

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Roger L. Couch, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

CALVIN BROWN, JR.,

APPELLANT

APPELLATE CASE NO. 2017-002537

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in admitting Facebook posts allegedly made by appellant because the State failed to authenticate such evidence?

STATEMENT OF THE CASE

On November 27, 2017, appellant was tried in Charleston County before a jury on two counts of attempted murder and a weapons charge. R. 1. R. 8, ll. 4 – 12. The Honorable Roger Couch presided over the trial. R. 1. David Osborne and Bruce Durant represented the State. R. 1. Mark Archer represented appellant. R. 1. The jury convicted appellant. R. 899, l. 25 – 900, l. 12. Judge Couch sentenced appellant to concurrent twenty-five year terms of imprisonment for the attempted murder charges and a concurrent five-year term on the weapons charge. R. 913, ll. 3 – 12. This appeal follows.

STANDARD OF REVIEW

The trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. State v. Thompson, 420 S.C. 386, 395, 803 S.E.2d 44, 48-49 (Ct. App. 2017). The appellate court reviews the trial court factual findings to determine whether they are clearly erroneous. Id.

ARGUMENT

The trial court erred in admitting Facebook posts allegedly made by appellant because the State failed to authenticate such evidence.

On May 22, 2015, Desmond Lewis a/k/a “Fats” (“Fats”) and his friend, Christopher Victoria a/k/a “P Roach” (“P Roach”) were “[h]anging out, drinking” and smoking marijuan at an apartment complex in downtown Charleston. R. 235, l. 24 – 236, l. 5. R. 239, ll. 3 – 6. R. 252, ll. 7 – 21. By 8:45 PM, the police were dispatched to the apartments because Fats had been shot in the leg. R. 90, l. 12 – 92, l. 7. Tragically, five-year old Tyreik G., who had been playing at a nearby playground, was also shot. R. 434, l. 6 – 436, l. 7. Tyreik G. did not hear the gunshots and did not see anything. R. 436, ll. 3 – 14. He was wounded in the spine and is paralyzed. R. 413, l. 13 – 415, l. 15.

The State began its opening statement by appealing to the jurors’ sympathy for Tyreik G. R. 78, l. 2 – 79, l. 2. The State’s contempt for its own witness, Fats, was apparent at sentencing when the solicitor asked for the maximum sentence on the charge related to Tyreik G. and “nothing for [Fats].” R. 909, ll. 18 – 22. Fats dodged the solicitor’s questions when the State called him as a witness and the solicitor was forced to play audio clips of an interview in which Fats claimed appellant was the shooter. R. 631, l. 8 – 643, l. 25. R. 672, l. 4 – 697, l. 8. The first officer on the scene asked Fats who shot him and Fats replied that he did not know. R. 104, ll. 13 – 22.

P Roach left the scene after tending to Fats’ leg and did not identify a shooter to the police. R. 267, l. 18 – 269, l. 17. At trial, P Roach claimed that appellant¹ and Fats were at odds

¹ Appellant’s nickname is “Calico.” R. 313, l. 22 – 314, l. 23.

because appellant slept with the mother of Fats' child, Similar McClary ("McClary"). R. 245, l. 1 – 246, l. 10. Facebook posts were critical to proving the case and the State asked P Roach to identify a picture from Facebook of appellant posing with McClary and making an obscene gesture to the camera twelve days before the shooting. R. 246, l. 14 – 248, l. 1. State's Ex. 92. After appellant objected, Judge Couch limited the State to having P Roach make the identifications in the photograph and initially refused to admit the accompanying text, stating the court would deal with the authentication issue later. R. 248, l. 6 – 251, l. 7.

According to P Roach, he and Fats were at the apartment complex taking pictures for Facebook when P Roach noticed Fats "staring at somebody walking past." R. 258, l. 2 – 259, l. 14. P Roach looked up and saw appellant coming from behind him. R. 259, ll. 11 – 18. Appellant stopped behind a tree. R. 262, ll. 3 – 15. Fats said appellant was about to shoot. R. 262, ll. 8 – 21. Appellant emerged from behind the tree and began shooting. R. 262, ll. 8 – 21. Fats ran and P Roach dived on the ground. R. 262, ll. 8 – 17. Appellant made no attempt to shoot P Roach and chased Fats around the corner. R. 262, l. 22 – 263, l. 6.

When P Roach went around the corner, he saw Tyreik G. being held by his grandmother bleeding. R. 266, ll. 2 – 4. Instead of helping the grandmother, P Roach then went back to smash a beer he had been drinking to destroy his fingerprints on the bottle. R. 266, l. 12 – 267, l. 17. He then found Fats and wrapped his shirt around Fats' bleeding leg. R. 267, l. 18 – 268, l. 2. P Roach left after telling the police he did not know what happened, explaining, "We don't snitch, talk to the police." R. 270, l. 12 – 271, l. 11. P Roach then got a gun and, together with Fats' brother, went to appellant's girlfriend's apartment to "kind of get revenge." R. 276, l. 16 – 277, l. 24. They did not see appellant. R. 277, l. 25 – 278, l. 7.

The next day the police interviewed P Roach and he told them he was “85 percent sure” the shooter was appellant. R. 279, l. 14 – 281, l. 8. As the trial approached, P Roach upped this figure to “100 percent.” R. 284, ll. 4 – 12. Prior to reaching the 100% number, in February 2017, P Roach wrote a letter explaining his prior statements were false and he “was under pressure from the detectives who questioned me and the victims [sic] parents.” R. 284, l. 15 – 286, l. 8. P Roach testified the letter was not true and he was pressured to write the letter by somebody at the jail. R. 285, l. 2 – 286, l. 14.

P Roach had an extensive criminal record. R. 237, l. 20 – 238, l. 12. By the age of twenty-four, he had two convictions for possession of a stolen car, aggravated assault, three convictions for breaking and entering into a car, two convictions for grand larceny, and one conviction for petty larceny. R. 236, l. 6 – 238, l. 12. P Roach also had pending charges for which he was facing a possible life sentence. R. 238, ll. 13 – 21. R. 302, l. 21 – 303, l. 14. He admitted trying to make deals with the police for help on his charges, including an attempt to get a personal recognizance bond, and was hoping that his testimony would curry favor with the solicitors. R. 295, l. 4 – 297, l. 3.

Six days after the shooting, the police left a message at appellant’s job and he called them and arranged to come to the station for an interview. R. 558, l. 8 – 559, l. 6. Appellant voluntarily gave a two-hour recorded interview and the police let him leave after its conclusion. R. 559, l. 12 – 561, l. 25. Appellant denied any connection to the shooting, but told the police that Fats once shot at him. R. 578, l. 10 – 580, l. 3.

The police collected multiple shell casings from the scene, all of which were .9mm Luger shells. R. 113, ll. 19 – 24. R. 139, l. 16 – 141, l. 19. The SLED agent who examined the shell casings concluded they were all fired from the same gun. R. 208, ll. 10 – 13. However, the

police officers and the SLED expert admitted the ammunition was common. R. 218, ll. 16 – 18. R. 128, ll. 2 – 8. The firearm was not recovered. R. 780, ll. 1 – 3.

The State called the mother of appellant's child, Shanorma Smith ("Smith"), to testify against him. R. 329, ll. 20 – 24. She had pending charges of first-degree burglary and assault and battery at the time of her testimony. R. 330, ll. 15 – 22. Smith testified appellant's user name on Facebook was "Spring Street MBMB." R. 335, ll. 7 – 13. The solicitor showed Smith Exhibit 92, which was a picture of appellant with McClary. R. 335, l. 14 – 336, l. 5.

Smith claimed appellant made the post and that she saw it when it was made. R. 335, l. 20 – 336, l. 9. The solicitor attempted to introduce the entire Facebook post, including the text and appellant objected because it had not been authenticated. R. 336, ll. 6 – 22. The solicitor agreed to "go a little bit further" to attempt to authenticate the Facebook post. R. 336, ll. 10 – 22.

Smith said she read the post when it was made and cursed out appellant as a result. R. 336, l. 24 – 337, l. 15. Appellant again objected on authentication grounds and the trial judge overruled the objection and admitted the entire post. R. 337, l. 16 – 338, l. 3. State's Ex. 92. Appellant poses in the picture with McClary, shooting the bird at the camera, and the text says, "Happy Mothers Day To my Nigga My Nigga.....Dats How It Pose To Be, Have Ya Chick In The Pic Like Pose For Me lol." State's Ex. 92.

Smith then said that after appellant was arrested, she gained access to appellant's Facebook account from a friend of appellant's who appellant had given his password and email. R. 340, l. 5 – 341, l. 23. Appellant did not admit making the posts, but Smith claimed they were authored by appellant. R. 341, ll. 7 – 23. The solicitor asked to admit another Facebook post and appellant again objected that it was not authenticated. R. 341, l. 24 – 343, l. 11. The court

overruled the objection and admitted the exhibit, State's Exhibit 93. R. 341, l. 24 – 343, l. 11. This exhibit contained a purported exchange between appellant and McClary two days before the shooting in which appellant said he wanted to have sex with her. State's Ex. 93. R. 343, l. 14 – 344, l. 18.

The court erred in admitting this Facebook post because it was not properly authenticated. See Rule 901(a), SCRE. Authentication is “a condition precedent to admissibility.” Id. The authentication requirement “is satisfied by evidence sufficient to support a finding that the matter in question is what is proponent claims.” Id. The court erred in allowing Smith to authenticate this Facebook post as she was not the author and told the court that she and another, unidentified person had access to appellant's account.

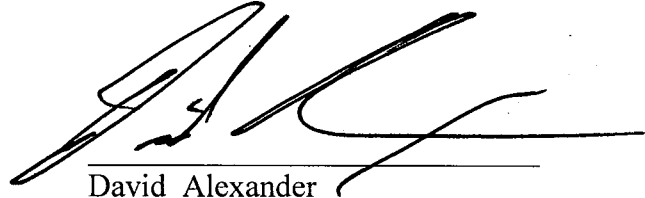
“[A]nyone can create a fictitious account and masquerade under another person's name or can gain access to another's account by obtaining the user's username and password.” Griffin v. State, 19 A.3d 415, 421 (Md. 2011). “The potential for fabricating or tampering with electronically stored information on a social networking site, thus poses significant challenges from the standpoint of authentication of printouts of the site.” Id. at 422. The court in Griffin refused to admit social media information because the evidence of authentication was too generic. Id. at 423-24. But see United States v. Barnes, 803 F.3d 209, 217 (5th Cir. 2015); United States v. Hassan, 742 F.3d 104, 132-133 (4th Cir. 2014).

Here, the potential for abuse was manifest because the State's witness admitted that appellant's account had been compromised. The State did not satisfy the authentication requirement and the trial court erred in admitting this evidence. The State's motive for the shooting was the feud between appellant and Fats over McClary. The improperly admitted Facebook posts allowed the State to show the feud continued just days before the shooting.

Tyreik G.'s grandmother told police that "two black males came from the side of the building shooting at each other," which shows a possibility that Fats or some other person was responsible for the shooting of Tyreik G. R. 782, ll. 7 – 14. The State's witnesses had criminal records, pending charges, and gave conflicting statements. This Court should reverse.

CONCLUSION

For the foregoing reasons, the Court should reverse appellant's conviction and remand this case for a new trial.

A handwritten signature in black ink, appearing to read 'DA', with a long horizontal stroke extending to the right.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of July, 2018.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Honorable Roger L. Couch, Circuit Court Judge

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CALVIN BROWN, JR.,

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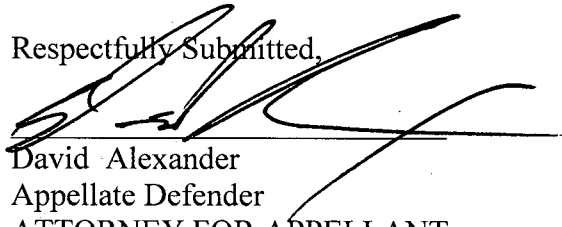
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Calvin Brown, Jr. states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Roger L. Couch, which was held on November 27 - December 1, 2017, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Calvin Brown, Jr.

Respectfully Submitted,



David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

This 25th day of July, 2018.

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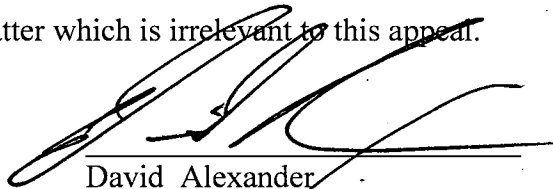
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s):
- (2) Trial Transcript (November 27 – December 1, 2017)
- (3) State's Exhibit #92
- (4) State's Exhibit #93

I certify that this designation contains no matter which is irrelevant to this appeal.

July 25, 2018



David Alexander
Appellate Defender

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Defense
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ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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 25, 2018.



David Alexander
Appellate Defender

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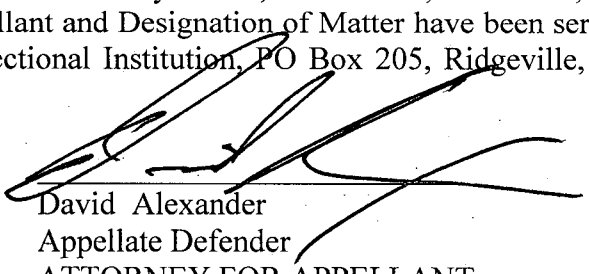
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CALVIN BROWN, JR.,

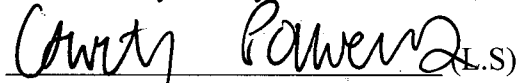
APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Calvin Brown, Jr., 318577, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 25th day of July, 2018.


David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of July, 2018.


Notary Public for South Carolina
My Commission Expires: May 2, 2027.