constant texting and she tried to shut off communication with him. Tr.p. 444-445.

She confirmed that she sent a text to Appellant asking him if Jeremy had been talking about her son's case. Tr.p. 445. She had learned from her boss who told her that Jeremy had been out to the nursing home and was telling things that had been discussed with her son's lawyer. Tr.p. 445, l. 5-9. At that point she stated she immediately sent a text to Appellant and asked him to please not tell let Jeremy know anything about the case and did not want anything detrimental to it. Tr.p. 445, l. 5-11. She stated that Appellant responded by text "that he was mad and his ass was his."[18] Tr.p. 445, l. 13-16. She said he continued texting up until November 11. Tr.p. 445, l. 17. She stated that she received a text on the morning on November 11 around 6:45 am. She stated: "He sent a text, of course, telling me that he loved me. And he asked if the reason

[18] Admissible as nonhearsay admissions by a party-opponent. See Rule 801(D)(2), SCRE.

I wasn't talking to him, if it was because of what Jeremy or Crystal had said, that problem was solved."[19] Tr.p. 445, 23 – p. 446, l. 1.

She states that she saw on the news Tuesday morning November 12th that a body had been found on the bridge, after she had learned about it through family. Tr.p. 446, l. 6- 17. She stated that she talked with Appellant that day and he told her the Jeremy's body had been found sitting up on the bridge and that someone had murdered him. Tr.p. 446, l. 19-25. Todd described immediately thinking that this was on the way to Crystal Collins, Jeremy's girlfriends house and had a real sick feeling in her stomach and Todd went to her phone and looked through the texts she had received the day before and saw that message about " if the reason you're not talking to me has anything to do with Jeremy of Crystal this is solved."[20] Tr.p. 447, l. 15-16. Todd stated that she then called Eric Prince of the Abbeville City Police Department. Tr.p. 447, 16-22. She stated she told them that she hoped that she was wrong and had watched too many crime shows, but she did not feel good about the text and thought it needed to be shared with them. Tr.p. 447. She stated that she received more text messages from the Appellant until his arrest. Tr.p. 448.

After the arrest, Todd stated that she received a letter from the Appellant. In the letter he stated that for the past year and a half, Jeremy has disrespected, verbally abused and physically abused him. Tr.p. 449-450. He complained in the letter that Jeremy had threatened him and had told him that he would kill him if he did not give him money. In the letter, Appellant described riding to Calhoun Park to visit some people and that he had asked Jeremy to pay him back some money.

[19] Admissible as nonhearsay admissions by a party-opponent. See Rule 801(D)(2), SCRE.
[20] Admissible as nonhearsay admissions by a party-opponent. See Rule 801(D)(2), SCRE.

> Well, that started the cussing. Then I asked him why and what did he do with the $182 he stole. That was Sam's money I had put up. He started telling me fuck you, stop this GD car. Well, I did. He got out. I got out and tried to talk to him. He hit me and pushed me against the car. At that point he bent over to pick up something and I snapped and shot him. Now, without meds I don't sleep. Every time I close my eyes I see him. I wish every day I didn't have that damned gun, but I did. I hope you know that's not me. I don't hurt people. I guess you have heard all the rumors going around. I shot him because he was going with you. I shot him because he was going to testify against Drew. I was connected to the Alex thing. I'm sure there's more. Well, enough of that. Well, you know I don't make it a habit of saying I'm sorry, but I can't make this better, so I'm sorry for putting you through my shit. I never meant for this to happen. I love you and your family very much. Now I guess I'm hated by a lot of people now. I let you and your family and Sam and my family down. Sam and Pam said that they already knew about the abuse by the way I had been acting the last few months. I'm also sorry for Jeremy telling Krystal stuff and her running her mouth. . .

Tr.p. 450-452.

Todd denied that she had ever heard of Appellant describing abuse by Jeremy. Instead, although she knew he was disrespectful, she thought they were "best friends." Tr.p. 452, l. 13-15.[21]

Krystal Collins, the victim's girlfriend stated she was in a relationship with him for over two years before his death and had a child with him. Tr.p. 457-459. She stated her telephone number was 864-378-3104. Tr.p. 458, l. 20. She described after the death of Jeremy, that she received a text on November 12th from Appellant in the early morning with her name misspelled as "Crystal" asking if she had heard from Jeremy and stated that he had not seen him since 10:30 the previous night.[22] Tr.p. 458, l. 23- p. 459, l. 6. She stated that she asked him if the law had picked him up because she knew he had a warrant for child support (for his ex-wife)

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[21] On cross-examination, Todd states that Appellant states in the letter that he is sorry that this ever happened. Todd states that she frequently told Defendant that she loved him via text. She states that Defendant's granddaughter called her "meme," a grandmotherly nickname, and that Defendant's grandchildren thought of Todd as their grandmother. She states that she had a strong relationship with Defendant's daughter, Samantha Clinkscales, and she sought her approval before dating Defendant. Tr.p. 452, l. 22- p. 457, l. 11.

[22] Pretext text message – not hearsay since not for the truth of the matter asserted. Rule 801 (c) (hearsay definition). Also, See Rule 801(2).

out and she asked Appellant of he had the Jeep or would file a missing person report and he said no. Tr.p. 459, l. 10-15. She said when she went to the house , he wouldn't make eye contact with her. She denied that the victim had been physical with her or with his father. Tr.p. 459-460. She stated that Jeremy lived with his father the whole time they were together.

During the defense case, the defense called the appellant's daughter, Samantha Clinkscales. Tr.p. 472-479. She states that Defendant had made comments alluding to his wondering whether Victim was his son or someone else's. Tr.p. 473, l. 12-20. She states that on her daily visits to Defendant's residence, she would see Defendant and Victim frequently arguing. Tr.p. 474. She stated that the arguments were about Jeremy lying about stuff. Tr.p. 474-475. She states that Victim had not been working prior to his murder and had received loans from her which went unpaid. She states that a comment was made during Defendant's treatment for chest pains that made her upset. She states that she has never witnessed Defendant commit a violent act his entire life. Tr.p. 475.

On cross-examination, Ms. Clinkscales stated that her phone number was 864-828-3554. She stated that she does not recall Defendant sending her texts stating that Victim was a "dumb ass fool." Tr.p. 476-477. [23] She states that she recalls Defendant sending her a series of texts asking about the average term for pregnancy - related to his concerns over the victim potentially not being his son. Tr.p. 477-478.[24] She admitted that Appellant lied to her on November 12th. Tr.p. 479.

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[23] Pretext text message – not hearsay since not for the truth of the matter asserted. Rule 801 (c) (hearsay definition). Also, See Rule 801(2).

[24] Not hearsay since not for the truth of the matter asserted. Rule 801 (c) (hearsay definition). Also, See Rule 801(2).

ANALYSIS

The Respondent submit that the trial judge did not abuse his discretion in admitting the evidence of the content of the text messages because he contends it was inadmissible under the Uniform Business Records Act or Rule 803(6), SCRE. Respondent respectfully submits that trial court did not abuse his discretion in its admission of the text message evidence.[25]

South Carolina adopted §19-5-510 of the South Carolina Code, the Uniform Business Record as Evidence Act, prior to the promulgation of the South Carolina Rules of Evidence. The unrepealed statute 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.

S.C.Code Ann. § 19–5–510 (1985). This section gives the trial court control to exclude or require additional proof if the authenticity or trustworthiness of the business record is suspect. *See Kershaw County Dep't of Soc. Servs. v. McCaskill*, 276 S.C. 360, 362, 278 S.E.2d 771, 773 (1981).

Patterned after the South Carolina Act and the Federal Rules, Rule 803(6), SCRE, excepts records of regularly conducted activity from the hearsay exclusion. Excepted records include:

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[25] It is well established that an out-of-court statement by a criminal defendant, if relevant, is admissible as a party admission, under an exception to the rule against hearsay. Many of the reported messages discussed at trial were allegedly sent by Appellant , and so were admissible as nonhearsay admissions by a party-opponent. See Evid.R. 801(D)(2). see also *State v. Espiritu*, 117 Hawai'i 127, 176 P.3d 885, 890–91 (Haw.2008) (holding "actual text messages" from the defendant were admissible under the party admissions exception).

> 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.

Rule 803(6), SCRE.

A business record without evidence about the manner in which it is prepared or the source of its information does not meet the requirements in either §19-5-510 or Rule 803(6), SCRE. *See State v. Sarvis*, 317 S.C. 102, 107, 450 S.E.2d 606, 609 (Ct.App. 1994); *see also Connelly v. Wometco Enterprises, Inc.*, 314 S.C. 188, 191, 442 S.E.2d 204, 206 (Ct.App. 1994) (holding employment file, although relevant and otherwise admissible, was properly excluded from evidence where the employer failed to offer the file through its custodian or another qualified witness); *State v. McFarlane,* 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983) (finding trial court properly refused to admit medical report when no one could testify to the identity, mode of preparation, or whether report was made in the regular course of business at or near the time of the accident). Business record entries must have been made at or near the time of the act to which they relate; the purpose of this mandate is to aid in establishing that the record was honestly and fairly kept. *South Carolina Nat'l Bank v. Jones*, 302 S.C. 154, 155, 394 S.E.2d 323, 324 (1990). See *State v. Rice*, 375 S.C. 302, 330-32, 652 S.E.2d 409, 423-24 (Ct. App. 2007) *overruled on other grounds by State v. Byers*, 392 S.C. 438, 710 S.E.2d 55 (2011). Thus, "

[d]ocuments kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status." *State v. Brockmeyer*, 406 S.C. 324, 343, 751 S.E.2d 645, 655 (2013).

The Appellant before this Court presents three broad and general theories as to why the evidence of the text messages was not admissible. First, he contends that it was not admissible evidence under either §19-5-510 or Rule 803(6) because the text message compilation of the actual text messages, State Exhibit #98, were not made in the regular course of business of Verizon Wireless. He asserts that because the content data is only kept for 3 to 5 days after the customers use it. The Appellant implies that by its limited life of the availability of text message content in the cellular company business records, the data is not therefore "kept" in the regular course of business.[26] He also contrast the content of the text message log as being a different type of business log of telephone number calls and suggests that this makes a difference. Additionally, he contrasts it from the firearm business records the supported admissibility in *State v. Duncan*, 274 S.C. 397, 264 S.E.2d 421 (1980).[27] Finally, he contends that since witnesses also described their involvement on particular text messages with Appellant as a recipient, it unduly emphasized the evidence, which he concedes that State suggested evidence malice and motive. Initial Brief of Appellant, p. 11, 14. For the reasons set forth below, each claim fails.

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[26] See infra; *Chewning v. Com.*, No. 2204-12-4, 2014 WL 931053, at *8 (Va. Ct. App. Mar. 11, 2014); *State v. Blake*, 974 N.E.2d 730, 739–41 (Ohio Ct.App.2012).

[27] In *Duncan*, the court found admissible records maintained by the ATF Division of U.S. Treasury Department to show a Mr. Snow had obtained the pistol from a TG&Y Store, to aid in explaining the testimony that the victim then had obtained the pistol from Mr. Snow. The ATF witness testified that his agency was the custodian of the record in question, that the records were made in the normal course of business and prepared as required by law. The only objection by the defendant was directed toward the fact that the ATF custodian had to obtain the records from his agency's central record center rather than maintaining them in his Greenville office. The Supreme Court held that this does not alter the fact that the ATF Division of the U.S. Treasury maintained the records and that ATF witness custodian witness was an employee of that agency. As such, the Court held was competent to testify from the agency's records. *State v. Duncan*, 274 S.C. 379, 383, 264 S.E.2d 421, 423 (1980).

Text Message Compilations by Wireless Firms Are Admissible As Business Records

The Appellant at trial conceded that the logs made of the text messages logs fit as a business record kept in the ordinary course of business. Tr.p. 338, l. 6-17. No issue is raised either at trial or in the appeal concerning authentication.[28] The text messages within the Verizon Wireless records were properly authenticated under Rule 901(b)(6),901 (b)(9), SCRE. The Appellant does not raise any issue in this appeal concerning whether the text messages were properly authenticated. Evidence before the trial judge revealed that the messages were identified with the cellphone numbers of the Appellant, the victim, Audrey Todd (864-391-1443), Samantha Clinkscales (864-828-3554), ex-wife Angela Schoch (239-896-6412) and Krystal Collins. The Appellant during his interview with law enforcement gave them his cellphone number (864-554-8876) and that of the victim (864-378-1744). Tr.p. 197, l. 3-18).[29] See *Pettibone v. State*, 91 So.3d 94 (Ala. Crim. App. 2011) (cellular telephone records for defendant and his victims were properly authenticated by the State, and, thus, were admissible under the business-records exception to hearsay; customer-service manager at telephone company, who

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[28] An issue conceded in the trial court cannot be argued on appeal. *State v. Jackson*, 364 S.C. 329, 613 S.E.2d 374 (2005)(appellant waived any argument he had when he acquiesced the next morning and stated he would ask witness if he had administered a polygraph and "leave it at that");' *State v. Benton*, 338 S.C. 151, 526 S.E.2d 228 (2000), cert. denied, 530 U.S. 1209 (2000)

[29] *See State v. Harris*, 358 S.W.3d 172 (Mo. Ct. App. E.D. 2011), reh'g and/or transfer denied, (Jan. 23, 2012) and transfer denied, (Mar. 6, 2012) (proof that proffered text messages on a cell phone were actually authored by the person who allegedly sent them may be in the form of admission by the author that he actually sent them, or simply an admission by the author that the number from which the message was received is his number and that he has control of that phone; such proof may even be established by the person receiving the message testifying that he regularly receives text messages from the author from that number, or something distinctive about the text message indicating the author wrote it, such as a personalized signature). Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result, is sufficient to authenticate the result when offered at trial, Rule 901(b)(9). E-mail or text messages may be authenticated through various traditional common law methods. *See generally U.S. E.E.O.C. v. Olsten Staffing Services Corp.*, 657 F. Supp. 2d 1029, 1034 (W.D. Wis. 2009) ("Thus, to authenticate the e-mail, the EEOC need only adduce evidence that the document is an e-mail between Olsten and Main Street, not that the contents of the e-mail are the actual thoughts of the author. Testimony from someone who personally retrieved the e-mail from the computer to which the e-mail was allegedly sent is sufficient for this purpose. *United States v. Hampton*, 464 F.3d 687, 690 (7th Cir.2006) (custodian of record may authenticate).

had access to the records and was able to verify that the records belonged to the company, was a "qualified witness" under the business-records exception based on her experience working at company, manager positively identified that the telephone records in State's exhibits were the telephone records for victim's cell phone, and she testified that the records were made in the regular course of company's business and that it was company's regular practice to make such records).[30]

The Text Message Compilation Satisfies the Business Record Test

Courts have held that electronic compilation of text messages by telephone communications companies satisfy as "records made in the regular course of business." *State v. Blake*, 974 N.E.2d 730 (Ohio Ct. App. 2012) (text messages sent and received by defendant's cellular telephone following shooting were properly authenticated such that admission of printout of messages under business records exception to hearsay rule was not plain error, in murder prosecution; custodian of records testified, providing adequate foundation for the records as a witness with knowledge of the business operations of provider, and stated that the cellular

[30] Jurisdictions across the country have recognized that electronic evidence may be authenticated in a number of different ways consistent with Federal Rule 901 and its various state analogs. Printouts of emails, internet chat room dialogues, and cellular phone text messages have all been admitted into evidence when found to be sufficiently linked to the purported author so as to justify submission to the jury for its ultimate determination of authenticity. *Tienda v. State*, 358 S.W.3d 633, 639 (Tex. Crim. App. 2012). *See also Jackson v. State*, 2009 Ark. App. 466, 320 S.W.3d 13 (2009) (Yahoo instant message conversations); *Bobo v. State*, 102 Ark.App. 329, 285 S.W.3d 270 (2008) (emails); *Hammontree v. State*, 283 Ga.App. 736, 642 S.E.2d 412 (2007) (internet instant message conversation); *Simon v. State*, 279 Ga.App. 844, 632 S.E.2d 723 (2006) (emails); *Ford v. State*, 274 Ga.App. 695, 617 S.E.2d 262 (2005) (internet chat room); *State v. Glass*, 146 Idaho 77, 190 P.3d 896 (App.2008) (on-line conversation); *People v. Chromik*, 408 Ill.App.3d 1028, 349 Ill.Dec. 543, 946 N.E.2d 1039 (2011) (text message); *People v. Downin*, 357 Ill.App.3d 193, 293 Ill.Dec. 371, 828 N.E.2d 341 (2005) (email); *Commonwealth v. Purdy*, 459 Mass. 442, 945 N.E.2d 372 (2011) (emails); *Commonwealth v. Amaral*, 78 Mass.App.Ct. 671, 941 N.E.2d 1143 (2011) (emails); *Kearley v. State*, 843 So.2d 66 (Miss.App.2002) (emails); *People v. Clevenstine*, 68 A.D.3d 1448, 891 N.Y.S.2d 511 (2009) (MySpace instant messages); *State v. Thompson*, 777 N.W.2d 617 (N.D.2010) (text messages); *In the Interest of F.P., a Minor*, 878 A.2d 91 (Pa.Super.Ct.2005) (instant messages); *State v. Taylor*, 178 N.C.App. 395, 632 S.E.2d 218 (2006) (text messages); *Bloom v. Commonwealth*, 262 Va. 814, 554 S.E.2d 84 (2001) (instant messages); *United States v. Gagliardi*, 506 F.3d 140 (2nd Cir.2007) (emails and internet chat room); *United States v. Barlow*, 568 F.3d 215 (5th Cir.2009) (Yahoo instant message conversations); *United States v. Tank*, 200 F.3d 627 (9th Cir.2000) (internet chat room); *United States v. Simpson*, 152 F.3d 1241 (10th Cir.1998) (internet chat room); *United States v. Siddiqui*, 235 F.3d 1318 (11th Cir.2000) (email).

telephone records, including text messages, belonged to a number separately identified as defendant's under Rules of Evid., Rules 803(6), 901(A)); *Long v. Commonwealth*, 2011 WL 6826377, at *2 (Ky. Dec. 22, 2011) ("it is self-evident that cell phone account records are business records "); *State v. Zachary*, 2013 WL 5783388, at *3 (Del. Super. Sept. 23, 2013); *Wilson v. Commonwealth*, No. 2014-SC-000392-MR, 2015 WL 5655524, at *6 (Ky. Sept. 24, 2015) (text messages admissible under hearsay challenge finding Rule 803(6) provides an exception to the prohibition against hearsay for "[r]ecords of regularly conducted activity" and the records in this case were regularly maintained by Cincinnati Bell). *See also United States v. Carr*, 607 F. App'x 869, 876 (11th Cir. 2015) (text messages admitted where records custodian from Metro PCS, explained how the company kept records of the actual content of the text message, the date and time the text messages were sent or received, and the phone number of the individuals who sent or received the messages which were kept in the ordinary course of business). Text messages have been admitted in situations involving a party opponent, or under the exception for business records in Evid.R. 803(6). *See State v. Roseberry*, 197 Ohio App.3d 256, 2011–Ohio–5921, 967 N.E.2d 233 (8th Dist.) (admission of party opponent[31]), and *State v. Blake*, 2012–Ohio–3124, 974 N.E.2d 730 (12th Dist.) (business records exception[32]); *State v. Taylor*, 178 N.C.App. 395, 632 S.E.2d 218, 230–31 (N.C.Ct.App.2006) (holding "printouts or transcripts of ... text messages" were "properly authenticated" by testimony from two Nextel employees about "how Nextel sent and received text messages and how the[ ] particular text messages were stored and retrieved"); cf. *Lee v. Commonwealth*, 28 Va.App. 571, 576, 507

[31] In *Roseberry*, the court of appeals noted that the state could have properly admitted text messages from the defendant through the victim's testimony, "because she was the recipient of the text messages, had personal knowledge of the content, and could [identify] the sender of the messages." Id.

[32] In the context of telephone records admitted under the business record exception, authenticity has been satisfied by testimony from telephone company employees who were custodians of the telephone records. *See Blake*, 2012–Ohio–3124, 974 N.E.2d 730, at ¶ 30. For example, in *Blake*, the custodian of records for the telephone company indicated that its records showed the telephone number of the cellular telephone receiving a text, the telephone number of the party sending the text, and the content and arrival time of the text message. *Id.*

S.E.2d 629, 632 (1998) (holding that the testimony of a company's fraud investigator that he "had knowledge of how [the company's] records were compiled and maintained[ ] and ... had access to those records as an integral part of his responsibilities ... for his employer" was sufficient to support admissibility under the business records exception).

The Appellant contends that the Fourth Circuit decision in *U.S. v. Cone*, 714 F.3d 197, 219-220 (4th Cir. 2013) supports exclusion of the text messages. In that case, the United States Court of Appeals for the Fourth Circuit held that a "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)." Id. at 220 (emphasis supplied); see also *Morisseau v. DLA Piper*, 532 F.Supp.2d 595, 621 n. 163 (S.D.N.Y.2008) ("An e-mail created within a business entity does not, for that reason alone, satisfy the business records exception of the hearsay rule."). The 4th Circuit expressed a concern that emails may be too casual to expect the same degree of accuracy generally attendant to more traditional business records. *Id.* at 219-20 (quoting *It's My Party, Inc. v. Live Nation, Inc.*, Case No. JFM–09–547, 2012 WL 3655470, at *5 (D.Md. Aug.23, 2012)). *Cone* also acknowledged, however, that "[a]s email is more commonly used to communicate business matters both internally and externally ... more formal paper records are becoming more unusual." Id. (citation omitted).

Contrary to the claim of Petitioner, *Cone* reinforces the axiomatic notion that emails should not be treated any differently than any other business record for purposes of Rule 803(6). Just like all other business records, the mere fact that a business record was created for a business entity does not necessarily satisfy the requirements of Rule 803(6)(B) that "the record was kept in the course of a regularly conducted activity of a business" and Rule 803(6)(C) that "making the record was a regular practice of that activity." Although Verizon Wireless custodian Dalmida

used to introduce those text message did not necessarily have personal knowledge of the particular conversation or all subject matter contained therein,[33] for the reasons stated above, the Respondent submits the foundation provided by Verizon Wireless was sufficient for admission under Rule 803(6) where it is uncontradicted that the text messages were kept by Verizon as a part of their business practice for three to 10 days.[34] Further, the Respondent that the Appellant has not identified any specific text message as improperly admitted under the referenced Rule. For that reason, Respondent notes the claim is limited to the general procedure used for admission of the text message. Accord, *United States v. Parnell*, No. 1:13-CR-12 WLS, 2015 WL 3447250, at *9 (M.D. Ga. May 28, 2015).

The Appellant also relies upon the Colorado Court of Appeals opinion in *People v. Glover* relating to FACEBOOK posted comments, which are obviously distinguishable from the text message conversations between Appellant and his ex-wife, daughter and the others, and are not self-authenticating. However, in Glover, the Colorado court of appeals acknowledged that the Facebook records could be admissible if properly authenticated under Rule 901. The Colorado court stated "to establish that a printout contains content from Facebook or another social networking website, courts have relied on testimony regarding how the records were obtained, the substance of the records themselves, and affidavits or testimony from employees of

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[33] Knowledge of the content of the business record is not necessary for admission under Rule 803(6): "To be admitted under [that Rule,] 'the person who actually prepared the documents need not have testified so long as other circumstantial evidence and testimony suggest their trustworthiness.' " *United States v. Parker,* 749 F.2d 628, 633 (11th Cir.1984) (*citing Itel Cap. Corp. v. Cups Coal Co., Inc.*, 707 F.2d 1253, 1259 (11th Cir.1983)).

[34] *See U.S. v. Ferber*, 966 F. Supp. 90, 50 Fed. R. Evid. Serv. 1251 (D. Mass. 1997) (e-mail from a subordinate to his superior recounting a telephone call from non-employee defendant in which defendant inculpated himself, was not a business record just because the e-mail was generated at or by a business; "while it may have been [the employee's] routine business practice to make such records, there was not sufficient evidence that [his employer] required such records to be maintained... [I]n order for a document to be admitted as a business record, there must be some evidence of a business duty to make and regularly maintain records of this type"); *Monotype Corp. PLC v. International Typeface Corp.*, 43 F.3d 443, 41 Fed. R. Evid. Serv. 86 (9th Cir. 1994); Note, When the Postman Beeps Twice: The Admissibility of Electronic Mail Under the Business Records Exception of the Federal Rules of Evidence, 64 Fordham L.Rev. 2285 (1996).

the social networking site" [cites omitted]. *People v. Glover*, 2015 COA 16, ¶ 26, 363 P.3d 736, 741, cert. denied, No. 15SC277, 2015 WL 7987958 (Colo. Dec. 7, 2015). Here, the telephone numbers of the recipients and the defendant's number established the authentication as testified by the Verizon custodian. *See Campbell v. State*, 382 S.W.3d 545, 551 (Tex. Ct. App. 2012) (noting that, as an initial matter of authentication under Tex. R. Evid. 901, "the content of the messages themselves purport to be messages sent from a Facebook account bearing [the defendant]'s name to an account bearing [the victim]'s name"); *Griffin v. State*, 419 Md. 343, 19 A.3d 415, 428 (2011) (One possible method for authenticating a social networking profile is "to obtain information directly from the social networking website that links the establishment of the profile to the person who allegedly created it."). The reliance upon *Glover*, supports the admission of the text messages – not defeat it where the message were properly linked to the Appellant and the other witnesses.

Limited Retention by Verizon Does Not Remove It From Being a Verizon Business Record

The Appellant contends the records in this case are not business records because the content of the text messages is generally kept by the wireless company for 3 to 5 days. Custodian Dalmida testified the records were kept and maintained in the regular course of business. Tr.p. 337, l. 5-14. She testified the records were maintained at Verizon at the switch for text messages. Tr.p. 334. She stated that the records of Verizon concerning the text content were generally available 3 to 5 days but could be as much as 10 days. Tr.p. 334, l. 11-25. Contrary to the assertion of the Appellant, this does not remove the information that was kept by Verizon Wireless for a limited period of time from being a business record. There is no requirement under "business record" rule that the information or item be kept for a certain period of time or in perpetuity to satisfy "records kept in the regular course of business." To the

contrary, it is the fact that the material information was kept in the regular course of business that causes it to satisfy the test, not the length that it is normally kept. This same argument has been rejected in other state courts. *Chewning v. Com.*, No. 2204-12-4, 2014 WL 931053, at *8 (Va. Ct. App. Mar. 11, 2014) (the fact that the evidence established that the records of the text message content would have been kept only three to five days absent a preservation order did not render them unreliable. The record supports a finding that the company used text messaging data for business purposes before the records were routinely automatically "laid over" with new records. As long as the reliability of the records is established, as it was here, the proponent need not additionally prove that the records would have been retained indefinitely or for some finite period longer than three to five days) *Cf. State v. Blake*, 974 N.E.2d 730, 739–41 (Ohio Ct.App.2012) (affirming the admission of text messages under the state business records hearsay exception based on testimony that the company retained those records in the ordinary course of business for about seven days). This argument is without merit.

In *Chewning v. Com.*, No. 2204-12-4, 2014 WL 931053, at *8 (Va. Ct. App. Mar. 11, 2014) the Virginia court addressed an alternative conclusion from its determination of admission of a "computer generated record and concluded that the Verizon Wireless records were admissible under the business records exception, as considered by the trial court, was also proper. Cf. Code § 19.2–70.3(F) (indicating, inter alia, that the records of a "provider of electronic communication service," not including "the contents of electronic communications," are admissible in evidence under the business records exception upon presentation of "an affidavit from the custodian of those ... records ... certifying that they are true and complete and that they are prepared in the regular course of business"). The business records exception permits " 'the admission into evidence of verified regular entries without requiring proof from the

original observers or record keepers.' " *McDowell v. Commonwealth*, 273 Va. 431, 434, 641 S.E.2d 507, 509 (2007) (*quoting Neeley v. Johnson*, 215 Va. 565, 571, 211 S.E.2d 100, 106 (1975)). Business records are admitted as an exception to the hearsay rule because they have a guarantee of trustworthiness and reliability. The business must keep the records in the normal course of its business and make them contemporaneously with the event that generates them. The people who prepare them [or] for whom they are prepared must rely upon the records in the transaction of the business. Finally, admissibility under the business records exception does not require that the records would have been retained for longer than three to five days. *See Blake*, 974 N.E.2d at 739–41.

The Sixth Circuit considered a hearsay objection to computer generated cell phone records in *United States v. Nixon,* 694 F.3d 623, 633–635 6th Cir. 2012). There, the trial court admitted a printout of account information under the business records exception in Federal Rules of Evidence, rule 803(6) where the information was stored in a computer database and a manager ran a query to create a spreadsheet for trial. (*Nixon*, supra, at p. 633.) The Sixth Circuit upheld the admission of the evidence, holding that while the record introduced at trial was not created until a person ran a query of the database, the printout was admissible under the business records exception because the electronic version of the underlying data was created and stored in the regular course of business. (Id. at pp. 634–635; see *U'Haul Intern., Inc. v. Lumbermens Mut. Cas. Co.* (9th Cir.2009) 576 F.3d 1040, 1043 ["evidence that has been compiled from a computer database is also admissible as a business record, provided it meets the criteria of [Fed. Rules Evid.], [r]ule 803(6)"]; *United States v. Fujii* (7th Cir.2002) 301 F.3d 535, 539 ["Computer data compiled and presented in computer printouts prepared specifically for trial is admissible under [Fed. Rules Evid.], [r]ule 803(6), even though the printouts themselves are not kept in the

ordinary course of business."]; *Potamkin Cadillac Corp. v. B.R.I. Coverage Corp.* (2nd Cir.1994) 38 F.3d 627, 632 ["A business record may include data stored electronically on computers and later printed out for presentation in court, so long as the original computer data compilation was prepared pursuant to a business duty in accordance with regular business practice."].)

Consequently, Ms. Dalmida's testimony met the evidentiary threshold required to admit the Verizon Wireless records under the business records exception.[35] She testified about the manner of the production and that the text content was available and kept as a business record. Since the material was reliable as a business record, the trial court properly admitted the items under the business record act and Rule 803(6).

Admissibility of the Verizon Wireless Records as Hearsay Exceptions or Non-hearsay.

The Appellant fails to identify any particular text message that he deems was inadmissible under hearsay rules. An issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory. *In the Matter of the Care and Treatment of McCracken*, 346 S.C. 87, 551 S.E.2d 235 (2001); *State v. Jones*, 344 S.C. 48, 543 S.E.2d 541 (2001); *State v. Cutro*, 332 S.C. 100, 504 S.E.2d 324 (1998)(a one sentence argument is too conclusory to present any issue on appeal); *Solomon v. City Realty Co.*, 262 S.C. 198, 203 S.E.2d 435 (1974).

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[35] See also, *Abdelrahim v. Guardsmark*, No. B207270, 2009 WL 3823283, at *3 (Cal. Ct. App. 2009) (rejecting hearsay challenge to email detailing alleged cause for termination on the ground that email fell within the business records exception because the author regularly wrote emails as part of her job). *See, e.g., State v. Espiritu*, 176 P.3d 885, 891 (Haw. 2008) (rejecting challenge to testimony about deleted text messages allegedly received from defendant, which were admissible as statements of a party, stating that "if evidence is hearsay admissible under an exception to the rule against hearsay, then testimony about such evidence is admissible"); *Funches v. State*, No. 57654, 2012 WL 436635, at *1 (Nev. Feb. 9, 2012) (reviewing challenge to witness's "testimony that he received a text message from another witness stating that [the defendant] and two other people had 'jumped' the victim").

As noted within the factual presentation of the particular items in the testimony (which is incorporated herein by reference) the text messages coming from the Appellant were admissible under different additional theories beyond business records. Hearsay is " 'testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.' " Charles T. McCormick, *McCormick's Handbook of the Law of Evidence* § 246, at 584 (Edward W. Cleary ed., 2d ed.1972)). "Where a human being has input information into computer data banks as records[,] ... there is an 'out-of-court asserter'...." Charles E. Friend & Kent Sinclair, *The Law of Evidence in Virginia* § 15–8, at 945 (7th ed.2012); *see Frye v. Commonwealth*, 231 Va. 370, 386–87, 345 S.E.2d 267, 279–80 (1986) (analyzing records from the Division of Motor Vehicles and National Crime Information Center computer databases, which contained human data input, as hearsay admissible under the business records exception); *Godoy v. Commonwealth*, 62 Va.App. 113, 121 n. 3, 742 S.E.2d 407, 412 n. 3 (2013) (distinguishing facts involving "telephone records [that] were solely computer-generated and had no human input" from "computer records that were at least partially generated by employees" posting data by hand).

It is well established that an out-of-court statement by a criminal defendant, if relevant, is admissible as a party admission, under an exception to the rule against hearsay. Many of the reported messages discussed at trial were allegedly sent by Appellant , and so were admissible as nonhearsay **admissions** by a party-opponent. See Rule 801(D)(2), SCRE. *See also State v. Espiritu*, 117 Hawai'i 127, 176 P.3d 885, 890–91 (Haw.2008) (holding "actual text messages" from the defendant were admissible under the party admissions exception). Examples of the admissions of the party opponent evidence are "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, l. 13-15; State Exhibit 98, p. 49] and "If I have done something wrong please let me know. Is it Jeremy or Crystal. That problem is solved. So baby please talk to me. . . "Tr.p. 371, l. 25- p. 372, l. 15. Further, many of the texts were not excludable as hearsay because they were not introduced for the truth of the matter asserted and were to show context and pretext in the messages. A pretext text message is not hearsay since not for the truth of the matter asserted. Rule 801 (c) (hearsay definition). See SCRE Rule 801(2). An example is the post-killing message between Appellant and Krystal that was non-hearsay. ["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, l. 6-10, State Exhibit 98, p. 161] and with his daughter Samantha Clinkscales ["Good morning. Call me when you get this. Your brother ain't at the house." Tr.p. 374, l. 14-15; State Exhibit 98, p. 153].

Absent specificity about any other particular hearsay claim, Respondent submits the particularize issue to each text is not preserved. Upon admission of the testimony the only claim was a generalized claim of relevance. Tr. 355. This cannot be enough to preserve individual challenges. To preserve an issue regarding the admissibility of evidence, a contemporaneous objection must be made. Failure to object when evidence is offered constitutes a waiver of the right to have the issue considered on appeal. *State v. Wannamaker*, 346 S.C. 495, 552 S.E.2d 284 (2001); *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57 (1996). To preserve an issue regarding the admissibility of evidence, a contemporaneous objection must be made. An objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge. *State v. Johnson*, 363 S.C. 53, 609 S.E.2d 520 (2005)(objection should be addressed to trial court in sufficiently specific manner that brings

attention to exact error); *State v. Dunbar*, 356 S.C. 138, 587 S.E.2d 691 (2003)(party need not use exact name of legal doctrine in order to preserve issue for appeal, but it must be clear that the argument has been presented on that ground).

Further, the evidence of the recipients of the text messages, Audrey, Samantha Clinkscales, ex-wife Angela Schoch and Krystal Collins were not hearsay inasmuch as they were not admitted for the truth of their comments, but offered to show the effect on the hearer – Appellant. *Watson v. Wall*, 239 S.C. 109, 121 S.E.2d 427 (1961). "An out-of-court statement that is offered to show its effect on the hearer's state of mind is not hearsay under Rule 801(c)." *United States v. Thompson*, 279 F.3d 1043, 1047 (D.C.Cir.2002).

Further the pretext statements of Appellant to Collins are admissible to show its falsity is not hearsay under Rule 801(c). *See U.S. v. Costa*, 31 F3d 1073, 1080 (11th Cir. 1994) ("Costa's statement is an obvious attempt to exculpate himself. The government offered the statement not for its truth, which would be absurd since the statement exculpates Costa and the government sought to inculpate him, but rather to show its falsity. By showing, through the introduction of other evidence, that Costa lied to his interrogators, the government sought to create an inference of Costa's guilt"); *U.S. v. Inserra,* 34 F.3d 83 (2nd Cir. 1994); *United States v. Wellington*, 754 F.2d 1457, 1464 (9th Cir. 1985) (alleged hearsay statements are false representations that were made to potential investors are not hearsay because their probative value is independent of their truth and remainder of the alleged hearsay statements are incidental comments)

HARMLESS ERROR

Respondent further submit that the introduction through witnesses at trial about their own text messaging with the Appellant creates harmless error in the admissions from State Exhibit

#98. Respondent incorporates by reference its Brief of Respondent, *infra.*, pages 20-24 setting out a summary of that testimony. "Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." *State v. Sims*, 387 S.C. 557, 567, 694 S.E.2d 9, 14 (2010) (*quoting State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006)). "When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, [the appellate court] will not set aside a conviction for insubstantial errors not affecting the result." *State v. Chisholm*, 395 S.C. 259, 271, 717 S.E.2d 614, 620 (Ct. App. 2011).[36] See, e.g., *United States v. Blackett*, 481 F. App'x 741, 742 (3d Cir. 2012) (deeming apparently erroneous admission of text message "harmless"); *People v. Logan*, No. 303269, 2012 WL 3194222, at *6 (Mich. App. 2012) (ruling that the "text messages [admitted at trial] were hearsay to which no exception applied," but deeming their admission harmless error); *Funches v. State*, No. 57654, 2012 WL 436635, at *1 (Nev. 2012) (agreeing that a text message implicating defendant should not have been admitted, but declaring it "harmless" as defendant admitted the truth of the information on his own). *cf. Commonwealth v. Koch*, 615 Pa. 612, 44 A.3d 1147 (2012), rev'g 39 A.3d 996, 1002, 1006 (Pa. Super. Ct. 2011) (holding that trial court erred in admitting text messages sent from the defendant's phone and granting a new trial); *Jonathan L. Moore, Time for an Upgrade: Amending the Federal Rules of Evidence to Address the Challenges of Electronically Stored Information in Civil Litigation*, 50 Jurimetrics J. 147, 176 (2010) ("[T]he flexibility of the rules to adapt and address the challenges of [electronically stored information] does not necessarily mean that amendments are not needed.... [S]ome of the

[36] *See State v. Rice*, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007) (trial court's error, if any, in admitting business records of defendant's former employer, which tracked weapons and other equipment issued to employees and indicated that defendant's assigned equipment had not been returned approximately one month after victim's murder and defendant's termination from employment, was harmless in murder prosecution; records were merely cumulative to testimony of defendant's supervisors, who confirmed that defendant had not returned her weapon).

changes wrought by technology have no common law analog, making it difficult for judges to resolve them.").

Even assuming arguendo that the content of the text messages was hearsay, harmless error can apply. S*ee State v. Armstead*, 432 So.2d 837, 839 (La.1983) ("[C]omputer printouts which reflect computer stored human statements are hearsay when introduced for the truth of the matter asserted in the statements."), *State v. Salkil*, 820 N.W.2d 159 (Iowa Ct. App. 2012) (the messages themselves were cumulative on the content of the text messages as Border testified that he received a text from Salkil that said "still kicking" and Johnson, too, testified as to the contents of text messages received from Salkil noting the court will not find prejudice in the admission of hearsay evidence if "substantially the same evidence has come into the record without objection").

Here, the text message business record evidence was cumulative to the testimony of recipient witnesses. Audrey Todd testified that she would commonly text Appellant. Tr.p. 443. She described receiving over 50 texts from him on November 9 when she was driving from Abbeville to Simpsonville and she asked Jordan to give it time. She stated she wanted to limit contact to her immediate family, including her mother, and her direct family. Tr.p. 444. She asked Jordan to give her time numerous times, because her family was grieving over the November 1 incident. Tr.p. 444, l. 15-24. She described feeling suffocated by the Appellant's constant texting and she tried to shut off communication with him. Tr.p. 444-445. She confirmed that she sent a text to Appellant asking him if Jeremy had been talking about her son's case after she had learned he had been discussing what had been told to lawyers with others. Tr.p. 445. At that point she stated she immediately sent a text to Appellant and asked him to please not tell let Jeremy know anything about the case and did not want anything detrimental to it. Tr.p. 445, l. 5-

11. She stated that Appellant responded by text "that he was mad and his ass was his." Tr.p. 445, l. 13-16. This was cumulative to the custodian Almida's testimony at Tr.p. 354, l. 13-15; State Exhibit 98, p. 49.

Todd said Appellant continued texting up until November 11. Tr.p. 445, l. 17. She stated that she received a text on the morning on November 11 around 6:45 am. She stated: "He sent a text, of course, telling me that he loved me. And he asked if the reason I wasn't talking to him, if it was because of what Jeremy or Crystal had said, that problem was solved." Tr.p. 445, 23 – p. 446, l. 1. This was cumulative to custodian Almida's text summary testimony at Tr.p. 371, l. 25- p. 372, l. 15. No objection was made to the testimony which is admissible as nonhearsay and an admission by a party-opponent. See Rule 801(D)(2), SCRE.

Similarly, the text message evidence testimony of custodian Almida was cumulative to the testimony of Krystal Collins, the victim's girlfriend. She described after the death of Jeremy, that she received a text on November 12th from Appellant in the early morning with her name misspelled as "Crystal" asking if she had heard from Jeremy and stated that he had not seen him since 10:30 the previous night. Tr.p. 458, l. 23- p. 459, l. 6. She stated that she asked him if the law had picked him up because she knew he had a warrant for child support (for his ex-wife) out and she asked Appellant of he had the Jeep or would file a missing person report and he said no. Tr.p. 459, l. 10-15. This evidence was cumulative to the Almida testimony at Tr.p. 374, l. 6-10, State Exhibit 98, p. 161. No objection was made to this evidence which was admissible to show pretext and was not hearsay since not for the truth of the matter asserted. Rule 801 (c) (hearsay definition). Also, See Rule 801(2).

Further, cumulative evidence was presented in the testimony of the appellant's daughter, Samantha Clinkscales. Tr.p. 472-479. She stated that Defendant had made comments alluding to his wondering whether the victim was his son or someone else's. Tr.p. 473, l. 12-20. She recalled Defendant sending her a series of texts asking about the average term for pregnancy - related to his concerns over the victim potentially not being his son. Tr.p. 477-478. This was consistent with the evidence of the text messages between her and her father presented during Almida's testimony. Tr.p. 367-369. No objection was made by the defense which presented her as a defense witness. Further, the Appellant's comments to her were not hearsay since they were not for the truth of the matter asserted. Rule 801 (c) (hearsay definition). Also, See Rule 801(2).

Since the emphasized evidence within the admitted text messages was cumulative to other evidence admitted at trial without objection, Respondent submits that if error any error is harmless. The Appellant asserts that since some of the text was referred to by witnesses it was some sort of an emphasized hearsay. However, he fails to recognize that none of the emphasized text were inadmissible hearsay. The suggestion that the recipient person' testimony unduly prejudice the defendant is a red herring. For example the impact of the text upon Audrey Todd was the basis that led to her contacting law enforcement and explained her actions. The texts were either non-hearsay because they were not for the truth of the matters asserted or an admission of a party-opponent which is an exception to the hearsay rule. For these reasons, the conviction should be upheld.

CONCLUSION

For all the foregoing reasons, Respondent, the State, submits that the judgment and conviction and sentences of the lower court should be affirmed.

Respectfully submitted,

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Attorney General

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ATTORNEYS FOR RESPONDENT

April 11, 2016

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that a true copy of the Initial Brief of Respondent and Designation of Matter in the above referenced case has been served upon counsel for Appellant by depositing one copy of same in the InterAgency Mail to:

Katherine H. Hudgins, Esq.
Appellate Defender
SCCID/Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, SC 29201

This 11th day of April, 2016.

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ALAN WILSON
ATTORNEY GENERAL

April 11, 2016

Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: The State v. Tony Vernon Jordan
Appellate Case No. 2014-002245

Dear Ms. Kitchings:

Enclosed please find the ***Initial Brief of Respondent*** and ***Designation of Matter***, along with certificate of service, in the above-referenced case. Also, enclosed please find ***Respondent's Motion to file Initial Brief of Respondent Out of Time.*** By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Lonetta B. Brawley
Legal Assistant to Donald J. Zelenka
Senior Assistant Deputy Attorney General

/lbb
Enclosure

cc: Kathrine Hudgins, Esquire
David M. Stumbo, Solicitor
Trisha Allen, Victim Assistance