STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Aiken County

Honorable Diane Schafer Goodstein, Circuit Court Judge

JAMES WHALEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001610

BRIEF OF APPELLANT PURSUANT TO WHITE V. STATE

VICTOR R. SEEGER
Appellate Defender

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

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred when it admitted into evidence multiple printouts of Facebook messages that were never properly authenticated because the state could only show that the messages came from a Facebook account with Petitioner's name on it, not that Petitioner authored the messages, and where the messages were presented as admissions of guilt?

STATEMENT OF THE CASE

During the November 2011 term the Aiken County Grand Jury indicted Petitioner for Disseminating Harmful Material to a Minor, Lewd Act Upon a Child, and Indecent Exposure. App. 220 – 225. Petitioner's bench trial was held before Honorable Doyet A. Early, III on September 10 – 12, 2013. App. 1. Ashley Agnew and J. William Weeks represented the state. Id. Retained counsel, Brian Katonak represented Petitioner. Id.

Judge Early found Petitioner guilty as indicted. App. 180, ll. 16 – 23. Judge Early sentenced Petitioner to ten years' imprisonment for disseminating harmful material to a child. Id. He sentenced Petitioner fifteen years' imprisonment for a lewd act upon a child, to run concurrently with the ten-year sentence. Id. He sentenced Petitioner to three years' imprisonment for indecent exposure to run consecutively. Id.

A timely Notice of Appeal was filed on Petitioner's behalf. However, on April 10, 2014, the South Carolina Court of Appeals dismissed the appeal because Petitioner's trial attorney failed to timely order the transcript. App. 202. The remittitur was issued April 28, 2014. Id.

On June 1, 2015, Petitioner filed a post-conviction relief application that alleged ineffective assistance of counsel for Petitioner's direct appeal getting dismissed. App. 192 – 199. On September 23, 2015, the state filed its return, which moved to dismiss Petitioner's post-conviction relief allegations as untimely made; however, the state conceded Petitioner's White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974), claim to a belated direct appeal. App. 201 – 205.

On May 26, 2017, Petitioner's post-conviction hearing was held before the Honorable Diane S. Goodstein. App. 207. Julie Coleman represented the state. Id. Aimee Zmroczek represented Petitioner. Id.

During the hearing the state moved to dismiss all of Petitioner's post-conviction relief allegations as untimely; however, it consented to Petitioner's White v. State claim to a belated appeal. App. 210, ll. 14 – 17. On June 22, 2017, Judge Goodstein denied all of Petitioner's post-conviction relief allegations with prejudice as untimely made, but granted Petitioner's White v. State allegation for a belated appeal. App. 216 – 219.

This brief follows.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001); State v. Wood, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004). Appellate courts are bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 454, 527 S.E.2d 105, 111 (2000); State v. Williams, 326 S.C. 130, 135, 485 S.E.2d 99, 102 (1997); State v. Patterson, 367 S.C. 219, 224, 625 S.E.2d 239, 241 (Ct. App. 2006); State v. Landis, 362 S.C. 97, 101, 606 S.E.2d 503, 505 (Ct. App. 2004).

The admissibility of evidence is within the sound discretion of the trial judge. State v. Mansfield, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. App. 2000); State v. Patterson, 337 S.C. 215, 228, 522 S.E.2d 845, 851 (Ct. App. 1999). Evidentiary rulings of the trial court will not be reversed on appeal absent an abuse of discretion of the commission of legal error which results in prejudice to the defendant. Mansfield, 343 S.C. at 77, 538 S.E.2d at 263.

ARGUMENT

The trial court erred when it admitted multiple printouts of Facebook messages that were never properly authenticated because the state could only show that the messages came from a Facebook account with Petitioner's name on it, not that Petitioner authored the messages, and where the messages were presented as admissions of guilt.

Relevant Facts

Petitioner's indictments span from 1996 until 2010. App. 7, ll. 2 – 3.

The facts alleged by the state are as follows. Petitioner's half-sister, Minor 1, testified at trial that Petitioner sexually assaulted her when she was five. App. 10, l. 17 – 13, l. 8. She testified that other improper conduct by Petitioner continued over several years. App. 13, l. 19 – 14, l. 14; App. 14, l. 16 – 15, l. 7. Minor 1 was twenty-two years old at the time of trial. App. 8, ll. 12 – 15.

Petitioner's niece, Minor 2, testified that Petitioner sexually assaulted her when she was "like five or six" as well. App. 66, ll. 9 – 17. Minor 2 was nineteen years old at the time of the trial. App. 64, ll. 10 – 11. The state attempted to admit Facebook messages purportedly sent by Petitioner to Minor 2. App. 76, ll. 1 – 15. Trial counsel objected to the admission of the Facebook messages because, "Of course, it's not signed to any Facebook. There's no foundation of proof that it actually came from [Petitioner's] computer. Anyone could have gone on his Facebook account and sent this so we're going to object." App. 76, ll. 8 – 14; App. 78, ll. 7 – 11. The court overruled defense counsel's objection. App. 76, l. 15; App. 78, ll. 12 – 13. Minor 2 testified that Petitioner was not a "Facebook friend" of hers. App. 80, ll. 18 – 19.

Petitioner's other niece, Minor 3, testified that Petitioner exposed himself to her when she was six and showed her a lewd video. App. 93, ll. 10 – 24; App. 96, l. 20 – 98, l. 12. Minor 3 was

eighteen years old at the time of the trial. App. 91, ll. 6 – 7. Once again, the state attempted to admit Facebook messages, this time purportedly from Petitioner to Minor 3, without proper authentication. App. 99, ll. 16 – 25; App. 100, ll. 17 – 18. Defense counsel again objected to the admittance of the Facebook messages. App. 99, ll. 12 – 13. Defense counsel's objection was overruled again. App. 99, l. 14; App. 100, ll. 19 – 20.

Alecia Diane Powell, Petitioner's half-sister, also testified at trial. App. 110, l. 2. Powell testified to receiving Facebook messages from Petitioner, but again the state did not show that Petitioner authored the messages. App. 112, ll. 2 – 5. Defense counsel also made a contemporaneous objection to the admittance of the Facebook messages to Powell. App. 112, l. 7. Judge Early overruled that objection as well. App. 112, l. 8. None of the witnesses were sequestered.

All three of the Facebook messages sent from the "James Whaley" account were largely similar. All three messages were unauthenticated apologies that severely prejudiced Petitioner.

The message sent to Minor 2 was titled, "I'm sorry," and the contents of the message contained phrases like, "I'm sorry for the way I've treated you and for things I have done," and, "Please forgive me for everything." The message sent to Minor 3 was almost identical, it was not given a subject line; however, it contained the same phrases cited in Minor 2's message. The message to Alicia Powell was apologetic too, it stated, "I'm sorry for the way I've treated your kids and things I have done," and, "[P]lease forgive me."

The trial court's overruling of defense counsel's objections to the admittance of the prejudicial and unauthenticated Facebook messages was an error and that error prejudiced Petitioner.

Discussion

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

While 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). 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 Griffin court found the 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. (emphasis added) 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 Connecticut Court of Appeals 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" of her Facebook account "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. (emphasis added) 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 into 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 be 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.

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.

In the instant case, the messages purportedly written by Petitioner were not connected to him despite the testimony from the state's witnesses that the name on the Facebook account was Petitioner's. As illustrated in Smith v. State, simply showing that Petitioner's name is on the account that sent messages at a given time is not enough to authenticate Petitioner as the author of the messages. "There mere fact that an electronic communication purports to originate from a certain person's account is in sufficient to authenticate that person as the author of the communications." Smith, at 433. The aforementioned authentication jurisprudence has showed that there were multiple avenues for authentication that the state could have taken in this case, but did not.

In Petitioner's case, the state failed to authenticate the messages based upon distinctive characteristics. Griffin; Tienda; supra. The witnesses in Petitioner's case all testified that the messages were sent from Petitioner's Facebook account, but only because the name and photo on the account was Petitioner's. App. 76, l. 20 – 77, l. 7; App. 99, l. 16 – 100, l. 2; App. 112, ll. 13 – 17. There was no testimony about the content of the messages or any characteristics of the content that would tend to show that Petitioner authored the Facebook messages. State v. Eleck,

23 A.3d 818, 820-824 (Conn. App. Ct. 2011). Furthermore, there was no testimony presented about any distinctive characteristics of Petitioner in the profile that the state alleged belonged to him.

The state did not present any certification from Facebook or have a Facebook employee testify to the validity of the Facebook message purportedly sent from Petitioner. The state's attempt at authentication of the Facebook messages was flawed in the same respect as in Griffin v. State, 19 A.3d 415, 420-421 (Md. 2011). Here, as in Griffin, the printout of an image from Facebook's site was used to authenticate the Facebook messages; however, the printout presented merely identified the name of Petitioner and his visage from a photograph on the site. Therefore, the state could not show that Petitioner was the likely author of the messages, just that someone purporting to be Petitioner sent those Facebook messages from that account.

The state failed to present any testimony regarding how secure the Facebook page was or who could access the it. As in Com. v. Williams, 456 Mass. 857, 869, 926 N.E.2d 1162, 1172 (Mass. 2010), where the Massachusetts court found that MySpace messages were not authenticated where the state could only establish that the messages were sent by someone with access to the defendant's MySpace Web page. "The state could not identify the person who actually authored the communication." Id. at 1172-1173.

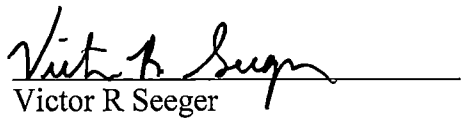
The state's attempt to authenticate the Facebook messages in Petitioner's case was insufficient for the same reason. The state only showed *what account* sent the Facebook messages, not the *author* that wrote the messages.

The prejudice from the improper admission of the Facebook messages cannot be overstated. Petitioner's trial strategy was a complete denial of the allegations against him. Therefore, evidence presented to be an admission of guilt by Petitioner is particularly damning to

his case. The state used the unauthenticated Facebook messages to contend that Petitioner admitted guilt to the crimes alleged. Therefore, the trial court's admission of the Facebook messages constituted reversible error because the state could not authenticate that Petitioner was the author of the messages. Further, the messages created undue prejudice to Petitioner because they appeared to show he admitted guilt. See State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991) (Finding that evidence creates unfair prejudice when it has an undue tendency to suggest a decision on an improper basis.)

CONCLUSION

By reason of the foregoing arguments Appellant's convictions should be reversed, and this case remanded to the Aiken County Court of General Sessions for a new trial.



Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of July, 2018.

CERTIFICATE OF COUNSEL

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

July 30, 2018

Victor R Seeger
Appellate Defender

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

ATTORNEY FOR APPELLANT

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Appeal from Aiken County

Honorable Diane Schafer Goodstein, Circuit Court Judge

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PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Appellant Pursuant to White v. State in the above referenced case has been served upon Julie Coleman, 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 James C. Whaley, #357132, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335, this 30th day of July, 2018.

Victor R. Seeger

Victor R Seeger
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 30th day of July, 2018.

Maria Leonard (L.S)

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