STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County

Donald B. Hocker, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

FABIAN LAMICHAEL GREEN,

APPELLANT

APPELLATE CASE NO 2017-001332

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge err in failing to grant a mistrial or a new trial where a juror asked a bailiff about the consequences of an impasse and the bailiff informed the juror that the judge would issue an Allen charge and require the jurors to continue to deliberate?

II. Did the trial judge err in permitting the state to introduce messages allegedly obtained from the deceased's Facebook account where the state failed to authenticate the messages?

STATEMENT OF THE CASE

On July 22, 2016, a Laurens County grand jury indicted Appellant for desecration of human remains (2016-GS-30-1077) and murder (2016-GS-30-1078). R. *(indictments). The state, represented by O. Warren Mowry, Jr., and James C. Todd, IV, called the case to trial before the Honorable Donald B. Hocker and a jury on May 30, 2017. Tr. 1. Tristan Shaffer represented Appellant. Tr. 1. At the conclusion of the trial, the jury found Appellant guilty as charged. Tr. 669, l. 24 – Tr. 670, l. 5. Judge Hocker sentenced Appellant to ten years imprisonment for desecration of human remains and forty-five years imprisonment for murder. Tr. 707, ll. 17-19. He ordered the sentences to be served concurrently. Tr. 707, ll. 16-17; R. *(sentence sheets).

On June 12, 2017, Appellant served his notice of appeal. This brief follows.

ARGUMENT

I. The trial judge erred in failing to grant a mistrial or a new trial where a juror asked a bailiff about the consequences of an impasse and the bailiff informed the juror that the judge would issue an *Allen* charge and require the jurors to continue to deliberate.

Relevant facts

While the jury was deliberating, the judge learned of improper communications with the jury. Tr. 667, ll. 7-12. The judge discussed the matter with the lawyers in his chambers. Tr. 667, ll. 11-12. However, the jury reached a verdict before the matter could be placed on the record or any further investigation undertaken. Tr. 667, ll. 12-17. After deliberating for approximately four hours, the jury indicated it had reached a verdict in the case. Tr. 667, ll. 7-8; Tr. 667, l. 23 – Tr. 668, l. 13. The jury found Appellant guilty of murder and desecration of human remains. Tr. 669, l. 23 – Tr. 670, l. 5. After the verdict was read, the judge examined the jurors individually. Tr. 669, l. 23 – Tr. 684, l. 25.

Most of the jurors claimed there were no communications during the trial with any of the bailiffs. Tr. 671, ll. 1-5; Tr. 673, ll. 8-11; Tr. 674, ll. 12-15; Tr. 675, ll. 18-21; Tr. 676, ll. 20-23; Tr. 679, ll. 4-7; Tr. 680, ll. 3-6; Tr. 681, ll. 4-7; Tr. 683, ll. 18-21; Tr. 684, ll. 20-23. However, some jurors admitted there were communications with the bailiffs, but insisted those communications were not about the case. Tr. 677, ll. 20-23; Tr. 682, ll. 5-11. Juror Shannon Byers claimed the only communication with the bailiffs was a request for a break to walk outside. Tr. 677, l. 24 – Tr. 678, l. 7. Juror Garrett Pace claimed his communications with the bailiffs concerned logistics only. Tr. 682, ll. 12-15.

Nevertheless, two bailiffs revealed there had been at least one substantive conversation between at least one juror and a bailiff. According to Johnny Bolt, a bailiff, one juror asked him

why there were so many security officers present. Tr. 688, ll. 3-10. Bolt could "sense there was some fear amongst" the jurors. Tr. 688, l. 11. Bolt advised the jurors the security officers were "for protection, for the Judge, the victims, and for the jurors and they didn't have anything to worry about." Tr. 688, ll. 12-14. Despite Bolt's reassurances, "for some reason [the jurors] had a lot of concerns as far as fear was concerned." Tr. 688, ll. 15-16. Additionally, Bolt explained that a female juror expressed a great deal of concern regarding "some pointing to the jurors going up and down the hall." Tr. 688, ll. 22-24. Another bailiff had told Bolt that "one of the Defendant's [family] member would point at them going, you know up and down the hall." Tr. 689, ll. 2-8.

The foreperson of the jury asked Bolt what would happen if the jury could not reach a unanimous verdict. Tr. 689, ll. 19-23. Initially, Bolt claimed he merely said, "[W]ell, the Judge will give you some details on that if something happens, that you will need to write him a note and I will have to take it to him." Tr. 689, l. 23 – Tr. 690, l. 1. However, when pressed further on whether he told the jury anything about an Allen[1] charge, Bolt explained that he was familiar with the process and said, "[W]ell, he will give an Allen charge, you know, because I have been doing [this] a lot, I have seen this and I just mentioned, you know, that is usually the procedure that they do. And I said, yeah, he would probably give you an Allen charge. I said, well, he will just give you a charge and probably want to see if, see if you can stay later, something or another, of that nature." Tr. 690, ll. 2-11; Tr. 690, l. 22 – Tr. 691, l. 3.

Another bailiff, Mike Easley, also discussed his communications with the jurors. A juror told Easley that she felt "uncomfortable in the hallway, that the Green Family had been walking in front of her and they stopped and turned around and pointed at her." Tr. 691, l. 25 – Tr. 692, l.

[1] Allen v. United States, 164 U.S. 492 (1896).

4. Jurors asked Easley "where the family was" and if the jurors were "going to be alright when" leaving the building. Tr. 692, ll. 4-6. Easley claimed he told the jurors that "everything would be alright because we would make sure that there were no problems." Tr. 692, ll. 7-10.

Prior to hearing from the bailiffs, Judge Hocker expressed his view that the responses from the jurors were "controlling," but that he would permit defense counsel to question the bailiffs to allow for "a complete record." Tr. 685, l. 22 – Tr. 686, l. 7. After the bailiffs testified, defense counsel moved for a mistrial based upon improper influences.[2] Citing Holmes v. United States, 284 F.2d 716 (4th Cir. 1960), defense counsel argued Appellant's right to an impartial jury trial had been violated by Bolt's comments to the jury. Tr. 696, ll. 11-25. Counsel noted that "Allen charges are heavily litigated [and] there [are] a lot of pitfalls that, there [are] a lot of mistakes that can be made that will make them unduly coercive." Tr. 697, ll. 4-7. Defense counsel explained that telling the jury that "if you tell the Judge you are deadlocked what he is going to do is basically tell you something else and then send you back there" was an "improper communication," creating "a structural error in th[e] trial." Tr. 697, ll. 11-14.

The solicitor argued that during the judge's questioning, all jurors gave "the same responses." Tr. 697, ll. 16-18. According to the state, there was "no problem." Tr. 697, l. 19. Despite the bailiffs' testimony, the solicitor argued the jurors' testimony was "the controlling issue in this matter." Tr. 697, ll. 21-23. "[T]he jurors ... expressed that no communications were made, no influence was imposed and therefore the [conviction] should stand." Tr. 697, ll. 23-25.

In response, defense counsel noted the "troubling" nature of the jurors' responses concerning the general lack of communications with the bailiffs where the bailiffs testified to

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[2] This motion had been made in-chambers when the improper communications were first revealed. Tr. 696, ll. 7-9.

substantive conversations with the jurors. Tr. 698, ll. 3-10. The dishonesty or withholding of information by the jurors was even more problematic and required the judge to grant a mistrial. Tr. 698, ll. 11-15.

The judge explained that while he was concerned that Bolt "mentioned Allen charge," and that such "should not ever happen again," he also considered the jurors' statements that "they were not influenced by any communications." Tr. 698, l. 25 – Tr. 699, l. 3. Judge Hocker understood Bolt's testimony to be that he communicated regarding the Allen charge "just to the Forelady." Tr. 699, ll. 4-6. Further, the judge understood the jurors "did not perceive that as a communication or something that would arise to having a communication." Tr. 699, ll. 7-10. The jurors indicated "they were uninfluenced by anything outside of the testimony, evidence and law presented in this case." Tr. 699, ll. 10-12. The judge did not "condone by any means what was, what was done or said," but he did not "think it [rose] to the level of creating prejudice to [Appellant] or [rose] to the level that the drastic remedy of a mistrial should be granted." Tr. 699, ll. 12-17.

At the close of the trial, defense counsel moved for a new trial based upon the improper communications between the jury and the bailiff. Tr. 700, ll. 9-12. The judge denied the new trial motion for the same reasons he denied the request for a mistrial. Tr. 701, ll. 9-11.

Discussion

"The Sixth and Fourteenth Amendments of the United States Constitution guarantee a criminal defendant a fair trial by a panel of impartial and indifferent jurors." Estelle v. Williams, 425 U.S. 501 (1976); Irvin v. Dowd, 366 U.S. 717 (1961); see also S.C. Const. art. I, §§ 3 & 14. "The jury is a central foundation of our justice system and our democracy." Pena-Rodriguez v. Colorado, 137 S.Ct. 855, 860 (2017). "The jury is a tangible implementation of the principle that

the law comes from the people." Id. "The failure to accord an accused a fair hearing violates even the minimal standards of due process." Irvin v. Dowd, 366 U.S. 717, 722 (1961).

"The evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." Parker v. Gladden, 385 U.S. 363, 364 (1966)(internal citation and quotation omitted). "[T]he very heart of a 'fair trial' embodies a disciplined courtroom wherein an accused's fate is determined solely through the exercise of calm and informed judgment." State v. Stewart, 278 S.C. 296, 303, 295 S.E.2d 627, 631 (1982). A jury must "render its verdict free from outside influences of whatever kind and nature" and make its decision based solely on the evidence admitted during the trial. State v. Cameron, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (Ct. App. 1993); see also State v. Cooper, 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999); State v. Bantan, 387 S.C. 412, 422, 692 S.E.2d 201, 206 (Ct. App. 2010). "In a criminal prosecution, the conduct of the jurors should be free from all extraneous or improper influences." State v. Kelly, 331 S.C. 132, 141, 502 S.E.2d 99, 104 (1998); see also Cooper, 334 S.C. at 551, 514 S.E.2d at 590. Conduct that affects the jury's impartiality will affect the verdict. Kelly, 331 S.C. at 141, 502 S.E.2d at 104.

According to the South Carolina Supreme Court, "[t]he less than lucid test is ... declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). Although the decision to grant or deny a mistrial is within the sound discretion of the trial court, the appellate court must reverse the ruling if the decision was an abuse of discretion amounting to an error of law. State v. Dial, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013)(citing State v. Wiley, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010); State v. Ferguson, 376 S.C. 615, 618, 658 S.E.2d 101, 103 (Ct.

App 2008)(citing State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007)). While a mistrial should be granted only when "absolutely necessary" and when a defendant can show error and resulting prejudice, a mistrial must be ordered when the incident "is so grievous that the prejudicial effect can be removed in no other way." Dial, 405 S.C. at 257, 746 S.E.2d at 500. Another way of describing when a mistrial must be granted is when there is "manifest necessity." State v. Bilton, 156 S.C. 324, 153 S.E. 269 (1930). This Court has held a "mistrial should only be granted when absolutely necessary, and a defendant must show both error and prejudice in order to be entitled to a mistrial." State v. Wilson, 389 S.C. 579, 585-586, 698 S.E.2d 862, 865 (Ct. App. 2010). Thus, to warrant reversal, "the errors must adversely affect [the defendant's] right to a fair trial." State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999).

Similarly, when "the defendant seeks a new trial on the ground of impropriety involving the jury, he is required to prove both the alleged misconduct and the resulting prejudice." State v. Covington, 343 S.C. 157, 163, 539 S.E.2d 67, 70 (Ct. App. 2000).

When an issue concerning improper juror conduct arises, the trial court first must make a factual determination as to whether juror misconduct occurred. Bantan, 387 S.C. at 423, 692 S.E.2d at 206 (citing State v. Zeigler, 364 S.C. 94, 109, 610 S.E.2d 859, 867 (Ct. App. 2005)). If misconduct occurred, then the trial court must determine whether the misconduct improperly influenced the jury. Id. The South Carolina Supreme Court explained that the "[r]elevant factors to be considered in determining whether outside influences have affected the jury are the number of jurors exposed, the weight of the evidence properly before the jury, and the likelihood that curative measures were effective in reducing the prejudice." Kelly, 331 S.C. at 141-142, 502 S.E.2d at 104.

The South Carolina Supreme Court has outlined the proper role for bailiffs in their interactions with jurors:

> If, during deliberation, the jury find need to review portions of the testimony or to consult the court regarding questions of law, the foreman should inform the bailiff that the jury wishes to consult with the judge. The subject matter of the jury's inquiry should not be discussed at all. The bailiff's single responsibility is to advise the court of the foreman's request. The matter is then completely in the hands of the trial judge.

Jacobs v. Am. Mut. Fire Ins. Co. of Charleston, 287 S.C. 541, 543, 340 S.E.2d 142, 143 (1986). This is so because "[t]he conduct of jurors and bailiffs must be above suspicion throughout the trial of every case." Id. "A bailiff or other person in charge must limit his communications with the jury and avoid all comments concerning the case." Blake by Adams v. Spartanburg General Hosp., 307 S.C. 14, 18, 413 S.E.2d 816, 818 (1992). After all, "the official character of the bailiff – as an officer of the court as well as the state – beyond question carries great weight with a jury." Parker, 385 U.S. at 470. Therefore, courts must give a bailiff's statements to a jury very close scrutiny in terms of accuracy and potential for coercion when challenged as improper. Ward v. Hall, 592 F.3d 1144, 1181 (11th Cir. 2010). "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." Mattox v. United States, 146 U.S. 140, 150 (1892); see also, Barnes v. Joyner, 751 F.3d 229, 240 (4th Cir. 2014).

"The test is whether the verdict was solely the result of honest deliberation on the case as publicly developed at trial, or whether there is reason to suppose outside influences entered into it as a factor." Blake, 307 S.C. at 18, 413 S.E.2d at 818. In fact, "[a] bailiff's ex parte communications with deliberating jurors ... is a species of jury misconduct." Lamb v. State, 251 P.3d 700, 711 (Nev. 2011).

In a case bearing some similarities to the instant matter, the South Carolina Supreme Court upheld a trial judge's grant of a new trial. Blake, 307 S.C. at 16, 413 S.E.2d at 817. During a medical malpractice case, a bailiff "allegedly made statements to the effect that the trial judge did

not like a hung jury, and that a hung jury places an extra burden on taxpayers." Id. After an evidentiary hearing on the allegation, the trial judge concluded the "bailiff made improper comments to two jurors, one of whom was the foreperson, and that the comments were relayed to the remaining jurors by the foreperson on the second day of deliberations." Id. The judge granted the new trial on "'a possibility of coercive effect'" resulting from the bailiff's comments. Id.

The Court recognized that the "bailiff's remarks to the jurors" raised "the same concerns with the jury about the necessity of reaching a verdict" that a judge may raise with the jury. Id. at 18, 413 S.E.2d at 818. However, the court explained that "in so encouraging a jury" to reach a verdict, "a trial judge has the duty to ensure that no juror feels compelled to sacrifice his conscientious convictions in order to concur in the verdict." Id. The Court agreed the bailiff's remarks were distinguishable from those the trial judge would have made in open court. Id. "The bailiff's comments were made outside the presence of the trial judge and counsel. It was a mere fortuity that the bailiff's communication was made known to the trial judge. Moreover, the bailiff's remarks were not offset by a statement that each juror should not surrender his conscientious convictions merely to reach an agreement." Id. Setting aside the jury's verdict was proper because "[a]dministration of the law should be above any possibility of taint, criticism, or suspicion of impurity." Id.

In State v. Cameron, 311 S.C. 204, 208, 428 S.E.2d 10, 12 (Ct. App. 1993), this Court held a private communication between a bailiff and the forelady of the jury during the jury deliberations required a new trial. At the conclusion of Cameron's trial, the judge instructed the jury that if the jury found Cameron guilty, then the jury would have to determine whether to recommend mercy. Id. at 206, 428 S.E.2d at 10. Further, the judge informed the jury that if it did not recommend mercy, the judge would sentence Cameron to life, but if the jury did recommend mercy, the

sentence would be left to the court's discretion. Id. During deliberations, the forelady asked the bailiff for more information regarding sentencing, particularly, sentencing if the jury recommended mercy. Id. The bailiff told the forelady that she would be glad to give the judge a note from the jury and to take the jurors back into the courtroom for further instruction; however, the bailiff added, "'This is a fair Judge, that's all I can answer you. He is a fair Judge." Id.

Cameron moved for a mistrial based on the improper communication between the bailiff and the forelady. Id. at 207, 428 S.E.2d at 11. The trial judge found "the short colloquy between the bailiff and the forelady could not have in any way influenced the jury to refuse to recommend mercy." Id. at 207, 428 S.E.2d at 12. This Court disagreed. As this Court explained, despite the trial judge's adequate instruction on the verdicts of guilty with and without mercy, the jury remained confused. Id. at 208, 428 S.E.2d at 12. "[T]he right to fix punishment or make a recommendation that would place punishment in the discretion of the court rested exclusively with the jury." Id. "The bailiff's response to the forelady, that they should not worry if they were deadlocked because the judge was fair, was misleading. It tended to lessen the jury's sense of responsibility by implying that if they rendered a verdict of guilty without mercy, the judge had some discretion in sentencing." Id. "Jurors are simply not to consider the opinions of neighbors, officials or even other juries." Id. (internal quotation omitted).

In Holmes v. United States, 284 F.2d 716, 717-718 (4th Cir. 1960), the Fourth Circuit granted a new trial "because of improper communication by a court official of prejudicial information to the jury." Immediately after submission of the case and just before the jury commenced deliberations, one of the jurors asked a deputy marshal where the defendants were staying. Id. at 718. The officer responded that he did not know about one of the defendants, but he knew the other was staying at the jail, serving a six-year sentence. Id. As the court explained,

"[i]nevitably, there were minor variations in the versions of the conversation subsequently recounted by the participants and those who heard it." Id. However, the court held it was "clear that the deputy marshal improperly communicated information to members of the jury which ... informed them of the prior conviction." Id. The Fourth Circuit explained the "private communication of the court official to members of the jury" was an "occurrence which cannot be tolerated if the sanctity of the jury system is to be maintained." Id.

According to the court, "[w]hen there has been such a communication, a new trial must be granted unless it clearly appears that the subject matter of the communication was harmless and could not have affected the verdict." Id. The Court found "[t]he subject matter of the communication was far from harmless" because "[n]othing had occurred at the trial to make relevant evidence of a prior conviction" of one of the defendants." Id. In fact, the judge would not have allowed a reference to a prior conviction to have occurred in open court. Id. "When the jury was privately informed of that fact by the deputy marshal out of the presence of the court and of counsel, there was not so much as opportunity to mitigate its obviously prejudicial effect." Id.; see also, Remmer v. United States, 347 U.S. 227, 229 (1954)(explaining "[i]n a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in the pursuance of known rules of the court and the instructions and directions of the court made during the trial with full knowledge of the parties" and providing that although the "presumption is not conclusive," "the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact was harmless to the defendant").

The Arizona Supreme Court examined whether a presumption of prejudice applied where a bailiff had improper contact with the jury in Perez v. Community Hosp. of Chandler, Inc., 929 P.2d

1303 (Ariz. 1997). There were three improper contacts between the bailiff and the jury. Id. at 1305. The first occurred when the jury asked the bailiff whether the jury could review portions of the trial testimony. Id. The bailiff told the jurors that it was not possible and they had everything necessary in order to render a verdict. Id. "The second contact was a question regarding the procedure at impasse." Id. The jurors were deadlocked and asked what would happen if they were unable to reach a decision. Id. "[T]he bailiff told the jurors that if they reported deadlock, the judge would speak to them about the problem and then send them back to deliberate until a verdict was reached." Id. The third contact occurred when the jury asked the bailiff whether signing a defense verdict form would allow a non-party to escape responsibility. Id. The bailiff told the jurors "that obtaining an answer to such a question would be time-consuming because it would have to be presented to the judge and the attorneys, so the jury should be certain they wanted to ask the question." Id.

In analyzing the prejudice question, the Arizona Court explained "[t]he fairness of trial by jury derives in substantial part from the prohibition of ex parte communication to the jury of information regarding evidence and legal standards." Id. at 1306. Ultimately, the court refused to adopt a strict rule of presumed prejudice in cases involving prohibited ex parte communications with the jury. Id. The court established "a two-prong inquiry: (1) Was there an improper communication? and (2) Was the communication prejudicial or merely harmless?" Id. The court established factors to consider: "(1) whether the communication was improper or simply involved an 'administrative detail,' (2) whether the communication, despite its impropriety, concerned an innocuous matter, (3) whether the substantive response accurately answered the question posed, (4) whether an essential right was violated, and (5) whether the nature of the communication prevents ascertainment of prejudice." Id.

The Arizona Supreme Court found "no dispute that the bailiff's actions in this case were improper." Id. The court found the jury's question about an impasse to be "significant procedural question." Id. at 1306-1307. According to the court, "[t]he bailiff misled the jury about the process in the event of a deadlock, at least failing to inform them that questions could and should be addressed to the judge and that any impasse problem should be presented to the judge." Id. at 1307. It was improper for the bailiff to advise the jury of what would happen if an impasse were reported. Id. "Because the jurors' problem was not presented to the court, the court could not respond to or address the deadlock issue, and the attorneys were denied an opportunity to assist the deadlocked jurors during this crucial step in the trial process." Id. The court also found the bailiff's remarks about the jury's request to read trial testimony improper. Id.

Recognizing that improper comments were subject to harmless error analysis, the Arizona Supreme Court explained it would "not require the litigant to demonstrate prejudicial effect when the nature of the error makes it impossible to ascertain the degree of prejudice resulting from the substance of a communication." Id. at 1309. "Thus, prejudice can be 'conclusively presumed' when the nature of the error deprives the court of the ability to determine the extent of prejudice." Id. According to the court, a litigant is denied several essential rights when a bailiff improperly communicates with a jury: "first, to have a jury free from unauthorized intrusion; second, to have a jury protected from extraneous and inaccurate information; and finally, the right to be notified about problems with jury deliberations and to be heard with respect to the method of addressing those problems." Id. "The right to a jury trial is hollow if a court officer acts without notice to the litigants and becomes a barrier to transmittal of information from the jury and a source of misinformation or coercion to jurors." Id. at 1310.

Communications between bailiffs outside the presence of the prosecutor, the defendant, defense counsel, and the judge are fraught with the potential for prejudice. See e.g., United States ex rel. Tobe v. Bensinger, 492 F.2d 232, 238 (7th Cir. 1974)(affirming a grant of habeas relief where there was conflicting evidence in the record regarding whether the bailiff told the jurors to deliberate until a verdict was reached, finding the communication akin to an Allen charge, but without an admonition that no juror should relinquish his conscientiously held convictions to join a majority verdict, and rejecting the individual jurors indication of voluntary verdicts where jury members "are not empowered to determine what amounts to legal coercion"); State v. Merricks, 831 So.2d 156, 160-161 (Fla. 2002)(holding a bailiff's improper communication with a jury regarding whether the jury could re-hear testimony was *per se* reversible error where the jury reached its verdict promptly after the bailiff's improper statement and the judge's general questioning of the foreperson regarding the jury's request for information did not provide specific information regarding what the jury sought); Oliver v. State, 334 A.2d 572, 573-574 (Md. Ct. Spec. App. 1975)(granting a new trial where a bailiff told the jury he did not think illegal entering and breaking and entering were different when asked by the jury); People v. Khalek, 689 N.E.2d 914, 915 (N.Y. 1997)(granting a new trial where after the court informed the jurors to cease deliberating for the evening, jurors asked a court officer to inform the judge that a verdict – not guilty on all counts – had been reached, but the officer merely repeated the judge's earlier instructions that the deliberations should cease without attempting to contact the court, requiring the jurors to be sequestered and resume deliberations the following day); People v. Rukaj, 506 N.Y.S.2d 677, 677 (N.Y. App. Div. 1986)(remanding for a new trial where a court officer told a juror that if the jury could not reach a verdict, the jury would be sequestered for the weekend and could be sequestered for as long as five or six weeks before a mistrial would be declared); Mooney v. State, 990 P.2d

875, 892-893 (Okla. Crim. App. 1999)(finding a death sentence was improperly coerced where a court instructed the bailiff to return the jury to the courtroom, but the bailiff had discussions with the jury regarding its note, which altered the course of conduct by the trial judge); State v. Christensen, 567 P.2d 654, 656-657 (Wash. Ct. App. 1977)(holding the appellate court could not say the bailiff's remarks had no prejudicial effect on the jury beyond a reasonable doubt where there was conflicting evidence regarding the bailiff telling the jury that rehearing testimony would take hours and was disfavored and that if the jury could not reach a verdict, then a retrial would result).

Certainly, "communications" between jurors and bailiffs "concerning administrative matters may not be prejudicial," but "when communications involve matters of law, the risk of prejudice is present and communication by the bailiff to jurors on such matters is improper." State v. Floyd, 725 N.W.2d 817, 828 (Neb. 2007), *rev'd on other grounds by* State v. McCulloch, 742 N.W.2d 727 (Neb. 2007). The Nebraska Supreme Court found a bailiff's communications with a juror improper where the bailiff indicated that the deliberations would last until the jurors reached a verdict or that there was no time limit to deliberations and that jurors could be required to deliberate the rest of the week. Id. at 829. "The communication went beyond simple administrative matters." Id. The question "should have been referred to the court, and the bailiff should not have attempted to give any direct answer to the question." Id. The court also found resulting prejudice from the improper communication. Id. The court concluded "the improper communication from the bailiff to the juror would have affected the average juror in a way that would have prejudiced [the defendant] and denied him a fair trial." Id. at 830. The court determined "the communication could have pressured the average juror to change his or her vote in order to avoid protracted deliberations." Id.

The Washington Supreme Court concluded a bailiff's statement there were no lodgings available to the jury and that they would be required to deliberate until they reached a verdict was

improper and was of a type that would prejudice a jury. State v. Crowell, 594 P.2d 905, 907-908 (Wash. 1979). The court explained "bailiff's statements here can be viewed as designed to hasten the jury's verdict." Id. at 908. The court likened the bailiff's remarks to those of a trial judge that may be coercive. Id. Thus, the defendant was entitled to a new trial. Id.

Examining a similar issue, the Oklahoma Court of Criminal Appeals required a new trial based upon a bailiff informing a jury to deliberate until they reached a verdict. Farrell v. State, 512 P.2d 225, 225-226 (Okla. Crim. App. 1973). The court explained that the general rule was that "any unauthorized communication to a juror during deliberations is presumed to be prejudicial, with the burden clearly upon the State to prove defendant was not prejudiced by a violation of the [state] statute forbidding illegal communication with jurors during their deliberations." Id. at 226. The evidence indicated "the bailiff instructed the jury of her own volition that they were compelled to return a verdict." Id. The statement "was a misstatement of the law as there is no compulsion that jurors be required to return a verdict." Id. "It goes without saying that jurors are not required to be held captive in the jury room until some verdict is rendered." Id.

The South Carolina Code of Laws sets forth the procedure to follow when a jury fails to agree. Pursuant to the statute, "[w]hen a jury, after due and thorough deliberation upon any cause, returns into court without having agreed upon a verdict, the court may state anew the evidence or any part of it and explain to it anew the law applicable to the case and may send it out for further deliberation." S.C. Code Ann. § 14-7-1330. However, "if it returns a second time without having agreed upon a verdict, it shall not be sent out again without its own consent unless it shall ask from the court some further explanation of the law." Id. The purpose of the statute is to give the jury the right to indicate to the court its view as to when time for due and thorough deliberation has elapsed. State v. Simon, 126 S.C. 437, ___, 120 S.E. 230, 232 (1923). Further, the statute "is intended 'to

prevent forced verdicts, and to prevent undue severity of jury service.'" State v. Barnes, 402 S.C. 135, 139, 739 S.E.2d 629, 631 (2013)(quoting State v. Freely, 105 S.C. 243, 89 S.E. 643 (1916)). Verdicts must be the result of calm and deliberate reflection, not coercion. State v. Kelley, 45 S.C. 659, 24 S.E. 45, 47 (1896).

"The trial judge has the duty to urge, but not coerce a jury to reach a verdict." Dawson v. State, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002)(citing Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002)); see also Workman v. State, 412 S.C. 128, 130, 771 S.E.2d 636, 638 (2015). "An Allen charge cannot be directed to the minority voters on the jury panel, but must instead be even-handed, directing both the majority and the minority to consider the other's views." Id. (citing Green, 351 S.C. at 194, 569 S.E.2d at 323). "Whether an Allen charge is unconstitutionally coercive must be judged 'in its context and under all the circumstances.'" Id. (quoting Tucker v. Catoe, 346 S.C. 483, 491, 552 S.E.2d 712, 716 (2001)); see Lowenfield v. Phelps, 484 U.S. 231, 237 (1988). "An Allen charge is an instruction advising deadlocked jurors to have deference to each other's views, that they should listen, with a disposition to be convinced, to each other's argument." State v. Lee-Grigg, 374 S.C. 388, 418 n.1, 649 S.E.2d 51, 57 n.1 (Ct. App. 2007), *aff'd*, 387 S.C. 310, 692 S.E.2d 895 (2010).

In Tucker, this Court adopted the standard set forth by the United States Supreme Court in Lowenfield to determine whether an Allen charge is unconstitutionally coercive. In Lowenfield, the United States Supreme Court considered, among other things, the following factors: (1) whether the charge speaks specifically to the minority juror(s); (2) whether the charge includes such language as "You have got to reach a decision in this case;" (3) whether there is an inquiry into the jury's numerical division; and (4) whether the jury returns a verdict shortly after the

supplemental charge. Tucker, 346 S.C. at 492, 552 S.E.2d at 716 (citing Lowenfield, 484 U.S. at 237); see also Workman, 412 S.C. at 130-131, 771 S.E.2d at 638.

"The trial judge may not indicate to or threaten the jury that they must agree, or failing to agree, they will remain in the jury room for a specified length of time." State v. Williams, 344 S.C. 260, 264, 543 S.E.2d 260, 263 (Ct. App. 2001). In order for an Allen charge to pass constitutional muster, it must remind the jurors that the verdict must be the result of each juror's own convictions, and not mere acquiescence in the conclusion of the other jurors. State v. Pulley, 216 S.C. 552, 555-557, 59 S.E.2d 155, 157-158 (1950); State v. Jones, 320 S.C. 555, 558-559, 466 S.E.2d 733, 734-735 (Ct. App. 1996); State v. Tillman, 304 S.C. 512, 521, 405 S.E.2d 607, 613 (Ct. App. 1991); State v. Hale, 284 S.C. 348, 355, 326 S.E.2d 418, 422 (Ct. App. 1985).

In Dawson, the South Carolina Supreme Court found that the following language included in the Allen charge given to the jury in that case was coercive because it "could be perceived as being directed toward the minority juror:"

> I have sometimes thought that the juror who could render less service to the Court and to the country than any other juror is the juror who says, I know what I want to do in this case and when and if everybody agrees with me, then we'll write a verdict, and we'll not write a verdict until that time.

Id. at 18-20, 572 S.E.2d at 446-447.

In State v. Simon, 126 S.C. 437, 437, 120 S.E. 230, 232-233 (1923), the South Carolina Supreme Court examined a judge's instruction to the jury regarding how long the jury would be required to deliberate. After deliberating for two hours concerning a misdemeanor receiving stolen goods charge, the jury reported to the presiding judge that it was deadlocked. Id. at 437, 120 S.E. at 232. The judge noted that it was "10 minutes of 6" when the jury made this report to the judge. Id. He provided the jurors with an envelope and directed them to continue deliberating: "[i]f you agree between now and 9:30 tomorrow morning, you can come out. If you do not agree between now and

then, I can talk to you then, and, if I find you still cannot agree, I would not keep you there any longer." Id. The Court explained the general rule is that "a jury should not be informed of the court's intention to keep them together for a specified time." Id. at 437, 120 S.E. at 233. The court found "that reasonable ground exists for the apprehension that the verdict here found was the result of the judge's ultimatum rather than the product of that concurrence of the deliberate and conscientious judgments of 12 jurors, based upon the evidence, which, in contemplation of law, the verdict of a jury is intended to represent." Id.; see also Rowland v. Harris, 218 S.C. 42, 44-46, 61 S.E.2d 397, 398-399 (1950)(ordering a new trial where the judge's instructions indicated the jury would have to deliberate the entire weekend unless it could reach a verdict earlier).

Bailiff Bolt acted improperly when he communicated to the jury that if the jury were unable to reach a verdict, then the judge would issue an Allen charge and request the jury to continue to deliberate. Judge Hocker found the communication occurred and explained that he was concerned about Bailiff Bolt's conduct. Judge Hocker admonished Bailiff Bolt that it "should not ever happen again." However, Judge Hocker concluded the improper communication was not prejudicial because the jurors did not perceive Bailiff Bolt's improper comment as a communication. This was legal error. The subject matter of the communication was not harmless, and it could have affected the verdict. See Remmer v. United States, 347 U.S. 227, 229 (1954)(explaining any private communication with a jury is presumptively prejudicial and the prosecution must establish that the contact was harmless to the defendant); Holmes, 284 F.2d at 718 (explaining that in order for a private communication between a court official and a member of the jury occurs, a new trial must be granted unless it clearly appears that the subject matter of the communication was harmless and could not have affected the verdict);.

Bailiff Bolt's improper communication to the jury was the equivalent of a coercive Allen

charge. On its face, Bailiff Bolt's improper communication intimated that the jury must reach a verdict. In other words, the jury was left with the impression that it would be required to deliberate for as long as necessary to render a verdict. Of course, this is simply incorrect. Additionally, Bailiff Bolt's improper communication had the coercive effect of an unconstitutional Allen charge because it failed to ensure that no juror felt compelled to sacrifice his conscientious convictions in order to concur in a verdict. The subject matter of the communication – what would happen if the jury could not reach a unanimous verdict – was not a simple administrative matter or an innocuous matter. Instead, it concerned substantial rights of the defendant.

Appellant was denied several critical rights based upon Bailiff Bolt's improper communication with the jury: (1) the right to have the jury free from unauthorized intrusion; (2) the right to have a jury protected from extraneous and inaccurate information; and (3) the right to be notified about problems with the jury deliberations and to be heard with respect to the method of addressing those problems. See Perez, 929 P.2d at 1309. Judge Hocker's reliance upon the jurors' testimony that their verdicts were not influenced by improper communications was misplaced. First, the jurors denied the improper communication occurred at all, which cast considerable doubt on their credibility. The jurors who denied any communications at all, which would have included innocuous details, such as locations of restrooms and descriptions for entering and exiting the courthouse, that undoubtedly occurred, lacked all credibility. Judge Hocker's factual finding that the improper communication with Bailiff Bolt in fact occurred demonstrates his finding that the jurors lacked credibility in this regard.

Although Judge Hocker indicated that the jurors with whom Bailiff Bolt communicated did not perceive his remarks as a communication, the factual finding that the communication

occurred cannot be disputed and was an implicit finding that the jurors lacked credibility. Second, as the Seventh Circuit Court of Appeals explained, the question of coercion must not be left to the jury members as they were not equipped to determine what amounts to legal coercion. Bensinger, 492 F.2d at 239. Furthermore, any argument that Bailiff Bolt's improper communications were not directed to the jurors in the minority must fail because "any influence which emphasizes the importance of agreement to the exclusion of the dictates of conscience is coercive and prejudicial." See Bensinger, 492 F.2d at 239.

Failing to grant a new trial or a mistrial, the trial judge permitted the "possibility of taint, criticism, [and] suspicion of impurity" to infect the "[a]dministration of the law" due to Bailiff Bolt's improper communication with the jury, which intimated to the jury that a verdict must be reached in the case no matter how long it took to do so. See Blake, 307 S.C. at 18, 413 S.E.2d at 818.

II. The trial judge erred in permitting the state to introduce messages allegedly obtained from the deceased's Facebook account where the state failed to authenticate the messages.

Relevant facts

Prior to trial, defense counsel moved to suppress a printout of Facebook messages purportedly between Appellant's girlfriend, Karina Galarza, and the deceased, Edwin Chirinos. Pre-Tr. 20, ll. 4-12. The state explained the messages were "not obtained from Ms. Galarza's Facebook account." Pre-Tr. 20, ll. 17-18. The state claimed the messages were sent from an account with the username of "Ruby Ninia [sic]," which the state called an "alias" for Galarza. Pre-Tr. 20, ll. 18-19. According to the state, the messages were obtained from the deceased's account. Pre-Tr. 20, ll. 21-22. "The victim's father has the password that was - - they were part of the same system, same phone, that sort of thing." Pre-Tr. 20, ll. 22-24. The state claimed the father "had access to it," "downloaded those," and "made these available to law enforcement." Pre-Tr. 20, l. 25 – Pre-Tr. 21, l. 3. The state pointed to an address contained within the messages, which was Galarza's home and where she and Appellant were arrested. Pre-Tr. 21, ll. 5-9. To support its contention that "Ruby Rina" was in fact Galarza, the state claimed a witness would testify to that fact. Pre-Tr. 21, ll. 15-23. The judge took the matter under advisement. Pre-Trial 25, ll. 9-10; Pre-Trial 40, ll. 2-11.

Immediately following jury selection, defense counsel expressed his concerns with the state's inability to authenticate the Facebook messages. Tr. 43, ll. 1-3. Counsel explained that the deceased's father, whom the state claimed downloaded and printed the messages from Facebook, was not a party to the conversation. Tr. 43, ll. 3-7. In fact, no party to the alleged conversation would be called to testify as a witness. Tr. 43, ll. 10-12. Counsel argued the state must prove the document is what it purports to be in order to authenticate it. Tr. 44, ll. 22-24.

Based on what had been presented, the state was unable to do so because the state did not have a party to the conversation or a person in charge of recordkeeping. Tr. 44, l. 24 – Tr. 45, l. 2. Counsel explained there had been no evidence presented as to the accuracy of the information or the completeness of the information. Tr. 45, ll. 2-9.

The state maintained that two people had access to the Facebook account – the deceased and his father. Tr. 43, ll. 22-24. According to the state, "[t]he father also had the password. So, he was able to get on there. He knows it's his son's account." Tr. 43, ll. 24-25. The state further asserted, "It's in fact listed as Edwin all the way through." Tr. 44, l. 1. In addition to a state's witness, Davian Holman, testifying that "Karina Galarza's Facebook account is Ruby Rina," there was a page among the messages in which "Edwin's answer is IDK. I don't know Karina." Tr. 44, ll. 1-10.

The judge did not "really find an authentication problem." Tr. 52, ll. 2-3. The judge explained that if the father testified "this was Edwin's Facebook account, I've got the password," and Holman could authenticate the identity of Ruby, then the messages were authenticated, as far as the judge was concerned. Tr. 52, ll. 3-7.

Prior to the deceased's father testifying, defense counsel renewed his motion to exclude the Facebook messages based upon the state's failure to authenticate the evidence. Tr. 164, ll. 15-24. Counsel made clear he was "objecting under 901" because the state could not authenticate the Facebook messages properly. Tr. 165, ll. 4-6. The judge ruled that authenticating the messages could "still be done by the father." Tr. 166, ll. 1-3. The state explained its plan to call the father "to illustrate that the Facebook messages were retrieved and provided to law enforcement as part of their investigation," then Davian Holman would "testify as to what happened at the scene," and the solicitor's investigator would testify that he used the

password provided by the father to retrieve the Facebook messages. Tr. 167, ll. 1-17.

The deceased's father, Edwin Anibal Diaz Cruz, explained that his son, Edwin Diaz Chirinos, had a Facebook account. Tr. 179, ll. 12-25. The father claimed he could access the deceased's Facebook account after the deceased went missing on May 8, 2016. Tr. 180, ll. 1-4. He was trying "to trace his whereabouts." Tr. 180, ll. 5-7. He was able to retrieve his Facebook messages and turned that information over to law enforcement. Tr. 180, ll. 8-13. Specifically, the father provided law enforcement with a screenshot of part of the Facebook messages he retrieved. Tr. 180, ll. 19-23; Tr. 181, ll. 9-11; State's Exhibit #61. The father was not monitoring the deceased's Facebook account. Tr. 181, ll. 22-23.

An investigator who learned of the screenshot went to Queens Circle to investigate. Tr. 183, l. 22 – Tr. 184, l. 18; Tr. 185, ll. 1-8. The investigator wanted to know if the deceased were in the home or if the occupants of the home had seen him. Tr. 185, ll. 1-8. After the deceased's body was found, the police returned to the Queens Circle address, where they spoke to Karina Galarza and Appellant. Tr. 185, ll. 17-24. After speaking to Galarza, the police arrested her and Appellant. Tr. 192, ll. 10-13. Shortly thereafter, the police also arrested Davian Holman. Tr. 192, ll. 17-23.

Holman and Appellant were cousins. Tr. 239, ll. 9-12. Holman claimed that Galarza's "Facebook name" was "Ruby Rina." Tr. 240, ll. 6-7. He claimed that on May 8, 2016, he was with Appellant and Appellant's girlfriend, Galarza, at the girlfriend's home on Queens Circle. Tr. 241, ll. 1-12. He further claimed that Galarza and Appellant "were on the phone texting," but he could not say whom or what they were texting. Tr. 242, l. 21 – Tr. 243, l. 2; Tr. 289, ll. 9-12. In fact, Holman never saw the phone's screen. Tr. 289, ll. 20-22. According to Holman, Galarza and Appellant were "laughing and giggling" while texting. Tr. 243, ll. 3-9; Tr. 289, ll. 23-25.

During Holman's testimony, the state offered the Facebook messages into evidence. Tr. 275, ll. 8-15. According to the state,

> [T]here has been mention that the, by Davian, that there was texting, that Edwin showed up, as was shown by the, here it is, by the message on State's number 61 for identification. He actually showed up at *** Queens Circle. I would say that that authenticates the messages. And that at this point we would ask that the Facebook messages come in.

Tr. 275, ll. 8-15. Defense counsel renewed his objection to authentication of the evidence. Tr. 276, ll. 9-10. He explained the state could not present a party to the conversation and the witnesses presented did not know what was going on in the conversation. Tr. 276, ll. 10-14. The judge reserved ruling until the state called the solicitor's investigator to explain how he accessed and produced the records proposed to be introduced by the state. Tr. 277, ll. 5-11.

The solicitor's investigator, Walter Bentley, learned about the Facebook messages upon reviewing the file prepared by the police when he was assisting the solicitor in getting ready for trial. Tr. 421, ll. 9-25. He "decided that they may be relevant" and decided to look at them. Tr. 422, ll. 1-2. From the police file, he had "a screen shot ... of some of the communication which further peaked [sic] [his] interest in wanting to look at those messages." Tr. 422, ll. 2-5. The screen shot, State's Exhibit #61, was provided by the police. Tr. 422, ll. 6-10; State's Exhibit #61. Regarding how he retrieved the Facebook messages from the deceased's account, Bentley explained:

> I was able to speak with [the deceased]'s family. His father, mother and an uncle who speaks some English. They were able to provide me with the email address which is what's used as a user name on Facebook. And also, they provided me with the password for the account. I used the information provided and I logged into the account and began looking for the messages that coordinated with the screen shot I had already viewed.

Tr. 422, ll. 11-20. What Bentley obtained "was quite lengthy so [he] just selected all the text and copied it into a word document to allow [him] to be able to actually print." Tr. 422, l. 21 – Tr.

423, l. 1. The document offered by the state was the document he printed. Tr. 423, ll. 1-2.

Bentley was familiar with Galarza's mother, Minerva Tapia. Tr. 423, ll. 11-24. He also knew Galarza to be Tapia's daughter. Tr. 424, ll. 4-5. Bentley was aware that Tapia had another daughter named Julissa and a son, but Bentley did not know the son's name. Tr. 424, ll. 6-9. According to Bentley, Tapia lived on Queens Circle. Tr. 424, ll. 10-11. When he was reviewing the Facebook messages, he found a reference to *** Queens Circle. Tr. 424, ll. 15-18. He also found a message sent from Edwin stating "IDK, which is I don't know, commonly used for Text or Facebook messaging and then the name Karina." Tr. 424, ll. 19-24. He also "found a couple different instances where messages were in there from the Facebook account of Ruby Rina, here it mentioned her sister and mentioned, actually mentioned the name Julissa, on two separate occasions." Tr. 424, l. 25 – Tr. 425, l. 5. Later, Bentley claimed there were three references to a sister named Julissa. Tr. 436, ll. 2-6.

Over defense counsel's objection, the judge permitted the Facebook messages to be admitted into evidence. Tr. 426, ll. 9-10; State's Exhibit #61; State's Exhibit #70.[3] The state and Bentley then engaged in some role playing as one assumed the role of "Edwin" and one assumed the role of "Ruby" when reading the exhibits to the jury. Tr. 426, l. 13 – Tr. 430, l. 24. Bentley explained that although the actual messages he saw had date and time stamps, those "did not show up" when he copied and pasted the messages into the word document. Tr. 430, l. 25 – Tr. 431, l. 6; cf. State's Exhibit #61 and State's Exhibit #70.

Discussion

The proponent of evidence must satisfy "[t]he requirement of authentication or

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[3] After the documents were admitted, the state argued that he had never heard the name Julissa previously and that the person with the name Julissa was identified as the writer's sister, which state argued limited the author to "Ms. Galarza." Thus, the state contended the document was authenticated. Tr. 438, ll. 26-20.

identification as a condition precedent to admissibility." Rule 901(a), SCRE. This requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Id. While the burden is not high, the proponent must offer a satisfactory foundation to permit the jury to conclude the evidence is authentic. Deep Keel, LLC v. Atlantic Private Equity Group, LLC, 413 S.C. 58, 64-65, 773 S.E.2d 607, 610 (Ct. App. 2015)(citing United States v. Hassan, 742 F.3d 104, 133 (4th Cir. 2014)).

One of the most common ways for the proponent to authenticate evidence is through the testimony of a witness with knowledge that the "matter is what it is claimed to be." See Rule 901(b)(1), SCRE. Another way to authenticate evidence is by showing the evidence contains "distinctive characteristics and the like." Rule 901(b)(4), SCRE. "Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances" may serve to authenticate evidence. Id.; see also State v. Anderson, 386 S.C. 120, 129, 687 S.E.2d 35, 39-40 (2009)(finding a master fingerprint card authenticated where an expert explained the prints on the master card were taken at a correctional facility on a specific date, and assigned a unique state identifying number).

Examining an authentication issue related to a social networking post, the Maryland Court of Appeals delved into how social networking sites work – and do not work. Griffin v. State, 19 A.3d 415, 420-421 (Md. 2011). Particularly, the court recognized that "anyone can create a fictitious account and masquerade under another person's name or can gain access to another's account by obtaining the user's username and password." Id. at 421. "The potential for fabricating or tampering with electronically stored information on a social networking site, thus poses significant challenges from the standpoint of authentication of printouts of the site." Id. at 422.

The court found a printout of a MySpace page was not authenticated. Id. at 423-424. The court explained the "picture of [the individual], coupled with her birth date and location, were not sufficient 'distinctive characteristics' on a MySpace profile to authenticate its printout, given the prospect that someone other than [the individual] could have not only created the site, but also posted the … comment." Id. at 424. According to the court, "the potential for abuse and manipulation of a social networking site by someone other than its purported creator and/or user" requires "a greater degree of authentication than merely identifying the date of birth of the creator and her visage in a photograph on the site" when what is offered is "a printout of an image from such a site." Id.. See also Lorraine v. Markel American Ins. Co., 241 F.R.D. 534 (D. Md. 2007)(laying out a "roadmap" for authentication of electronically stored information).

The Mississippi Supreme Court explained "[t]he authentication of social media poses unique issues regarding what is required to make a prima facie showing that the matter is what the proponent claims." Smith v. State, 136 So.3d 424, 432 (Miss. 2014). "Creating a Facebook account is easy." Id. "Not only can anyone create a profile and masquerade as another person, but such a risk is amplified when a person creates a real profile without the realization that third parties can 'mine their personal data.'" Id. "Friends and strangers alike may have 'access to family photos, intimate details about one's likes and dislikes, hobbies, employer details, and other personal information,' and, consequently, 'the desire to share information with one's friends may also expose users to unknown third parties who may misuse their information.'" Id.

Tremendous concerns over authentication exist due to the ease of fabricating and tampering with electronically stored information. Id. at 432-433. Therefore, the mere fact that an electronic communication purports to originate from a certain person's account is insufficient to authenticate that person as the author of the communications. Id. at 433. "[S]omething more

than simply a name and small, blurry photograph" is needed to identify the Facebook account as belonging to the purported user. Id.

The court held the state failed to provide sufficient evidence that the Facebook messages were from the defendant because the only information tying the account to the defendant was the name and a "very small, grainy, low-quality photograph." Id. at 434. "No other identifying information from the Facebook profile, such as date of birth, interests, hometown, or the like was provided." Id. Despite the defendant's girlfriend's testimony the defendant sent the messages to her, the court found this was not sufficient. Id. The court explained the state "utterly failed to provide any information as to the basis of her purported knowledge." Id.

The Supreme Judicial Court of Massachusetts held a trial court erred in permitting the prosecution to introduce messages sent via MySpace. Com. v. Williams, 926 N.E.2d 1162, 1172 (Mass. 2010). A witness testified that she received MySpace messages from the defendant's brother telling her not to testify against the defendant. Id. The witness explained the account showed a picture of the brother and showed the user's name was "doit4it." Id. According to the court, the contents of the messages indicated the sender was familiar with the witness and the pending criminal cases against the defendant and wanted to keep the witness from testifying. Id. The court explained there "was insufficient evidence to authenticate the messages." Id. There was no testimony regarding how secure the web page was or who could access the web page. Id. "While the foundational testimony established that the messages were sent by someone with access to [brother]'s MySpace Web page, it did not identify the person who actually sent the communication." Id. at 1172-1173.

The Appellate Court of Connecticut concluded a defendant failed to authenticate authorship of electronic messages sent to him purportedly from a state's witness using Facebook.

State v. Eleck, 23 A.3d 818, 820-824 (Conn. App. Ct. 2011). After the witness provided damaging testimony against the defendant, he sought to impeach her credibility by asking if she had spoken with the defendant." Id. at 820. The witness admitted to seeing the defendant, but claimed she had not spoken to him "in person, by telephone or by computer." Id. Counsel showed the witness a printout of an exchange of electronic messages between the defendant's Facebook account and another account bearing her name. Id. She identified the user name on the account as hers, but denied sending the messages. Id. She also claimed that someone had "hacked" into her Facebook account and changed her password rendering her no longer able to access the account. Id. The defendant testified that he downloaded and printed the exchange of messages from his computer. Id. at 821. He testified that he recognized the user name as belonging to the witness and that the user name's profile contained photographs and other entries identifying the witness as the account holder. Id.

Although the court found the witness's testimony about the "hacking" "dubious," particularly considering the messages were sent prior to the alleged hacking, the court noted the testimony highlighted "the general lack of security of the medium and raise[d] an issue as to whether a third party may have sent the messages" using the witness's account. Id. at 824. The court determined "that the fact that [the witness] held and managed the account did not provide a sufficient foundation for admitting the printout, and it was incumbent on the defendant, as the proponent, to advance other foundational proof to authenticate the proffered messages did, in fact, come from [the witness] and not simply from her Facebook account." Id. The court also found the content of the messages too vague to support the defendant's position that circumstantial evidence established the witness as the author. Id. The messages did not "reflect distinct information that only [the witness] would have possessed regarding the defendant or the

character of their relationship." Id.

The Texas Court of Criminal Appeals also expressed concerns regarding authenticating electronic writings. Tienda v. State, 358 S.W.3d 633 (Tex. Crim. App. 2012). The court explained "computers can be hacked, protected passwords can be compromised, and cell phones can be purloined." Id. at 642. The court observed "[t]hat an email on its face purports to come from a certain person's email address, that the respondent in an internet chat room dialogue purports to identify himself, or that a text message emanates from a cell phone number assigned to the purported author – none of these circumstances, without more, has typically been regarded as sufficient to support a finding of authenticity." Id. at 641-642. Nevertheless, the court found the circumstantial evidence presented in the case before it sufficient to authenticate the MySpace page and information contained therein as being authored by the defendant. Id. at 642. That evidence included numerous photographs of the defendant, including his unique tattoos and distinctive eyeglasses and earring, references to a specific death, references to a specific gang, references to a particular shooting, and evidence of defendant having been on a monitor for a year and a photograph on MySpace of him wearing a monitor. Id. at 645. See also, Parker v. State, 85 A.3d 682, 688 (Del. 2014)(finding Facebook posts allegedly from the defendant authenticated where the substance of the post referenced the altercation that was the subject of the criminal charge, the post was created on the same day as the altercation occurred, and the alleged victim in the case testified to seeing the post and sharing the post).

One of the leading cases concerning the authentication of social media postings is United States v. Vayner, 769 F.3d 125 (2nd Cir. 2014). The district court permitted the government to introduce a profile page from a Russian social networking site, which was similar to Facebook. Id. at 127. A Special Agent with the State Department's Diplomatic Security Service identified

the printout from VK.com as "from 'the Russian equivalent of Facebook,' and noted that the page purported to be the profile of 'Alexander Zhiltsov' (an alternate spelling of Zhyltsou's name), and that it contained a photograph of Zhyltsou." Id. at 128. The agent noted that under the heading for "contact information," the profile listed "'Azmadeuz' as 'Zhiltsov's' address on Skype. Id. Additionally, the page showed that "Zhiltsov" worked at Martex International and Cyber Heaven, which were places where the state's key witness indicated the defendant worked. Id. The agent admitted he had only a "'cursory familiarity' with VK, had never used the site except to view this single page, and did not know whether any identity verification was required in order for a user to create an account on the site." Id. at 128-129.

The Second Circuit held the district court abused its discretion by admitting the VK web page because the government failed to authenticate the document. Id. at 131. The court explained that information about Zhyltsou appeared on the VK page, including his name, photograph, and details about his life that were consistent with the state's key witness. Id. at 132. However, the government presented "no evidence that Zhyltsou himself had created the page or was responsible for its contents." Id. "[T]he mere fact that a page with Zhyltsou's name and photograph happened to exist on the Internet at the time of Special Agent Cline's testimony does not permit a reasonable conclusion that this page was created by the defendant or on his behalf." Id. While distinctive characteristics of a document alone may provide circumstantial evidence sufficient for authentication, all of the information on the VK page tying it to Zhyltsou was also known by the state's key witness, and probably many others, "some of whom may have had reasons to create a profile page falsely attributed to the defendant." Id. Except for the VK page itself, "no evidence in the record suggested that Zhyltsou even had a VK profile page, much less that the page in question was that page." Id. at 132-133. The government failed to present

any evidence that identification verification was necessary to create such a page with VK, which may have helped determine whether the page actually belonged to Zhyltsou. Id. at 133.

The Fourth Circuit Court of Appeals recently addressed authentication of Facebook pages. United States v. Hassan, 742 F.3d 104, 132-133 (4th Cir. 2014). The Fourth Circuit affirmed the trial court's ruling that the Facebook pages "were self-authenticating under Federal Rule of Evidence 902(11)." Id. Although South Carolina does not have a Rule 902(11) in its Rules of Evidence, nor does it have any equivalent, the discussion of how the Fourth Circuit analyzed the issue is instructive because the court also addressed authentication under Rule 901(a), FRE, which is similar to South Carolina's authentication rule.

Specifically, "Rule 902(11) authorizes the admission in evidence of records that satisfy the requirements of Rule 803(6)(A)-(C), 'as shown by a certification of the custodian ... that complies with a federal statute or a rule prescribed by the Supreme Court.'" Id. at 133. After explaining that the government had satisfied Rule 902(11), FRE, by provision of a certification of the records custodian of Facebook, and that the documents were self-authenticating, the district court and the Fourth Circuit required the government to prove the Facebook pages were linked to the defendants, pursuant to Rule 901, FRE. Id. at 132-133. Both the district court and the Fourth Circuit found Rule 901(a), FRE, satisfied by "tracking the Facebook pages and Facebook accounts" to the defendants' "mailing and email addresses via internet protocol addresses." Id. at 133. See also United States v. Recio, 884 F.3d 230, 236-237 (4th Cir. 2018)(finding a Facebook post authenticated where the government presented "a certification by a Facebook records custodian, showing that the Facebook record containing the post was made 'at or near the time the information was transmitted by the Facebook user,'" the user name associated with the account was the defendant's, one of four email addresses associated with the

account included the defendant's full name, more than one hundred photos of the defendant were posted to the account, and one of the photos posted to the timeline was accompanied by text wishing the defendant a "happy birthday").

However, the Third Circuit concluded that Facebook chat logs could not authenticated under Rule 902(11), FRE, because they were not the kinds of documents properly understood as records of a regularly conducted activity under Rule 803(6), FRE. United States v. Browne, 834 F.3d 403, 409 (3rd Cir. 2016). According to the Third Circuit, "any argument to the contrary misconceives the relationship between authentication and relevance, as well as the purpose of the business records exception to the hearsay rule." Id. Evidence is relevant "only if it is what the proponent claims it is, i.e., if it is authentic." Id. The court explained that in the case before it, "the relevance of the Facebook records hinge[d] on the fact of authorship." Id. at 410. Therefore, 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 [the defendant] and the victims authored the Facebook messages at issue." Id. The records custodian affirmed "only that the communications took place as alleged between the named Facebook accounts." Id. This was not sufficient. Id.

The Third Circuit also explained the government's "theory of self-authentication" was "predicated on a misunderstanding of the business records exception." Id. The purpose of the business records exception was "to capture records that are likely accurate and reliable in content, as demonstrated by the trustworthiness of the underlying sources of information and the process by which and purposes for which that information is recorded." Id. However, Facebook did not "purport to verify or rely on the substantive contents of the communications in the course of its business." Id. "At most, the records custodian employed by the social media platform can

attest to the accuracy of only certain aspects of the communications exchanged over that platform, that is, confirmation that the depicted communications took place between certain Facebook accounts, on particular dates, or at particular times." Id. at 410-411. According to the court, that was "no more sufficient to confirm the accuracy or reliability of the contents of the Facebook chats than a postal receipt would be to attest to the accuracy or reliability of the contents of the enclosed mailed letter." Id. at 411. The court concluded "the Facebook records [were] not business records under 803(6) and thus [could not] be authenticated by way of Rule 902(11)." Id.

Next, the court considered whether the government authenticated the Facebook chats via Rule 901(a), FRE. The court explained:

> The authentication of electronically stored information in general requires consideration of the ways in which such data can be manipulated or corrupted, and the authentication of social media evidence in particular presents some special challenges because of the great ease with which a social media account may be falsified or a legitimate account may be accessed by an imposter.

Id. at 412 (internal citations omitted). Nonetheless, the Third Circuit concluded the government "provided more than adequate evidence to support the disputed Facebook records reflected online conversations that took place between" the alleged individuals "such that the jury could reasonably find the authenticity of the records by a preponderance of the evidence." Id. at 413 (internal quotations omitted). Four witnesses who participated in the Facebook chats did not identify the records, but did offer "detailed testimony about the exchanges" over Facebook. Id. The testimony "was consistent with the content of the four chat logs." Id. Three witnesses testified that "after conversing with the Button Facebook account ... they met in person with Button – whom they were able to identify in open court as [the defendant]." Id. The court found this "powerful evidence not only establishing the accuracy of the chat logs but also linking them

to [the defendant]." Id. Additionally, when the defendant spoke to the police, he made "significant concessions that served to link him to the Facebook conversations." Id. The defendant's testimony was consistent with the personal details the Facebook user provided throughout his Facebook conversations with the four witnesses. Id. at 414. Finally, the court observed the government "supported the accuracy of the chat logs by obtaining them directly from Facebook and introducing a certificate attesting to their maintenance by the company's automated systems." Id. at 414-415.

The Fifth Circuit Court of Appeals found Facebook messages and text messages properly authenticated by a witness with knowledge in United States v. Barnes, 803 F.3d 209, 217 (5th Cir. 2015). The messages were purportedly between a witness and a defendant. The witness testified she had seen the defendant use Facebook, she recognized his Facebook account, and the Facebook messages matched the defendant's manner of communicating. Id. Further, the witness testified the defendant could send text messages from his cell phone, she had spoken to the defendant on the phone number that was the source of the text messages, and the content of the text messages indicated they were from the defendant. Id. While the witness could not testify to certainty that the defendant authored the messages, the court explained that "conclusive proof of authenticity [was] not required for the admission of disputed evidence." Id.

The state failed to authenticate the Facebook messages purportedly between the deceased and the co-defendant, Karina Galarza. Without question, no witness with knowledge testified that the printout produced by the state or the screen shot were what the state purported those documents to be – an online conversation between the deceased and Karina Galarza. None of the witnesses who testified were parties to the conversations. None of the witnesses who testified were aware of the conversations when the conversations were allegedly taking place.

None of the witnesses who testified could say who the participants of the conversations were or the subject matter of the conversations.

Additionally, the state failed to authenticate the messages based upon distinctive characteristics. The messages were between "Edwin" and "Ruby." The deceased's father testified that the screenshot he produced to law enforcement was from the Facebook account he accessed that purportedly belonged to his son, but he did not, and likely could not, identify the additional Facebook messages produced by the state. The very fact that the deceased's father was aware of his son's username and password – and based upon Bentley's testimony, the mother and uncle were aware of those items as well – defeated any argument the state could have made regarding the security of the Facebook messages.

The messages purportedly written by Ruby were not connected to Galarza despite Holman's testimony that Galarza's name on Facebook was Ruby Rina. There are undoubtedly many people using the name Ruby or Ruby Rina on Facebook. The state could not prove, or lay any foundational evidence, that the messages from "Ruby" were authored by Galarza. In fact, the messages revealed that someone other than Ruby was accessing the account – "Man my stupid ass sister put that sit. 100." See Court's Exhibit #2 at 9/18/2014 at 6:58 p.m.

Thus, Edwin's Facebook account was unsecure *and* Ruby's Facebook account was unsecure.

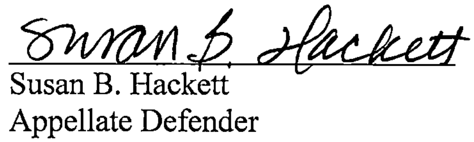
Bentley testified that the document he produced was altered from the original. He indicated that the Facebook messages he saw online included date and time stamps, but when he "cut and pasted" those messages from Facebook and put them into a Word document, the date and time stamps disappeared.

As evident by the state's closing argument, the Facebook messages were critical to the

state's case. The prejudice deriving from the improper admission of those messages cannot be overstated. The state used the Facebook messages to allege Appellant and Galarza lured the deceased to Galarza's residence so that they could kill him. The state used the Facebook messages to prove malice and criminal intent, critical elements of the murder charge. The judge's improper admission of the Facebook messages constituted reversible error.

CONCLUSION

Appellant respectfully requests this Court reverse the trial judge and remand for a new trial.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of April, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
APR 04 2018
SC Court of Appeals

Appeal from Laurens County

Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

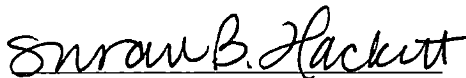
V.

FABIAN LAMICHAEL GREEN,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter 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; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Fabian Lamichael Green, #372509, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 4th day of April, 2018.



Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me this 4th day of April, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.