

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County

Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

v.

TONY VERNON JORDAN,

APPELLANT

APPELLATE CASE NO. 2014-002554

FINAL REPLY BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

 ORIGINAL

RECEIVED
MAY 26 2016
SC Court of Appeals
RESPONDENT,

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ARGUMENT IN REPLY	1
CONCLUSION	17

TABLE OF AUTHORITIES

Cases

<u>Alzuraqi v. Group 1 Automotive, Inc.</u> , 921 F.Supp.2d 648 (N.D.Tex.2013).....	13
<u>Boca Investorings P'ship v. United States</u> , 128 F. Supp. 2d 16 (D.D.C. 2000)	14
<u>Burns v. Clayton</u> , 237 S.C. 316, 117 S.E.2d 300 (1960).....	15
<u>Jolly v. State</u> , 314 S.C. 17, 443 S.E.2d 566 (1994).....	15,16
<u>McCullough v. Illinois</u> , 136 S. Ct. 219, 193 L. Ed. 2d 166 (2015)	13
<u>People v. McCullough</u> , 2015 IL App (2d) 121364, ¶ 121, 38 N.E.3d 1, 31, <u>appeal denied</u> , 32 N.E.3d 676 (Ill. 2015).....	13
<u>Rassoulpour v. Washington Metropolitan Area Transit Authority</u> , 826 F.2d 98, (D.C.Cir.1987)	14
<u>Simpkins v. State</u> , 303 S.C. 364 S.E.2d 142 (1991).	15
<u>State v. Blackburn</u> , 271 S.C. 324, 247 S.E.2d 334 (1978).....	9
<u>State v. Douglas</u> , 369 S.C. 424, 632 S.E.2d 845 (2006).....	5
<u>State v. Gaster</u> , 349 S.C. 545, 564 S.E.2d 87 (2002).....	6
<u>State v. Saltz</u> , 346 S.C. 114, 551 S.E.2d 240 (2001).	15,16
<u>State v. Schumpert</u> , 312 S.C. 502, 435 S.E.2d 859 (1993)	15
<u>TK-7 Corp. v. Estate of Barbouti</u> , 993 F.2d 722 (10th Cir. 1993).....	13
<u>Tome v. United States</u> , 513 U.S. 150, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995)	15
<u>United States v. Baker</u> , 693 F.2d 183 (D.C.Cir.1982)	12
<u>United States v. Davis</u> , 571 F.2d 1354 (5th Cir.1978).....	13
<u>United States v. Smith</u> , 521 F.2d 957 (D.C.Cir.1975)	14
<u>United States v. Snyder</u> , 787 F.2d 1429 (10th Cir.1986).....	13

<u>United States v. Vigneau</u> , 187 F.3d 70 (1st Cir.1999).....	14
<u>Wilson v. Zapata Off-Shore Co.</u> , 939 F.2d 260 (5th Cir. 1991)	12,13

Rules

Federal Rule of Evidence 805.....	13
Rule 401, SCRE.....	5
Rule 403, SCRE.....	5
Rule 801, SCRE.....	16
Rule 801(d)(1)(B), SCRE	14,15
Rule 801(d)(2), SCRE.....	2, 9
Rule 802, SCRE.....	16
Rule 803(6), SCRE	1,2,13
Rule 901, SCRE.....	2

ARGUMENT IN REPLY

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

Appellant challenges the testimony of Jennifer Dalmida, the records custodian for Verizon Wireless, in regard to the **content** of text messages between Appellant (#864-554-8876) and his daughter, Samantha Clinkscales (#864-828-3554) between Appellant and Audrey Todd, (#864-391-1443) between Appellant and his son Jeremy, the deceased (#864-378-1744) between Appellant and Krystal Collins, Jeremy's girlfriend (#864-378-3104) and between Appellant and his ex-wife, Angela Schoch (#239-896-6412). The **content** of the text messages does not meet the business records exception to the hearsay rule because the **content** contains double hearsay from individuals outside of the business and the **content** does not meet another exception to the rule against hearsay.

At trial Appellant objected to the admission of State's Exhibit #98, the cell phone records from Verizon, including the **content** of text messages, upon which Ms. Dalmida based her testimony. State's Exhibit #98 is a 173 page record of calls and texts, including the **content**, made from and to Appellant's phone. At trial Appellant argued that the text messages constituted inadmissible hearsay, were irrelevant and were more prejudicial than probative. (R. p. 71, line 12 – p. 72, lines 1-12). The State moved to admit the records from Verizon under the business records exception to the hearsay rule, rule 803(6), SCRE. (R. pp. 305-317).

Appellant objected to the admission of the **content** of the text messages. Trial counsel argued:

Your Honor, in terms of the business records, I think both the court ruled, [sic] and also the State statute that it addresses, Uniform Business Records as Evidence, which is 19-5-520, states that it is a record of an act or a condition is what falls under the exception, not the actual act or context itself. So we're not disputing that a log of incoming/outgoing calls or log of text messages sent, the date, from whom they were sent, to who they were sent. That those would fall under business records, as

long as the proper foundation is laid, but we are contesting that the actual text itself falls under the business records exception for both the court rule and the statute.

(R. p. 310, lines 6-17). Additionally, Appellant again argued that some of the text messages were irrelevant, sent four days prior to the incident and some of the text messages did not constitute admissions by appellant. (R. p. 310, line 18 – p. 311, lines 1-10).

The trial judge asked, “How does it not fall under Rule 901? Generally it’s self-authenticating as a telephone conversation.” (R. p. 312, lines 15-17). Trial counsel responded, “Your Honor, unlike a phone call where you can recognize someone’s voice, anyone can text that from someone else’s phone. There’s no way to say that text was sent by Tony. And, Your Honor, there’s not been any testimony from anyone getting texts from him that would serve as any sort of authentication. There’s not been any testimony that anyone saw him texting.” (R. p. 313, line 24 – p. 314, lines 1-6). The judge found that the text messages met the hearsay exception as business records and admitted the entire 173 page record, State’s #98. (R. p. 316, line 14-24; p. 317, lines 15-16). The trial judge erred. The **content** of the text messages does not meet the business records exception to the rule against hearsay. Additionally, many of the text messages contained in State’s Exhibit #98 should have been excluded as irrelevant. Finally, many of Appellant’s statements contained in the text messages do not qualify as admissions pursuant to Rule 801(d)(2), SCRE.

In footnote #7 of the States brief the State submits that absent a business records exception to the hearsay rule, some of the challenged text messages were admissible as nonhearsay admissions by a party-opponent, Rule 801(d)(2), SCRE, and other text messages were not hearsay as they were not admitted for the truth of the matter asserted but concedes that, “Other messages in the records presented 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.”

The State also argues that that any error in the admission of State's Exhibit #98 and the testimony of the records custodian, Dalmida, was harmless because it was merely cumulative to the testimony of the recipients and or senders of the text messages who testified at trial in regard to the text messages. (Brief of Respondent pp. 39-43). As will be discussed below, the corroborative effect of the jury hearing about the text messages twice, once from the records custodian and a second time from the recipient or sender of the text messages, unduly emphasizes the text messages and creates prejudicial error requiring reversal.

A. Test Messages between Appellant (#864-554-8876) and his Daughter Samantha Clinkscales (#864-828-3554).

The records custodian testified about the following text messages between appellant and his daughter Samantha Clinkscales:

1.) November 8, 2013

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

(R. p. 322, line 4 – p. 324, lines 1-6).

2.) November 10, 2013

Normal number of weeks pregnant, 40 What?

Why?

Just Wondering.

Who was saying they're pregnant?

Nobody.

Then why you asking?

Never mind, honey. I'll just take somebody that knows.

It's 40 weeks.

Thank you very much.

Chloe was two weeks early and she was 38 weeks, so that would mean 40 is full term.

Okay, thank you.

Welcome. Now tell me why you needed to know.

No.

Why not?

No need to. Just thinking about something that happened over 25 years ago. That's all.

With Jeremy?

Or another kid.

Why does it matter. It's nothing. You all have a good day.

Obviously it is bc you're asking about it.

Just happened to think about. That's all. Too much time on my hands I guess.

(R. p. 337, line 10 – p. 338, 339, 340, 341, lines 1-17).

3.) November 12, 2013

Good morning. Call me when you get this. Your brother ain't at the house.

(R. p. 346, lines 14-15).

State's Exhibit #98 contained the text messages referred to above by the records custodian and additionally contained the following exchange between Appellant and his daughter:

4.) November 9, 2013

Your brother is a dumb ass fool and she's a dumb ass bitch.

He said they are going to work things out she just using his dumbass.

Yep like always.

(State's Exhibit #98, p. 81).

All of the text messages should have been excluded as they do not meet the business records exception to the rule against hearsay. Additionally, the text messages between Appellant and his daughter should have been excluded as unduly prejudicial. Appellant objected to the text messages as inadmissible hearsay not meeting the business records exception and as irrelevant and unduly prejudicial pre-trial and right before the testimony of the records custodian when the trial judge admitted State's Exhibit #98. (R. p. 71, line 12 – p. 72, lines 1-12; R. p. 310, line 18 – p. 311, lines 1-10). Appellant was not required to continue and renew the objection. The challenge to the text messages is preserved for appellate review.

Evidence is relevant if it tends to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence. Rule 401, SCRE. All relevant evidence is admissible. State v. Douglas, 369 S.C. 424, 429–30, 632 S.E.2d 845, 848 (2006). Relevant evidence may be excluded if the prejudicial effect of its admission substantially outweighs the probative value of the evidence. Rule 403, SCRE. The trial court has broad discretion in determining the relevancy of evidence and its decision to admit

or exclude evidence will not be reversed on appeal absent an abuse of that discretion and a showing of prejudice. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002).

The text message from the Appellant to his daughter calling Jeremy a dumb ass does not make any fact to be determined by the jury more or less probable and is prejudicial. The text message alluding to a question about whether Appellant was Jeremy's biological father is more prejudicial than probative of any issue in regard to the murder charge. The judge erred in admitting the text messages between appellant and his daughter.

The State argues that the third text message dated November 12, 2013, is not hearsay because it was a pretext message not admitted for the truth of the matter asserted and constituted an admission. (State's Brief fn #16). The State questioned Appellant's daughter at trial about the text message asking her to call him because her brother was not at home. (R. p. 451, lines 1-10). The improper testimony from the records custodian based on the improper admission of State's exhibit #98 prejudicially bolstered and highlighted the text message testified to by the daughter.

The State also argues that the fourth text message listed above and dated November 9, 2013, is not hearsay because it was a pretext message not admitted for the truth of the matter asserted and constituted an admission. (State's Brief fn #23). Again, the text message calling Jeremy a dumb ass was irrelevant, unduly prejudicial and should have been excluded. Calling Jeremy a dumb ass is not pretext and not an admission. The text messages between Appellant and his daughter should have been excluded as irrelevant and unduly prejudicial.

B. Test Messages between Appellant (#864-554-8876) and Audrey Todd, (#864-391-1443).

The records custodian also testified about the following text messages between Appellant and Audrey Todd:

1.) November 8, 2013

Our problems are my problems. I here for you, baby. I love you.

Please, please make sure Jeremy knows nothing at all. Someone just called and said he is telling Crystal and others all kind of stuff and it's going to be detrimental to Drew's defense. I can't have any obstacles helping my son.

Baby, I told Jeremy nothing. What is he telling?

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.

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.

(R. p. 324, line 3 – p. 325, 326, 327, lines 1-20). Appellant renewed the relevance objection and the objection was again overruled. (R. p. 327, lines 22-25).

2.) November 9, 2013

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 there for a moment I was being selfish and just thinking about my feelings. My [sic] will try not to let it happen again. No problems 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.

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 very much.

Honey, I want to be your rock. I got 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 feelings like I did for my first wife, and this time I don't those feelings can't compare to the strong feels 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 now 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.

(R. pp. 332 - 336).

3.) November 11, 2013

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

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.

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 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.

Oh, and you didn't fail Drew and you've done all you could. I love you.

Okay, I need a promise. When you are ready you will tell me. I'm going to test you three to four times a day to let you know I'm here and I love you. That will be ok. Right?

(R. p. 343, line 25 – p. 344, 345, 346, line 1).

The text messages between Appellant and Todd should have been excluded as irrelevant. The text messages are love letters and do not make any fact to be determined by the jury more or less probable. The State argues the first text message dated November 8, 2013, is admissible as nonhearsay and admissions by a party opponent, Rule 801(d)(2). (Brief of Respondent fn #9). The text message stating “I’m going to get to the bottom of it. Yes ma’am. I’m mad as hell now. His [Jeremy’s] ass is mine” may show that Appellant was angry with Jeremy but it is not an admission of murder and constitutes inadmissible hearsay. Jeremy was alive at the time the text was sent on November 8, 2013.

The State also argues that the November 11, 2013, text message is admissible as nonhearsay and admissions by a party opponent, Rule 801(d)(2). (Brief of Respondent fn #11). The text message that states, “If it Jeremy or Crystal, that problem solved” is inadmissible hearsay and not an admission of murder. According to the records custodian the text was sent at 6:49 AM on November 11, 2013. (R. p. 343, line 11 – p. 344, lines 1-11).. Based on evidence introduced at trial, Jeremy was not killed until the evening of November 11, 2013. Jeremy was alive at the time the text message was sent. Appellant presented this argument to the trial court when he objected to the text messages admission pre-trial. (R. p. 76, lines 16-20).

The State also argues that any error in the admission of State’s Exhibit #98 and the testimony of the records custodian based on State’s Exhibit #98 is harmless because it was cumulative to the testimony of Audrey Todd who testified at trial in regard to the text messages. (Respondent’s Brief p. 42). While improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless, State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978), here the State was allowed to present the same evidence twice, unduly

highlighting the evidence to the jury. In the present case the improperly admitted hearsay was not harmless.

C. Test Messages between Appellant (#864-554-8876) and Jeremy, the deceased (#864-378-1744).

The records custodian testified about the content of the following text message between Appellant and the deceased:

When you see Crystal get my house key. If you all ain't together she don't need no key.

Okay, LOL. You going to start treating her like you do Kelsy just cause we're having an argument.

No. If you all going to be together she can keep the key. Why would she need it if you all ain't together.

Then give us a chance to see what we're going to do. I mean, we've been together for two years.

Whatever, fool.

(R. p. 328, line 10 – p. 329, 330, lines 1-4). This text message sequence is irrelevant and prejudicial. The trial judge erred in refusing to exclude this testimony and this reference in State's Exhibit #98.

D. Test Messages between Appellant (#864-554-8876) and Krystal Collins, Jeremy's girlfriend (#864-378-3104).

The records custodian testified to the content of the following text messages between Appellant and his son Jeremy's girlfriend, Krystal Collins:

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.

Does he has the jeep?

You going to do a missing person thingy or just wait on him to come home?

No.

(R. p. 346, line 7 – p. 347, lines 1-3).

The State argues, outside of the business records exception, that the above text message sequence is not hearsay because it is a pretext message and not admitted for the truth of the matter asserted. (Respondent's brief fn #22). The State also argues that any error in the admission of these text messages is harmless because cumulative to Krystal Collins' trial testimony. (Respondent's brief p. 42). Again, the State was allowed to present the same evidence twice, unduly highlighting the evidence to the jury. In the present case the improperly admitted hearsay was not harmless.

E. Test Messages between Appellant (#864-554-8876) and his ex-wife, Angela Schoch (#239-896-6412).

The records custodian also testified about the following text messages between Appellant and his ex-wife, Angela Schoch:

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.

(R. p. 336, line 19 – p. 337, lines 1-5). As argued by Appellant at trial, this text message is more prejudicial than probative, especially in light of the fact that the ex-wife was not questioned about the text message. While Appellant's ex-wife, Angela Schoch testified at trial and verified that her phone number was, at one time, 239-896-6412, she did not testify about this text message or any other text messages between herself and Appellant. The testimony from the records custodian based on State's Exhibit #98 containing the content of text messages between Appellant and his ex-wife should have been excluded as inadmissible hearsay.

The State argues that "...[T]he 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." (Respondent's Brief p. 39). The text message in question in regard to Appellant's ex-wife, Angela Schoch, was a message sent to her from Appellant. It is unclear what effect the State was attempting to show in regard to the text messages involving Audrey Todd, Samantha Clinkscales and Krystal Collins.

The **content** of text messages does not qualify as a business record and does not meet the business records exception to the rule against hearsay. While the phone records of outgoing and incoming calls and texts would qualify as business records, the **content** of the text messages would not as the **content** contains double hearsay. In Wilson v. Zapata Off-Shore Co., 939 F.2d 260, 271 (5th Cir. 1991), the Fifth Circuit Court of Appeals wrote:

Double hearsay in the context of a business record exists when the record is prepared by an employee with information supplied by another person. If both the source and the recorder of the information, as well as every other participant in the chain producing the record, are acting in the regular course of business, the multiple hearsay is excused by Rule 803(6). United States v. Baker, 693 F.2d 183, 188 (D.C.Cir.1982). However, if the source of the information is an outsider, as in the facts before us, Rule 803(6) does not, by itself, permit the admission of

the business record. The outsider's statement must fall within another hearsay exception to be admissible because it does not have the presumption of accuracy that statements made during the regular course of business have. See United States v. Davis, 571 F.2d 1354, 1360 (5th Cir.1978). Further, Federal Rule of Evidence 805 requires that all levels of hearsay satisfy exception hearsay requirements before the statement is admissible.

In People v. McCullough, 2015 IL App (2d) 121364, ¶ 121, 38 N.E.3d 1, 31, appeal denied, 32 N.E.3d 676 (Ill. 2015), and cert. denied sub nom. McCullough v. Illinois, 136 S. Ct. 219, 193 L. Ed. 2d 166 (2015), the Appellate Court of Illinois wrote:

Furthermore, multiple hearsay is excused by Rule 803(6) only where both the source and the recorder of the information, as well as every other participant in the chain producing the record, are acting in the regular course of business. Wilson v. Zapata Off-Shore Co., 939 F.2d 260, 271–72 (5th Cir.1991) (hospital records were admissible as business records but statement of informant contained in hospital records was second level of hearsay needing its own exception); Alzuraqi v. Group 1 Automotive, Inc., 921 F.Supp.2d 648, 671 (N.D.Tex.2013) (if customer surveys fell within business-records exception to hearsay rule, the contents of the surveys were hearsay because the sources of the contents were outsiders). Thus, if the source of the information is an outsider, Rule 803(6) does not, by itself, permit the admission of the business record. Wilson, 939 F.2d at 271. The outsider's statement must fall within another hearsay exception to be admissible, because it does not have the presumption of accuracy that statements made during the regular course of business have. Wilson, 939 F.2d at 271.

In TK-7 Corp. v. Estate of Barbouti, 993 F.2d 722, 729 (10th Cir. 1993)(footnote #4 omitted), the Tenth Circuit Court of Appeals wrote:

Even if the plaintiffs had established an adequate foundation under Rule 803(6), however, the document would not be admissible because it contains double hearsay. The information set forth in the report pertaining to TK–7's potential sales was clearly based on the opinions of individuals other than Speaks. These opinions were apparently conveyed to Speaks and recorded by him in the Exline Report. There was no foundation to show that these other individuals who supplied the information to Speaks were acting in the course of a regularly conducted business activity of TK–7. As such, the exception for business records does not shield their out-of-court assertions from the rule against hearsay. See United States v. Snyder, 787 F.2d 1429, 1434 (10th Cir.1986) (When any of the participants are outside the pattern of regularity of activity, the reason underlying the business records exception fails.)

In Boca Investorings P'ship v. United States, 128 F. Supp. 2d 16, 21 (D.D.C. 2000), the United States District Court for the District of Columbia wrote:

As Judge Boudin recently explained for the First Circuit:

[T]he business records exception does not embrace statements contained within a business record that were made by one who is *not* a part of the business if the embraced statements are offered for their truth.... [N]o such safeguards of regularity or business checks automatically assure the *truth* of a statement [made] to the business by a stranger to it “[O]utsider” information, where offered for its truth, [is excluded] unless some other hearsay exception applies to the outsider's own statement. United States v. Vigneau, 187 F.3d 70, 75–76 (1st Cir.1999) (emphasis in original); see Rassoulpour v. Washington Metropolitan Area Transit Authority, 826 F.2d 98, 100–01 (D.C.Cir.1987) (evidence excluded as not fitting within business records exception because of multiple hearsay problem; no showing as to who provided information in report); United States v. Smith, 521 F.2d 957, 964 (D.C.Cir.1975) (hearsay in business record not admissible under business records exception; only admissible if it falls within another exception).

The **content** if the text messages is not a business record of Verizon because the text messages were made by individuals who were not a part of Verizon. The **content** of the text messages is hearsay upon hearsay. As discussed above in regard to the particular text messages, none of the text messages fall within another exception to the hearsay rule. The error in improperly admitting the testimony of the Verizon records custodian and State's Exhibit #98 is not harmless.

The text messages to Appellant from his daughter, Samantha Clinkscales, from Audrey Todd and from Krystal Collins are prior consistent statements with their testimony at trial. Rule 801(d)(1)(B), SCRE, provides that a prior statement by a witness is not hearsay if it is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or

motive arose. In State v. Saltz, 346 S.C. 114, 124, 551 S.E.2d 240, 245 (2001), the South Carolina Supreme Court discussed Rule 801(d)(1)(B) writing:

The plain language of Rule 801(d)(1)(B) only permits evidence of a prior consistent statement when the witness has been charged with recent fabrication or improper motive or influence. Although questioning a witness about a prior inconsistent statement does call the witness's credibility into question, that is not the same as charging the witness with "recent fabrication" or "improper influence or motive." Cf. Tome v. United States, 513 U.S. 150, 157, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995) ("Prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited.... The rule speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told.").

The text messages were inadmissible pursuant to Rule 801(d)(1)(B) because there was no express or implied charge against Clinkscales, Todd or Collins of recent fabrication or improper influence or motive.

In Jolly v. State, 314 S.C. 17, 20, 443 S.E.2d 566, 568 (1994), decided before the adoption of Rule 801(d)(1)(B), SCRE, the South Carolina Supreme Court wrote:

The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies. Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991). We have recognized three exceptions to the rule against hearsay that allows prior consistent statements of a witness to be admitted. First, in criminal sexual conduct cases, when the victim testifies, evidence from other witnesses that she complained of the sexual assault is admissible in corroboration, limited to the time and place of the assault and excluding details or particulars. *Id.* at 367, 401 S.E.2d at 143. Second, the *res gestae* or excited utterance exception allows corroborative rape testimony without the time/place exception. State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993). Third, when a witness has been impeached by proof that the witness has made a prior inconsistent statement, proof is allowed that the witness made a prior consistent statement, provided that the prior consistent statement must have been made before the "existence of [the] relation of [the witness] to the cause." Burns v. Clayton, 237 S.C. 316, 117 S.E.2d 300 (1960).

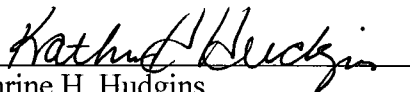
None of the three exceptions discussed in Jolly render the **content** of the text messages admissible. The **content** of the text messages meets the definition of hearsay found in Rules 801 and 802, SCRE and the testimony meets no other hearsay exception.

The error in admitting the text messages was not harmless. As the Court noted in Saltz, “Erroneously admitted corroboration testimony is not harmless merely because it is cumulative. On the contrary, ‘it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.’ Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994).” 346 S.C. at 124, 551 S.E.2d at 246.

CONCLUSION

Based on the above arguments, Appellant's conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

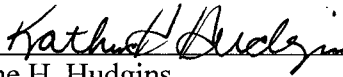
ATTORNEY FOR APPELLANT.

This 26th day of May, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Reply Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

May 26th, 2016


Kathrine H. Hudgins
Appellate Defender

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

RECEIVED

MAY 26 2016

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County

Eugene C. Griffith, Jr., Circuit Court Judge

RECEIVED

MAY 26 2016

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

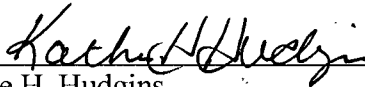
TONY VERNON JORDAN,

APPELLANT

APPELLATE CASE NO. 2014-002554

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 26th day of May, 2016.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 26th day of May, 2016.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.