STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

On Writ of Certiorari to the Court of Appeals
Appeal from Horry County
Honorable Paul M. Burch, Circuit Court Judge
Appellate Case No. 2014-001668

THE STATE,

Respondent,

vs.

ANTHONY E. ADKINS,

Appellant.

RESPONDENT'S PETITION FOR REHEARING

On July 19, 2017, this Court issued an unpublished opinion in which it reversed Appellant Anthony E. Adkins's convictions for kidnapping and criminal domestic violence of a high and aggravated nature and remanded his case for a new trial. State v. Adkins, Op. No. 2017-UP-295 (S.C. Ct. App. filed July 19, 2017). In reversing Adkins's convictions, this Court held the trial judge erred by ruling text messages allegedly sent to Adkins by the victim and the victim's sister were inadmissible based on the fact they had not been sufficiently authenticated. Furthermore, this Court held it could not conclude the trial judge's ruling excluding the text messages was not prejudicial to Adkins in light of the fact the evidence of guilt was not overwhelming and the trial judge solely and incorrectly ruled on the issue of authentication without ever actually ruling on whether any of the text messages would have been admissible on some basis during trial. Pursuant to Rule 221(a), SCACR, Respondent, the State, respectfully

petitions for rehearing because the State believes this Court misapprehended and overlooked the facts, law, and controlling deferential standard of review in finding the trial judge abused his broad discretion over evidentiary matters by ruling Adkins failed to sufficiently establish the evidence he sought to authenticate was, in fact, what he claimed it to be, which was a complete and unaltered record of the text messages he received and sent on his phone.

As this Court recognized in its opinion, evidence must be authenticated before it can be admitted. State v. Aragon, 354 S.C. 334, 336, 579 S.E.2d 626, 627 (Ct. App. 2003). In order for evidence to be authenticated, the party offering the evidence must establish the evidence is actually what it is claimed to be. Id.; see Rule 901(a), SCRE ("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."). In South Carolina, that requirement can be satisfied in numerous ways, including through the presentation of the testimony of a witness with knowledge the matter is what it is purported to be and through proof of internal patterns or other distinctive characteristics. Rule 901(b), SCRE. Critically though, as with all other evidentiary matters, a trial judge is vested with broad discretion over matters involving the authentication of evidence, and an appellate court in our state will **not** reverse a trial judge's ruling on such a matter absent a prejudicial abuse of discretion constituting a manifest error of law. See Wright v. Pub. Sav. Life Ins. Co., 262 S.C. 285, 290-291, 204 S.E.2d 57, 60 (1974) ("It is well settled that the admission or exclusion of evidence is largely addressed to the sound discretion of the trial judge and that the exercise of his discretion thereabout will not be disturbed in the absence of an abuse of such discretion amounting to a manifest error of law."); see also United States v. Ruggiero, 928 F.2d 1289 (2nd Cir. 1991) ("[W]e review rulings as to authentication for abuse of the district court's 'broad

discretion.' " (citations omitted)); United States v. Howard-Arias, 679 F.2d 363, 366 (4th Cir. 1982) (recognizing resolution of an authentication question rests in the sound discretion of the trial judge and the trial judge's ruling on such a question will not be reversed on appeal absent an abuse of discretion).

In Adkins's case, Adkins presented to the trial judge a twenty-eight page document containing a number of purported text messages that allegedly reflected Adkins's communications with the victim and the victim's sister but that did not have any information about the number associated with the phone used to send and receive those alleged messages. (R. p. 171; pp. 343-370). In attempting to authenticate that document during trial, Adkins personally testified about the circumstances surrounding the record of the text messages. (R. p. 147; pp. 169-170). Through his testimony, Adkins alleged he received a number of text messages from the victim and her sister, and he claimed he had **not** tampered with, deleted, or erased anything from his phone, including the text messages he "believe[d]" were sent by the victim, before turning that phone over to a defense investigator. (R. p. 147; p. 149; p. 154). Additionally, Adkins asserted he had received approximately 1,200 text messages from the victim through three to five separate numbers along with text messages from the victim's sister, and he indicated he believed the text messages he received were, in fact, sent by those parties based on the context of the messages, his familiarity with the victim's voice, the victim's identification of herself during calls, and his identification of the victim in photographs she purportedly sent to him depicting her body but not her face.[1] (R. pp. 147-151; pp. 154-155). Adkins further asserted his phone contained a record of all the calls associated with it. (R. p. 155). However, Adkins was seemingly unable to identify his own phone number, and, at various

[1] Conveniently for him, Appellant asserted during cross-examination the solicitor would have been incapable of identifying the victim from the alleged photographs if they were shown to her even though he could do so. (R. pp. 160-161).

points during his testimony, he claimed a number he was seeking to attribute to the victim through the record of the text messages was his own number until being confronted with that glaring inconsistency. (R. p. 152; pp. 156-158; p. 166; pp. 343-370).

Beyond his own testimony, Adkins proffered the testimony of Jather Stevens, the defense investigator who used a computer to "pull" the data off Adkins's cell phone. (R. pp. 170-171). During his testimony, Stevens indicated the documentary record presented to the trial judge was a complete copy of the information he removed from the phone, asserted the record contained what he obtained from connecting Adkins's phone to a computer equipped with various programs downloaded from the internet, and maintained he had personally made no alterations to the information he removed from the phone. (R. pp. 170-171; pp. 174-177). Additionally, Stevens specifically indicated he obtained a single photograph from the phone when removing the information from it, but he neither offered any testimony regarding what the photograph depicted nor produced the alleged photograph to the trial judge to aid in the authentication of the record of the text messages. (R. pp. 176-177). Subsequent to that, Stevens conflictingly claimed he obtained "several" photographs from the phone, but, again, he offered neither the photographs nor any specific remarks about their contents to support his testimony. (R. p. 177). Furthermore, Stevens acknowledged he did not obtain any records related to the incoming and outgoing calls on Adkins's phone despite Adkins's earlier testimony indicating that information was still available on his phone. (R. p. 155; p. 177).

Significantly, based on that collective testimony and evidence, Adkins was representing to the trial judge the documentary record he was seeking to admit was purportedly produced by a computer program and reflected **all** the text messages he had sent and received on his cell phone subsequent to the incident, which should have included the roughly 1,200 text messages he

claimed he received from the victim during that time period. (R. p. 149; p. 154; pp. 174-177). Notably though, the document presented to the trial judge contained just 292 text messages, which called into question the accuracy, reliability, authenticity, and completeness of the proffered document. (R. p. 154; pp. 343-370). Similarly, as reflected at various points in the document itself, Adkins allegedly sent text messages to the victim informing her he had just received text messages from other senders, but none of the text messages Adkins allegedly had just received from the other senders prior to communicating that fact to the victim actually appeared in the document. (R. p. 351; p. 355). In light of that fact, the actual contents of the document strongly suggested the document did not accurately and completely reflect the text messages received and sent on Adkins phone as had been claimed to the trial judge while also suggesting some of the messages may have either been deleted from the phone or excised from the document despite Adkins's representation **nothing** had actually been deleted. (R. p. 149; p. 154). Likewise, on the last page of the document, the document ended in the middle of a text message that purportedly was sent by the victim, which singularly demonstrated the incompleteness of the document and prevented the trial judge, the solicitor, the victim, and anyone else from knowing fully what was contained in the alleged text messages. (R. p. 370). Moreover and troublingly, the formatting of the document shifted from "PM To" and "PM From" at various points to "PMTo" and "PMFrom" at other points, which was entirely inconsistent with the unchanging formatting that would have been expected from a computer program and which strongly suggested the document was either manually typed or edited.[2] (R. p. 344).

[2] Notably, Stevens alleged the proffered document was in the "raw format" produced by the computer program he used to remove the data from the phone. (R. pp. 176-177).

In light of those numerous, significant, and unexplained problems with the record of the text messages proffered to the trial judge, the evidence and testimony presented during the trial was simply insufficient to reasonably and sufficiently establish the proffered record was actually what it was purported to be, which was a complete and unaltered record of all text messages sent and received on Adkins's phone. See Howard-Arias, 679 F.2d at 366 (recognizing "[t]he purpose of this threshold [authentication] requirement is to establish that the item to be introduced, i.e., marijuana, is what it purports to be, i.e., marijuana seized from the 'Don Frank' "); see also United States v. Gelzer, 50 F.3d 1133, 1140-1141 (2nd Cir. 1995) (instructing the "evidence sufficient" standard of Rule 901 of the Federal Rules of Evidence, which is the same as standard enunciated by Rule 901 of the South Carolina Rules of Evidence, requires the proponent of evidence to prove "by a preponderance of the evidence" it is what it is claimed to be); cf. United States v. Browne, 834 F.3d 403, 410 (3rd Cir. 2016) ("To authenticate the messages, the Government was . . . required to introduce enough evidence such that the jury could reasonably find, **by a preponderance of the evidence**, that Browne and the victims authored the Facebook messages at issue." (emphasis added)). Under those circumstances, the trial judge did not abuse his broad evidentiary discretion in finding Adkins failed to sufficiently authenticate the documentary evidence in order for it to be admissible during trial, and his ruling in that regard should have been afforded broad deference on appeal as it was supported by the evidence available to him. See State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); see also State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) (instructing a trial judge's evidentiary rulings are entitled to deference on appeal). Accordingly, for the foregoing reasons combined

with the all the reasons raised in the Final Brief of Respondent and during oral argument before this Court, the State respectfully urges this Court to rehear this matter pursuant to Rule 221, SCACR, reconsider its decision in light of the controlling deferential standard of review, vacate its previous opinion, and ultimately affirm Adkins's convictions and sentence.

Respectfully submitted,

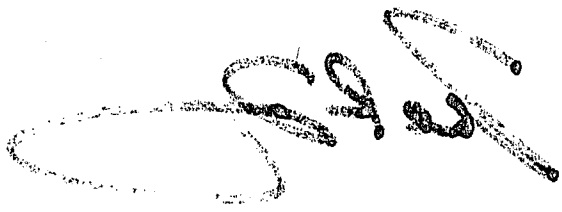
ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

By: _____
Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

August 3, 2017



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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Respondent's Petition for Rehearing on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tristan M. Shaffer, Esquire
Shaffer Law Firm
225 Columbia Ave.
Chapin, SC 29036

I further certify that all parties required by Rule to be served have been served.
This 3rd day of August, 2017.

Sally Ellison

SALLY ELLISON
Legal Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

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August 3, 2017

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

RE: State v. Anthony E. Adkins – Appellate Case No. 2014-001668

Dear Ms. Kitchings:

Enclosed please find the original and six copies of Respondent's Petition for Rehearing, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

cc: Tristan M. Shaffer, Esquire
Victim Advocacy Division