STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Paul Burch, Circuit Court Judge

Case No. 2014-001668

THE STATE,

RESPONDENT,

V.

ANTHONY ADKINS,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in ruling that text messages from the alleged victim and her sister sent to Appellant on prepaid "burner" telephones were inadmissible on authenticity grounds, when Appellant testified that he attributed the phone numbers to the alleged victim and her sister through voice identification, context of the messages, and nude pictures of the alleged victim?

2. Did the trial Court err in failing to qualify a 40-year law enforcement veteran as an expert witness on police investigation and/or crime scene investigation?

STATEMENT OF THE CASE

Procedural History

On July 25, 2013, Appellant was indicted for Criminal Domestic Violence of a High and Aggravated Nature and Kidnapping. ROA 378-381. Appellant's case was called to trial on July 21, 2014 before the Honorable Paul Burch. ROA 1. Appellant was represented by Stuart Axelrod and Tristan Shaffer. State was represented by Assistant Solicitor Nancy Livesay. On July 23, 2014, the jury found Appellant Guilty. ROA 330, ll. 2-10. Appellant was sentenced two concurrent sentences of ten years. ROA 341, ll. 11-13. This appeal follows.

Factual History

Appellant was accused by his girlfriend, Jerica Bryson, of kidnapping and assault that allegedly took place over several days. Although there were pictures of the injuries, there was no physical evidence collected to support her claims.

At trial, Appellant argued that the State failed to meet their burden due to inconsistencies in the alleged victim's stories and the failure of the State to present any corroborating evidence. ROA 273, l. 3 – ROA 292, l. 17. Appellant presented witnesses in an attempt to point out the inconsistencies in Jerica's story and to show that the State failed to and to show deficiencies in the investigation. However, Appellant was not allowed to present evidence of text messages received from Jerica and her sister. ROA 143, ll. 6-21; ROA 189, ll. 1-6; ROA 191, ll. 3-10. Additionally, the trial court refused to allow expert testimony concerning the deficiencies in the criminal investigation. ROA 265, ll. 1-17.

Appellant was convicted and sentenced to ten years. This appeal follows.

ARGUMENT

I. The trial court erred in ruling that text messages from the alleged victim and her sister sent to Appellant on prepaid "burner" telephones were inadmissible on authenticity grounds, when Appellant testified that he attributed the phone numbers to the alleged victim and her sister through voice identification, context of the messages, and nude pictures of the alleged victim.

Relevant Facts

After Appellant's arrest, Jerica contacted Appellant via several phone numbers. Appellant had both communicated with Jerica both through text and phone calls on these numbers. Appellant had also been in touch with Jerica's sister, Tasha, through text messages. ROA 147, ll. 16-25.

Appellant recognized the numbers as coming from Jerica and Tasha. Appellant had spoken to Jerica and Tasha on these numbers and recognized their voices. ROA 147, l. 24-ROA 148, l. 17; ROA 151, ll. 3-15. Appellant then stored the numbers on his phone.

Appellant could further recognize the numbers belonging to Jerica the sexual context of the messages. ROA 150, ll.7-13. Moreover, Jerica had sent Appellant nude pictures of herself from the phone numbers. From the nude pictures, Appellant was able to further identify Jerica as the owner of the phone. ROA 150, ll. 14-15. Appellant could even identify the room where the pictures were taken as a room in Jerica's grandmother's house. Tr. ROA 150, ll. 16-22.

At the direction of his trial counsel, Appellant produced his phone to a private investigator, Jather Stevens, to examine the phone and text messages. ROA 170, l. 7 – ROA

172, l.16. Appellant testified that he had not altered the text messages in any way. Likewise, Mr. Stevens had not altered the content of the text message conversations but had pulled the messages off into a print. ROA 172, ll. 14-16. Mr. Stevens also attempted to locate subscriber information on the phones that were parties to the text message conversations. However, the search for these numbers indicated that the other parties were using "burner" phones without subscriber information. ROA 173, ll.4-7.

During trial, Jerica claimed that she was afraid of Appellant hand had not contact with Appellant since leaving the hospital in South Carolina. ROA 33, ll. 1-19. Appellant sought to impeach these statements through the text messages ROA 193. ll. 1-2. Appellant also sought to introduce these text messages to show that Jerica was not afraid of Appellant. ROA 193, ll. 1-3. Moreover, Appellant believed that the text messages from Jerica and Tasha were relevant for impeachment and character purposes. ROA 193, ll. 9-14.

During trial, Jerica claimed that she was afraid of Appellant hand had not contact with Appellant since leaving the hospital in South Carolina. ROA 33, ll. 1-19. Appellant sought to impeach these statements through the text messages ROA 193, ll. 1-2. Appellant also sought to introduce these text messages to show that Jerica was not afraid of Appellant. ROA 193, ll. 1-3. Moreover, Appellant believed that the text messages from Jerica and Tasha were relevant for impeachment and character purposes. ROA 193, ll. 9-14.

Discussion

Appellant met the requirement for authentication; therefore, the text messages should have been admissible. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding

that the matter in question is what its proponent claims." Rule 901(a), SCRE. The state rule is identical to the federal rule with the exception of subsection (b)(10). *See* Rule 901, SCRE (notes). Under the federal rule, the proponent need not rule out all possibilities inconsistent with authenticity but must merely present sufficient proof to allow a reasonable juror to find the evidence is what it purports to be. *See United States v. Hyles*, 479 F.3d 958, 968-69 (8th Cir. 2007); *see also United States v. Vidacak*, 553 F.3d 344 (2009) ("the burden of authentication is not as demanding as suggested by Vidacak--a proponent need not establish a perfect chain of custody or documentary evidence to support their admissibility.").

Rule 901 provides a non-exclusive list of ways in which a document may be authenticated. For example, statements over a telephone may be authenticated by voice identification Rule 901(b)(5). However, there is no specific limitation contained in Rule 901 that limits a party's ability to authenticate specific documents.

Although there is no South Carolina law directly on point, several state and federal courts have considered issues involving authenticating text messages. In *State v. Taylor*, the North Carolina Court of Appeals found that there was sufficient evidence to authenticate text messages when the sender identified himself and provided information that was known by the alleged sender. *See State v. Taylor*, 178 N.C. 395, 414, 632 S.E.2d 218, 231 (N.C. App. 2006). Other jurisdictions similarly have focused on the sender's identity and looked to the context and content of the text messages for evidence identifying the sender. *See, e.g.*, *Dickens v. State*, 175 Md. App. 231, 927 A.2d 32, 36-37 (Md. Ct. Spec. App. 2007) (identifying details in text messages that could have been known by only a small number of persons, including defendant, defendant's conduct after the messages were sent, and

nickname used in one message as circumstantial evidence sufficient to link defendant to the messages).

Here Appellant presented sufficient evidence on which the finder of fact would have been able to find that the text messages were sent by Jerica and Tasha. Appellant testified that he had saved the numbers in his phone and had spoken to Jerica and Tasha on those numbers. *See* Rule 901(B)(5), SCRE. Appellant also that he was able to identify that Jerica and Tasha were the ones sending the messages based on the context of the messages. *See Dickens, supra.* Furthermore, the sender's identified themselves as Tasha and Jerica. *See Taylor, supra.* Moreover, in the case of text messages from Jerica, at one point she sends nude pictures of herself in the home she is staying in. This is strong circumstantial evidence to support the fact that those text messages came from Jerica.

In sum, the test for authentication is not a strenuous one; Appellant was able to far exceed the requirements of Rule 901, SCRE. Therefore, the jury should have been allowed to determine whether the messages were authentic.

II. The Trial Court erred in failing to qualify a 40-year law enforcement veteran as an expert witness on police investigation and/or crime scene investigation.

Relevant Facts

Despite Jerica claiming that she had been vaginally penetrated with a vacuum hose, the police did not collect any forensic evidence that would corroborate Jerica's story. In fact, the police did very little in the way of investigating this crime other than relying on the word of Jerica. Appellant attacked the investigation and argued that the state had failed to meet its burden in this case. ROA 281, l. 2 – ROA 282, l.16. Officer Mossi and Officer Vanvorrhis

testified that the case was passed the case off to a detective in keeping with departmental policy. To rebut the testimony of Officer Mossi and Officer Vanvorrhis and to point out in adequacies in the investigation, Appellant sought to introduce the evidence of Neil Frebowitz. ROA 260, ll. 1-18.

Frebowitz testified that he started his law enforcement career in 1974. He retired from the Washington DC Police Department in 2004 and began to work for the Horry County Police Department (HCPD) soon thereafter. ROA 245, ll. 7-9. From 2008 until 2014, Frebowitz worked as a detective for the Major and Violent Crimes Unit of the HCPD. ROA 248, ll. 9-24.

Despite Mr. Frebowitz's long career, the Court found that Frebowitz was not qualified as an expert. The Court made the following ruling:

> [E]ver since the OJ Simpson case, the trial courts in the United States have been criticized heavily, especially Judge Ito in that case, about the shift of trying defendants for what they are charged with, to trying everybody else, especially law enforcement. It has been a terrible philosophical problem for the courts, and still trying to sort it out. What you are attempting to do here, I'm not having any part of it. I respect his law enforcement career because I was in it a long time myself. It sounds like we followed almost the same path, but he's never been qualified in this court. Where are we headed with this? I can see what is happening. I'm not having any part of it. Therefore, he is not qualified for criminal investigation to testify in this regard. I'm not going to find it.

ROA 265, ll. 1-17. Additionally, the Court refused to allow Trial Counsel to proffer Mr. Frebowitz's testimony. ROA 265, 1.1 – ROA 262, l. 25

The following day of trial, the State suggested alternative basis for the Court's ruling; however, the Court reaffirmed that it denied Mr. Frebowitz's testimony based on his qualifications. ROA 270, ll. 1-20.

Discussion

"Expert testimony is not admissible unless it satisfies all three requirements with respect to subject matter, expert qualifications, and reliability." *See Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). Although in the present case the Trial Court seems to have personal "philosophical" reasons for disagree with the subject matter of Mr. Frebowitz's testimony, the trial court's legal basis for suppressing the evidence is based on Mr. Frebowitz's qualifications. ROA 261, ll. 1-17; ROA 270, ll. 16-20.

Rule 702, SCRE recognizes that there are a variety of ways in which a person can become qualified as an expert. *See Fields v. J Haynes Waters Builders, Inc.*, 376 S.C. 545, 658 S.E.2d 80 (2007). Defects in an expert witness's education and experience go to the weight, rather than the admissibility, of the expert's testimony. *See Gooding v. St. Francis Xavier Hosp.*,326 S.C. 248, 253, 487 S.E.2d 596, 598 (1997).

Mr. Frebowitz was qualified as an expert in the area of crime scene investigations and criminal investigations. Mr. Frebowitz had worked as a criminal investigator for 5 years and had many other years as police officer. His experience qualified him to give opinions on evidence collection and to be able to discuss deficiencies in the investigation. *See Fields, supra.*

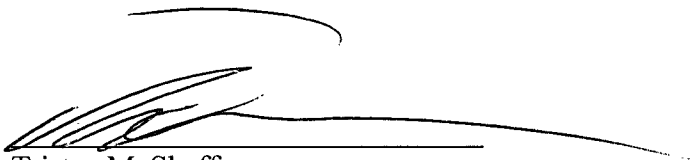
The deficiencies in the investigation was a disputed point in this trial, therefore, Mr. Frebowitz's opinion would be relevant. The relevancy is recognized by the Trial Court when he acknowledged that Appellant could argue the deficiencies in his closing argument. ROA 261, l. 18 – ROA 262, l. 1. Therefore, Appellant should have been allowed to present testimony on the deficiencies in the investigation.

In sum, Appellant respectfully contends that the Trial Court abused its discretion in failing to qualify Mr. Frebowitz as an expert.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court grant him a new trial.

Respectfully submitted,



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This 12th day of November, 2015.

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CERTIFICATE OF SERVICE

I, Tristan Shaffer, do hereby certify that I have this date served the Final Brief upon the Respondent, by depositing a copy of same in the United States Mail, postage prepaid, addressed as follows:

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Tristan M. Shaffer

November 13, 2015