STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Laurens County

The Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

Respondent,

v.

FABIAN LAMICHAEL R. GREEN,

Appellant.

Appellate Case No. 2017-001332

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Fabien Green ("Appellant") was indicted by the Laurens County grand jury on the charge of murder (2016-GS-30-1078) and desecration of human remains (2016-GS-30-1079). R. pp. 640-645. At trial, Appellant was represented by Tristan Shaffer, Esquire. Deputy Solicitor Warren Mowry, Esquire, and Assistant Solicitor James Todd, Esquire, prosecuted the case on behalf of the Eighth Circuit Solicitor's Office. (R. p. 1). Appellant was tried before the Honorable Donald B. Hocker, May 30th, through June 2nd, 2017. (R. p. 1). At the conclusion of the trial the jury found Appellant guilty of both charges. (R. p. 553, l. 23 – p. 554, l. 9). Following the conviction, Judge Hocker sentenced Appellant to forty-five (45) years. (R. p. 483, ll. 16-19). Appellant then filed a timely Notice of Appeal. Susan Hackett, Esquire, with the Division of Appellate Defense, submitted Appellant's Initial Brief on April 4th, 2018. This Brief of Respondent follows.

RESPONDENT'S STATEMENT OF THE FACTS

In the early evening of May 8, 2016, the victim, Edwin Diaz Charinos, received several flirtatious Facebook messages from a "Ruby Rina" soliciting him to come over to her house located at 108 Queens Circle. (R. p. 183, l. 21 – p. 184, l. 9). Ruby Rina was a nickname used by Karina Galarza, who happened to be the current girlfriend of Fabian Green (Appellant). (R. p. 180, l. 15 – p. 181, l. 7). The victim and Galarza had been romantically involved sometime in the past. (R. p. 355, l. 13 – p. 358, l. 24). However, the messages sent to Edwin on May 8th, were a conspiracy between Galarza and Appellant to lure Edwin to the house so that the couple could murder him. (R. p. 182, l. 1 – p. 189, l. 9).When Edwin arrived at Galarza's house Appellant emerged from a backroom and beat him to death with the blunt end of a claw hammer. (R. p. 185, l. 14 – 189, l. 13). Appellant's cousin, Davian Holman[1], was also present and bore witness to the murder. (R. p. 99, l. 19 – p. 101, l. 11; p. 180, l. 9 – 12; p. 184, l. 13 – p. 189, l. 13).

Thereafter, Appellant, along with Davian, loaded Edwin's body in the back seat of Edwin's Ford Mustang and drove it out to a rural location in Lauren's county. (R. p. 131, ll. 12-20; p. 189, l. 14 – p. 193, l. 17). Once they arrived at the location, Appellant removed the body from vehicle and partially set it on fire. (R. p. 193, l. 18 – 195, l. 25; p. 44, ll. 12-20). After failing to completely burn the body, Appellant and his cousin proceed to a nearby family members' house where they asked for lighter fluid or alcohol. (R. p. 196, l. 11 – p. 197, l. 12; 266, l. 12 – p. 271, l. 22). The family member told Appellant that they had neither, whereupon, Appellant and his cousin left on foot. (R. p. 197, ll. 19-22; p. 272, ll. 2-11). At this moment, Galarza was back at the house attempting to clean up the large amount of blood from the murder scene. (R. p. 191, l. 15 – p. 192, l. 3).

[1] Testimony from trial reflects that Appellant's cousins, Davian Holman, suffers from some level of intellectual disability. (R. p. 229, l. 4-18; p. 317, ll. 7-11).

After putting out a missing person report for Edwin Charinos, Law Enforcement received several cellphone screen shots from the victim's parents showing some of the Facebook messages sent to Edwin from Ruby Rina. (R. p. 129, l. 8 – p. 130, l. 15). The messages provided Law Enforcement with the 108 Queens Circle address and referenced Karina Galarza by name. (R. p. 132, l. 22 – p. 133, l. 18; p. 352, ll. 21 – 24; p. 355, l. 13 – p. 358, l. 24). On May 26th, Law Enforcement located Edwin's charred remains after receiving a phone tip from a local who had come across them. (R. p. 44, ll.12-20; p. 49, l. 4 – p. 50, l. 14; p. 94, l. 15 – p. 96, l. 14; p. 122, l. 19 – p. 126, l. 10). Law Enforcement also located the family whom Appellant had requested lighter fluid and alcohol on May 8th, and they corroborated the unusual event. (R. p. 266, l. 12 – p. 272, l. 11; p. 299, ll. 8-10).

Law Enforcement eventually went to 108 Queens to investigate. (R. p. 141, l. 19 – p. 141, l. 7). While there they received information from Karina Galarza. (R. p. 141, l. 8). With this information Law Enforcement were able to get warrants for the arrest of Appellant and his cousin Davian. (R. p. 141, ll. 2-23). After locating and arresting the cousin Davian, they proceeded to take him to Lauren's County Sheriff Headquarters for interview. (R. p. 198, l. 15 – p. 199, l. 25; p. 204, l. 4-16). There, Davian provided Law Enforcement with a detailed confession implicating Appellant and Galarza. (R. p. 179, l. 22 – p. 205, l. 21; p. 315, l. 8 – p. 317, l. 24). Later on, during a search of the Galarza house, crime scene technicians from SLED located blood splatter on a china cabinet near the living room couch. (R. p. 154, ll. 17-25; p. 162, l. 23 – p. 166, l. 1). This blood was later confirmed as belonging to the victim. (R. p. 379, l. 3 – p. 381, l. 8). Lastly, while Appellant was in jail awaiting trial, the detention center staff intercepted a letter that Appellant had attempted to surreptitiously forward to another inmate. (R. p. 337, l. 4 – p. 339, l. 11). In that letter Law Enforcement discovered a detailed account of the

murder, including references to the Facebook messages. (R. p. 410, l. 14 – p. 413, l. 7). Thereafter, SLED, through the use of an exemplar, were able to confirm that the handwriting belonged to Appellant. (R. p. 406, l. 1 – p. 409, l. 4). Appellant later confirmed during his testimony that he did write the letter, but that he'd falsified the information "to give a sense of reality." (R. p. 445, ll. 6-9).

SUMMARY OF THE ARGUMENT

Appellant contends the trial judge erred by denying a mistrial motion that was raised after one of the bailiffs informed a juror that, in the event of a deadlock, the judge would issue an *Allen* charge and inquire whether the jurors could stay longer. In support of that contention, Appellant maintains the improper communication with the bailiff incurably prejudiced the proceeding and, as a result, the trial judge's refusal to issue a mistrial abridged Appellant's constitutional right to have his case decided by a fair and impartial jury. Contrary to Appellant's contentions, Appellant's right to a trial by a fair and impartial jury was not adversely impacted by the bailiff's misconduct because the trial judge took affirmative measures to ensure the impartiality of the jury was not impacted by the improper contact, and his determination in that regard was supported by the evidence presented during trial, including the unequivocal representations of the jurors who affirmed under oath that they had remained fair and impartial despite the misconduct. Under those circumstances, the trial judge did not abuse his broad discretion in refusing to grant the extreme measure of a mistrial in Appellant's case. Additionally, throughout the case, the State presented sufficient circumstantial and testimonial evidence to authenticate the Facebook messages received by the victim prior to his death. Alternatively, if the trial court erred in its determination that the State met its burden on authentication, such error would be harmless for the fact that the additional evidence supporting Appellant's guilt was overwhelming. For these reasons the Appellant's convictions should be affirmed.

ARGUMENT

I. The Trial Judge Did Not Abuse His Broad Discretion By Denying Appellant's Mistrial Motion In Light Of The Fact That He Declined The Motion Only After Questioning Each Juror To Ensure The Misconduct Had Not Affected Their Impartiality And That Their Verdict Had Not Been Impacted By The Improper Contact.

How the Issue Arose at Trial

As the jury was preparing to render its verdict to the court, the judge learned of possible improper communication between a juror and a bailiff. (R. 551, 11. 7-12). After an in chambers discussion with the trial attorneys, the judge determined that the appropriate measure was first to allow the jury to issue the verdict. (R. p. 551, l. 12 – p. 554, l. 9). He then sequestered the jurors and questioned each individual juror. During each questioning, the judge asked the following questions:

1. "Your verdict of guilty on both charges, is that currently your verdict in this case?"
2. "Was and is your verdict based one-hundred percent on the testimony, evidence and law presented to you in this case?"
3. "Was your verdict influenced in any way, with any communication with any of the bailiffs or any third party not connected with the jury in this case?"
4. "Did you have any communication with any of the bailiffs or with any third party not a part of the jury in this case?"

(R. 555, 11. 1-5; R. 557, 11. 8-11; R. 558, 11. 12-15; R. 559, 11. 18-21; R. 560, 11. 20-23; R. 563, 11. 4-7; R. 564, 11. 3-6; R. 565, 11. 4-7; R. 567, 11. 18-21; R. 568, 11. 20-25). All the jurors affirmatively indicated that guilty on both charges was their verdict, their verdict was based one-hundred percent on the testimony, evidence, and law presented during the trial, and that they were not influenced in any way by any improper communication. (R. p. 555, l. 1 – p. 568, l. 25). Two of the jurors indicated that they did have limited communication with the bailiffs, but that the communication was limited to entering and exiting the jury room and taking

breaks. (R. p. 561, l. 20 – p. 562, l. 1; p. 665, l. 17 – p. 566, l. 21). Thereafter, the judge permitted Defense Counsel to question Bailiff Johnny Bolt. Mr. Bolt testified that some jurors expressed some concern about passive aggressive acts from Appellant's family being directed toward the jurors. (R. p. 572, l. 3 – p. 573, l. 18). The question by Defense Counsel then progressed into whether any jurors had inquired about a deadlocked. The following testimony took place:

> Q: Did any, at any point during their deliberations did they ever mention to you that they may be deadlocked?
>
> A: No, no. But they just, the Foreman did say, what happens if we can't reach a, reach a, you know, that, we can't reach any verdict. And I said, well, 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.
>
> Q: Okay. Did you ever tell them anything about an *Allen* Charge?
>
> A: Well, I was familiar and I said, well, he will give an *Allen* charge, you know, because I have been doing 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.

(R. p. 573, l. 19 – 574, l. 11). During question, the other bailiff denied hearing Mr. Bolts' response to the juror question, and indicated that he did not witness any indication that the jury was deadlocked. (R. p. 575, l. 15 – p. 577, l. 3). Based upon Mr. Bolt's testimony, Defense Counsel moved for a mistrial. (R. p. 580, l. 4 – p. 582, l. 15). However, after consideration of Mr. Bolt's testimony and further discussion between the trial attorneys, the judge thoroughly concluded:

> Well, here is how I view this. First of all, certainly the existence of some communication of some sort with the Bailiffs caused me enough concern to where I immediately got the lawyers back in-chambers to, not only to explain to you guys what I understood took place, number one. And then gave you the

> opportunity to hear, informally in-chambers from Mr. Bolt and Mr. Easley. While it does concern me that Mr. Bolt mentioned [sic] *Allen* charge, while that concerns me and should not ever happen again, I have to take what the jurors told me that they were not influenced by any communications. So they did not perceive, and let me digress for just a moment. How I understand Mr. Bolt's statement of an *Allen* charge was just to the Forelady. I may be wrong, I wasn't back there, that is my perception. But be that as it may, the Forelady or anybody else did not perceive that as a communication or something that would arise to having a communication. And furthermore they were uninfluenced by anything outside of the testimony, evidence and law presented in this case. While again, I don't condone by any means what was, what was done or said. I don't think it rises to the level of creating prejudice to the Defendant or rising to the level that the drastic remedy of a mistrial should be granted. So I am going to deny your motion, Mr. Shaffer.

(R. p. 582, l. 18 – p. 583, l. 17).

Standard of Review

In criminal cases, appellate courts sit to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Significantly, a decision as to whether to grant or deny a motion for mistrial rests within the sound discretion of the trial judge, and a trial judge's ruling in regards to a mistrial motion will not be disturbed on appeal absent a prejudicial abuse of discretion. *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 627-628 (2000): *see State v. Coaxum*, 410 S.C. 320, 331, 764 S.E.2d 242, 247 (2014) ("[T]o receive a new trial, the defendant must show a prejudicial abuse of discretion."); *State v. Kelly,* 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998) ("A mistrial should not be granted unless absolutely necessary. Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial. In order to receive a mistrial, the defendant must show error and resulting prejudice.") (citations omitted). An abuse of discretion occurs where the trial court's conclusions lack evidentiary support or are controlled by an error of law. *State v. Elders*, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010).

Analysis

"A defendant in a criminal prosecution is constitutionally guaranteed a fair trial by an impartial jury, and in order to fully safeguard this protection, it is required that the jury render its verdict free from outside influences of whatever kind and nature." *State v. Cameron*, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (Ct. App. 1993) (citing *State v. Johnson*, 302 S.C. 243, 250, 395 S.E.2d 167, 170 (1990); *State v. Wasson*, 299 S.C. 508, 511, 386 S.E.2d 255, 256 (1989); *State v. Salters*, 273 S.C. 501, 504, 257 S.E.2d 502, 504 (1979)). Moreover, "[i]t is the duty of the trial judge to see that a jury of unbiased, fair and impartial persons is impaneled. *State v. Powers*, 331 S.C. 37, 43, 501 S.E.2d 116, 119 (1998) (citing *State v. Matthews*, 291 S.C. 339, 353 S.E.2d 444 (1986); *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990)).

However, "unless the misconduct affects the jury's impartiality, it is not such misconduct as will affect the verdict." *Kelly*, 331 S.C. at 141, 502 S.E.2d at 104. Significantly, in South Carolina, prejudice will not be presumed from improper influences on the jury. *State v. Grovenstein*, 335 S.C. 347, 351, 517 S.E.2d 216, 218 (1999) ("the Court of Appeals erred in adopting a 'presumption of prejudice' standard."). Instead, prejudice must be shown by the defendant in order to warrant the grant of a mistrial or the disqualification of any jurors. *Id.*

Most importantly, "[t]he power of the trial court to declare a mistrial should be used with the greatest caution under urgent circumstances and for very plain and obvious reasons stated on the record by the trial court." *State v. Wiley*, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (2010). "A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." *Id.* "The granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way." *Id.* at 495–96, 692 S.E.2d at 563.

Critically, "[a] trial judge's determination of the neutrality or impartiality of a juror should not be disturbed unless error is manifest." *DeLee v. Knight*, 266 S.C. 103, 111-12, 221 S.E.2d 844, 847 (1975) (citing *Irvin v. Dowd*, 366 U.S. 717 (1961)); *see State v. Simpson*, 325 S.C. 37, 41, 479 S.E.2d 57, 59 (1996) ("A juror's competence is within the trial judge's discretion and is not reviewable on appeal unless wholly unsupported by the evidence."). Deference should be given to the trial judge's decision regarding the qualification of the jury as the trial judge is able to actually see and hear the jurors in assessing their demeanor, credibility, and impartiality. *State v. Evins,* 373 S.C. 404, 418, 645 S.E.2d 904, 911 (2007); *see Patton v. Yount*, 467 U.S. 1025, 1038 (1984) (instructing a trial judge's determinations on the impartiality of a juror are presumed to be correct and are entitled to special deference on appeal). "The findings of the trial court on questions of fact relating to the fitness of a juror are conclusive, and will not be disturbed on review unless manifestly erroneous." *State v. Maxey*, 218 S.C. 106, 110, 62 S.E.2d 100, 102 (1950). "This principle of law is so well established it hardly becomes necessary to cite authority to sustain it." *Id.*

In the capital case of *State v. Kelly*, the trial judge received a note from a juror indicating that a religious pamphlet concerning God's view on capital punishment was being circulated in the jury room. *State v. Kelly*, 331 S.C. 331, 139, 502 S.E.2d 99, 103 (1998). Upon receiving the note, the trial judge questioned the jurors individually to determine who, if anyone, had read the pamphlet and what information was contained in the pamphlet. The jurors provided mixed responses to the judge's questioning. Appellant's counsel made a motion for a mistrial arguing the jurors had been less than truthful when initially questioned under oath. The judge denied appellant's mistrial motion. *Id.* at 140–41, 502 S.E.2d at 104. On review, the South Carolina Supreme Court set forth the "[r]elevant factors to be considered in determining whether outside

influences have affected the jury are [1] the number of jurors exposed, [2] the weight of the evidence properly before the jury, and [3] the likelihood that curative measures were effective in reducing the prejudice." *Kelly*, 331 S.C. at 141-142, 502 S.E.2d at 104. Furthermore, the Court submitted that in instances of misconduct "the trial judge is in the best position to determine the credibility of the jurors . . ." *Id.*, at 142, 502 S.E.2d at 105. The Court upheld the judge's denial, citing: "he found them credible and capable of rendering an impartial verdict based solely on the evidence." *Id.* In this decision, the Court concluded:

> The trial judge conducted extensive voir dire of the jurors both prior to empaneling the jury and during questioning concerning this incident. The trial judge questioned the jurors extensively about potential biases and prejudices and, thus, placed himself in the best position to assess the truthfulness of the jurors. Further, the trial judge consistently admonished the jury not to discuss the case and not to consider extraneous material. The trial judge did not find members of the jury were being untruthful. We respect this finding.

Id., at 142-43, 502 S.E.2d at 105.

At Appellant's murder trial, the relevant factors articulated in *Kelly* were satisfied in favor of denying the motion for mistrial. *See Kelly*, 331 S.C. at 140, 502 S.E.2d at 104. The trial court determined, based off the testimony received, that only one juror was exposed to the bailiff's statement. *See* R. p. 582, l. 18 – p. 583, l. 17. Further, the weight of the evidence strongly favored guilt. The prosecution presented Facebook messages luring the victim to Appellant's girlfriend's house, a jailhouse letter in which Appellant confessed to committing the murder, and eye witness testimony from Appellant's own cousin. Lastly, the judge took the appropriate measure of submitting each juror to questioning to ensure that their decision was in no way biased by the bailiff's misconduct. *See Remmer v. United States,* 347 U.S. 227, 229-230 (1954) ("The trial court . . . should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate."). Each juror confirmed they had remained impartial and that their decision was

based solely off the evidence presented at trial. The judge found their testimony to be truthful. *See Harris*, 340 S.C. at 63, 530 S.E.2d at 628 ("A mistrial should only be granted when absolutely necessary. The trial judge is in the best position to determine the credibility of the jurors; therefore, this Court grants him broad deference on this issue.") (citations omitted).

In light of the fact that the trial judge questioned each juror individually to ensure they were unaffected by the misconduct, and, importantly, the jurors who ultimately decided Appellant's case unanimously and unequivocally indicated they were not impacted by the bailiff's improper statement and had fairly and impartially decide the case based solely upon the evidence and testimony presented during trial, the decisions to deny Appellant's motion for a mistrial was appropriate.[2] Furthermore, considering the overwhelming evidence presented at trial, the misconduct's ability to have an affect or impact on the jury and the verdict was, at a minimum, substantially reduced.

Appellant cites extensively in his brief to this Court's decision in *State v. Cameron*, 311 S.C. 204, 207–08, 428 S.E.2d 10, 12 (Ct. App. 1993). However, the *Cameron* opinion agrees that a new trial should not be granted "when the subject matter of the communication was harmless and could not have affected the verdict." *State v. Cameron*, 311 S.C. 204, 207–08, 428 S.E.2d

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[2] Appellant appears to suggest on appeal the jurors were influenced by the bailiff's comments despite their contentions to the contrary. Despite being pure speculation, the only evidence presented during trial in regard to the jurors' impartiality was their unequivocal representations to the trial judge that they had remained fair and impartial, and the trial judge fully credited those representations in finding the jurors were not affected by the misconduct, which was a finding entitled to substantial weight on appeal. *See Kelly,* 331 S.C. at 143, 502 S.E.2d at 105 ("The trial judge did not find members of the jury were being untruthful. We respect this finding.") *see also State v. Williams*, 166 S.C. 63, 164 S.E. 415, 421 (1932) (overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991)) ("In the absence of any showing to the contrary, we must assume that each and every member of the jury sought honestly and impartially, under the law, to discharge his duty; and that he observed the oath required of a juror."). Notwithstanding his base speculation the jurors were untruthful in his case, Appellant has wholly failed to meet his burden of establishing the jurors were influenced by the bailiff's misconduct.

10, 12 (Ct. App. 1993) (quoting *Holmes v. United States*, 284 F.2d 716, 718 (4th Cir.1960)) (emphasis added). Moreover, "[t]he mere fact ... that some conversation occurred between a juror and the court official would not necessarily prejudice a defendant." *Id.* at 207–08, 428 S.E.2d at 12.

It is difficult to comprehend how the bailiff's brief comment to the jury foreperson could have had any effect on the jury's guilty verdict. It was given in response to a juror's hypothetical question.[3] There is no evidence in the record that the jury had, in fact, reached an impasse. Moreover, the trial judge carefully instructed the jury that a verdict must be unanimous. *See* R. p. 549, ll. 20-22; *see also Grovenstein,* 335 S.C. at 353, 517 S.E.2d at 219 ("[J]urors are presumed to follow the law as instructed to them."); *State v. Johnson*, 306 S.C. 119, 128, 410 S.E.2d 547, 553 (1991) ("The jury is presumed to remember and know the trial testimony . . ."); *State v. Queen*, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975) ("It is the duty of jurors to take the law from the court in the particular case on trial. It must be presumed that they do so.").

South Carolina case law wholly supports the trial court decision denying the defense's motion for a mistrial in light of the inappropriate communication. More importantly, Appellant has failed to show that he was prejudiced by any potential error in denying this motion.

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[3] *See McLain v. Gen. Motors Corp.*, 586 A.2d 647, 655 (Del. Super. Ct. 1988) (denying request for inquiry in similar circumstances after finding: "statement allegedly made by the bailiff in this case is not prejudicial. The bailiff did not comment upon the evidence or the parties. There is no suggestion that the bailiff's remark was a deliberate attempt to influence the jury's verdict or to hasten their deliberations."); *Lamb v. State*, 127 Nev. 26, 45, 251 P.3d 700, 713 (2011) (holding that bailiff's exchange with the jury, while improper, nonetheless did not carry a reasonable probability or likelihood of having influenced its verdict because it did not introduce incorrect law in the proceeding.).

II. The Trial Court Did Not Err In Allowing The Admission Of The Facebook Messages Because The Proper Evidentiary Foundation Was Demonstrated At Trial.

How the Issue Arose at Trial

At a pre-trial hearing, Defense Counsel sought to suppress several Facebook messages that the State intended to introduce. The State explained that the messages were obtained from the victim's Facebook account. They were sent to the victim from an account using the alias "Ruby Rina." (Pre-R. p. 2, ll. 4-20). The State was able to gain access through the victim's father, who had acquired the victim's password. (Pre-R. p. 2, l. 25 – p. 21, l. 3). The Solicitor further testified that the messages indicated that there was a prior relationship between the victim and Karina Galarza, and that the victim had been invited to murder scene on the day of his death. (Pre-R. p. 3, ll. 4-14). The State confirmed that it had a witness that would confirm that Ruby Rina was the Facebook alias used by Karina Galarza. (Pre-R. p. 3, ll. 15-23).

The judge then inquired as to how the messages did not qualify as impermissible hearsay. (Pre-R. p. 4, ll. 3-8). The State indicated that it intended to prove that a conspiracy existed between Appellant and Karina Galarza to murder the victim. (Pre-R. p. 4, ll. 12-21). Moreover, the state testified that it was in possession of a letter, written by the defendant, that mentionesd the process of using Facebook to lure the victim. (Pre-R. p. 7, ll. 11-18). After hearing argument from both sides, the judge determined to take the matter under advisement. (Pre-R. p. 7, ll. 19-21).

On the day of trial, immediately after jury selection, the Defense raised an additional concern as to whether the State would be able to authenticate the Facebook messages, due to the fact that neither party to the conversation would be testifying. (R. p. 16, ll. 1-20). The State responded that it had a portion of the messages where the victim referred to the individual as Karina, and repeated that a witness would also testify that is was Karina Galarza's account. (R. p.

16, l. 22 – p. 17, l. 15). The judge ensured both sides that he would give consideration to the authentication issue. (R. p. 18, ll. 12-16).

Later, the judge posited that he did not "really find an authentication problem." (R. p. 20, 11. 2-3). The judge explained that if the father testified "this was Edwin's Facebook account, I've got the password," and the State could authenticate the identity of Ruby, then the messages were authenticated, as far as the judge was concerned. (R. p. 20, 11. 3-7).

Prior to the victim's father testifying, the Defense renewed its motion to exclude the Facebook messages based upon the state's failure to authenticate the evidence. (R. p. 113, l. 1 – p. 114, l. 2). Counsel stated that he was "objecting under 901" because the State could not authenticate the Facebook messages properly. (R. p. 114, 11. 4-6). The judge indicated that he would hold off on ruling until the State sought to move the messages into evidence. However, he expressed that he felt the testimony from the victim's father, who had gained access to his son's Facebook account, could adequately authenticate the messages. (R. p. 114, l. 17 – p. 115, l. 7).

The deceased's father, Edwin Anibal Diaz Cruz, explained that his son, Edwin Diaz Chirinos, had a Facebook account. R. p. 128, 11. 12-25. The father testified that he was able to access the victim's Facebook account after he went missing on May 8, 2016. R. p. 129, 11. 1-4. The father then provided law enforcement with screenshots of relevant portions of the Facebook messages he retrieved. R. p. 129, 11. 19-23; R. 130, 11. 9-11. From this, Investigators proceeded to the Queens Circle address sent from Ruby Rina. R. p. 132, 1. 22 – p. 133, 1. 18; p. 134, 11. 1-8. There they found both Appellant and Karina Galarza. After interviewing Galarza, Investigators attained sufficient information to arrest both her and Appellant. R. p. 141, 11. 10-13.

Later at trial, the State presented testimony from Appellant's cousin, Davian Holman. R. p. 179, l. 22 – p. 180, l. 14. Holman confirmed that Ruby Rina was, in fact, Karina Galarza, and that Appellant and Galarza were dating on the day of the murder. R. p. 180, l. 15 – p. 181, l. 7. He also testified that Galarza resided at 108 Queens Circle, and in the hours leading up to the murder the couple spent a lot of time typing and laughing on a cell phone. R. p. 182, ll. 5-25; p. 183, l. 21 – p. 184, l. 5.

Thereafter, the State presented testimony from Investigator Walter Bentley. He testified that he gained access to the victim's Facebook account and reviewed the messages in preparation for trial. R. p. 349, ll. 9-25. He then copied the messages to a Word Document to submit at trial. R. p. 350, l. 21 – p. 351, l. 2. Investigator Bentley testified that he was familiar with Karina Galarza's mother, Minerva Tapia, who had assisted Bentley several times in the past with translations when he was employed with the Lauren County Sheriff's Department. He was also aware that Tapia had a daughter named Karina, and that the family resided at 108 Queens circle. R. p. 351, l. 12 – p. 352, l. 14. After Investigator Bentley's testimony, the State sought to introduce the substance of the Facebook messages which the judge accepted, having found them sufficiently authenticated. R. p. 353, l. 24 – p. 354, l. 12. The judge noted Defense Counsel's prior objections. R. p. 354, ll. 8-10. Within the messages, the victim identified the other party as Karina and was invited to 108 Queens Circle on the day of his murder. R. p. 352, ll. 19-24; p. 358, l. 11 – p. 359, l. 13.

Towards the end of the State's case, the State introduced a letter written by Appellant that was intercepted and seized as contraband while he was in jail awaiting trial. R. p. 337, l. 5 – p. 338, l. 4; p. 408, l. 24 – p. 409, l. 4. In the letter, Appellant acknowledges that he had lured the

victim using Facebook. R. p. 410, l. 25 – p. 411, l. 9. Appellant later testified that he wrote the letter but that everything he wrote was false. R. p. 445, ll. 3-9.

Standard of Review

"'The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.'" *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "'An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.'" *Id.* (quoting *Pagan*, 369 S.C. at 208, 631 S.E.2d at 265).

Analysis

"A party offering evidence must meet '[t]he requirement of authentication ... as a condition precedent to admissibility.'" *Deep Keel, LLC v. Atl. Private Equity Grp.*, LLC, 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015) (quoting SCRE 901 (a)). "The authentication requirement 'is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.'" *Id.* South Carolina Rules of Evidence provide several examples of authentication methods that conform with the requirements of authentication. SCRE 901(b). Two relevant examples are "Testimony Of Witness With Knowledge," and "Distinctive Characteristics And The Like." SCRE 901(b)(1) & (4). The later includes "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." SCRE 901(b)(4). Furthermore, telephone conversations with an individual can be authenticated "by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if ... circumstances, including self-identification, show the person answering to be the one called." SCRE 901(b)(6) . The rule also

clarifies that these examples are only illustrations and do not limit other methods that a court may deem sufficient. SCRE 901(b). Importantly, "the burden to authenticate evidence is not high and requires only that the proponent of the evidence offer a satisfactory foundation from which the jury could reasonably find the evidence is authentic." *Deep Keel, LLC*, 413 S.C. at 64, 773 S.E.2d at 610 (internal quotations omitted).

In *State v. Hightower*, the South Carolina Supreme Court reviewed whether a trial judge erred in admitting an incriminating typewritten letter, signed with the typewritten initials 'WHH.' The petitioner in the case argued there was no proof of the authenticity of the typed initials. *State v. Hightower*, 221 S.C. 91, 105, 69 S.E.2d 363, 370 (1952). The Supreme Court affirmed the trial court concluding:

> We think there is sufficient proof of the authenticity of the letter and of the identity of the writer of that letter to warrant its admission in evidence. Like any other material fact, the genuineness of a letter may be established by circumstantial evidence if its tenor, subject-matter, and the parties between whom it purports to have passed make it fairly fit into an approved course of conduct, and manifests the probability that the subject-matter of its contents was known only to the apparent writer and the person to whom it was written,—these circumstances justify its admission.

Id.

In addition, in *State v. Thompson* the appellant argued the trial court erred in admitting the 911 recording into evidence because it was not properly authenticated and violated his confrontation clause rights. *State v. Thompson*, 420 S.C. 386, 399–400, 803 S.E.2d 44, 51 (Ct. App. 2017), *reh'g denied* (Aug. 28, 2017), *cert. granted* (Mar. 7, 2018). More precisely, the appellant asserted the State was required to present testimony of a witness to identify the caller's voice as belonging to the victim in order to properly authenticate the 911 recording. *Id.* This Court disagreed holding:

> Authentication of a 911 caller's identity can be accomplished by combining the caller's self-identification with circumstances surrounding the call. Here, the testimony of Cauthen and Collins coupled with the fact that the information the caller gave the dispatcher was confirmed by police when they arrived at the scene proved the recording was reliable, satisfying the purpose of the authentication requirement.

Thompson, at 399–400, 803 S.E.2d at 51. This Court further noted:

> Furthermore, courts in other jurisdictions have also held a witness is not required to identify a caller's voice when the circumstances surrounding the call indicate the information given by the caller is accurate. *See United States v. Espinoza*, 641 F.2d 153, 170 (4th Cir. 1981) (holding the testimony of a telephone conversation was admissible "even though the witness cannot certainly identify the person with whom he spoke by voice identification, [when] the identity of the person ... [was] established by circumstantial evidence"); *Rodriguez-Nova v. State*, 295 Ga. 868, 763 S.E.2d 698, 701 (2014) ("[A]n audio recording can be authenticated by the testimony of one party to the recorded conversation."); *Young v. State*, 696 N.E.2d 386, 389 (Ind. 1998) ("A caller's identity can be established by circumstantial evidence, and need not be proven beyond a reasonable doubt."); *Johnson v. State*, 699 N.E.2d 746, 749 (Ind. Ct. App. 1998) ("A recording is not admissible unless the voices contained thereon are identified. ... However, circumstantial evidence may be utilized for identification purposes."); *State v. C.D.L.*, 250 P.3d 69, 78 (Utah Ct. App. 2011) ("Authentication of a telephone caller's identity can be accomplished by combining that caller's self-identification during the call with circumstances surrounding the call."); *State v. Williams*, 136 Wash.App. 486, 150 P.3d 111, 118 (2007) ("A sound recording, in particular, need not be authenticated by a witness with personal knowledge of the events recorded. Rather, the trial court may consider any information sufficient to support the prima facie showing that the evidence is authentic.").

Id. at 400–01, 803 S.E.2d at 51.

Appellant's case shares similarities with all the above cases in that particular features in the content of the messages authenticate that the messages were between the victim and Appellant's girlfriend. First, the victim referred to the other party as "Karina." Thereafter, the user did not seek to deny or correct the assumption. R. p. 352, ll. 19-24. Second, when asked for her address, Galarza provided that of her residence at 108 Queens Circle. R. p. 358, l. 11 – p. 359, l. 13. Authentication was, therefore, satisfied in that Galarza's identity was sufficiently

confirmed and admitted by circumstantial evidence. *See Winburn v. Minnesota Mut. Life Ins. Co.*, 261 S.C. 568, 576–77, 201 S.E.2d 372, 376 (1973)). ("Authenticity of documentary evidence may be shown, so as to render it admissible in evidence, by indirect or circumstantial evidence.").

Perhaps more importantly, the State presented testimony from Davian Holman who confirmed that "Ruby Rina" was Galarza. *See* R. p. 181, ll. 6-7. Holman was intimately familiar with Appellant and his girlfriend. *See* R. p. 180, ll. 9-20. In fact, he testified that he considered Appellant to be more of a brother rather than a cousin. *See* R. p. 180, ll. 9-14; p. 264, ll. 11-15. Additionally, testimony indicated that he spent a lot of time over at the Galarza's residence. *See* R. p. 182, ll. 1-11; p. 183, ll. 1-4; p. 198, ll. 15-25. This form of authentication is the chief example found in South Carolina Rule of Evidence 901(b). *See* SCRE 901(b)(1) ("*Testimony of Witness With Knowledge*. Testimony that a matter is what it is claimed to be."). Furthermore, the State presented supporting testimony from its investigator who was familiar with Karina Galarza's family, and who confirmed that she resided at the address sent to the victim on the day of his murder. *See* R. p. 352, ll. 4-24; *see also State v. Brockmeyer*, 406 S.C. 324, 352–53, 751 S.E.2d 645, 660 (2013) (noting Rule 901, SCRE, "list[s] as acceptable methods of authentication the testimony of a witness with knowledge 'that a matter is what it is claimed to be' and distinctive characteristics, such as '[a]ppearance, contents substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances' ").

III. Even If The Trial Court Should Not Have Allowed The Facebook Messages Into Evidence, Their Admission Was Harmless Error, As The Jury Had Substantial Additional Evidence To Convict Appellant.

Improper admission evidence is harmless when it could not have reasonably affected the result. *State v. Barnes*, 421 S.C. 47, 804 S.E.2d 301 (Ct. App. 2017). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship. However, "[t]o say that an error did not 'contribute' to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial...." *Arnold v. State,* 309 S.C. 157, 420 S.E.2d 834 (1992). Rather, "[t]o say that an error did not contribute to the verdict is ... to find that error unimportant *in relation to everything else the jury considered on the issue in question,* as revealed in the record." *Id.* at 166, 420 S.E.2d at 839 (citation omitted) (emphasis added). Error "is harmless where an Appellant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." *State v. Collins*, 409 S.C. 524, 538, 763 S.E.2d 22, 29-30 (2014), *reh'g denied* (Sept. 24, 2014).

In *State v. Barnes*, this court ruled that the trial court erred in admitting hearsay testimony. *State v. Barnes*, 421 S.C. 47, 56, 804 S.E.2d 301, 306 (Ct. App. 2017). Nevertheless, it concluded the error was harmless.

> [T]he State overwhelmingly proved Barnes was one of the people who entered the kitchen and shot at Victim. This evidence includes, most compellingly, Barnes' letter to his mother confessing to the crime; his mother's identification of him as the person wearing the gray sweatshirt in the surveillance video; and the timeline of Barnes' whereabouts on the night of the shooting. Accordingly, the error in admitting hearsay against Barnes through Wright and Schaefer's testimony was harmless beyond a reasonable doubt

Id.

During Appellant's case, the State presented similar evidence to prove that Appellant committed the murder. The State presented a graphic letter in which Appellant admits to murdering Edwin Charinos. *See* R. p. 410, l. 14 – p. 413, l. 8. The State also presented eye witness testimony from Appellant's cousin who witnessed the murder and identified Appellant as the killer. *See* R. p. 179, l. 22 – p. 189, l. 13. Additionally, DNA evidence found at the scene proved that the victim was killed at Appellant's girlfriend's house and subsequently moved to a rural location where it was burned. *See* R. p. 381, ll. 2-8; p. 376, l. 5 – p. 377, l. 9. Lastly, the evidence presented placed Appellant at this same location on the night of the murder. Davian testified that he and Appellant drove the body to Taylor drive where Appellant burned the body. *See* R. p. 192, l. 4 – p. 196, l. 10. The State also presented testimony from Willie Williams who knew Appellant and lived a short distance from the where the victim's body was located. *See* R. p. 267, l. 2 – p. 268, l. 2; p. 273, l. 24 – p. 274, l. 8. He testified that on the night of the murder, Appellant and Davian showed up at his house asking for lighter fluid. *See* R. p. 268, ll. 3-5; p. 269, l. 9 – p. 270, ll. 7-21. Moreover, he testified that Appellant was in possession of a bucket, and that he dumped the contents of the bucket into William's neighbor's dumpster. *See* R. p. 271, ll. 6-15. This is the same bucket that Davian testified Appellant utilized to carry the items Appellant used in burning Edwin's body. *See* R. p. 194, ll. 6-18; p. 197, ll. 16-20.

Appellant points to numerous cases where federal and other states' courts found authentication inadequate in regards to social media account, however, none are capable of overturning Appellant's conviction. Each case is either distinct from Appellant's case or the error was found to be harmless. In *Griffin v. State*, the Maryland Court of Appeals took issue with the lack of witness testimony authenticating the social network account holder. *See Griffin v. State*, 19 A.3d 415, 420-424 (Md. 2011) ("[Authentication 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.*") (emphasis added). Under the current circumstances, the State presented significantly more evidence than a simple profile printout to support Ruby Rina's true identity. Moreover, while the Mississippi Supreme Court in *Smith v. State* did find error in the trial court's authentication of messages originating from a social media account, it nevertheless concluded the error was harmless. *See Smith v. State*, 136 So. 3d 424, 436 (Miss. 2014) ("However, because the admission of these two Facebook messages into evidence was harmless beyond a reasonable doubt, we affirm the Wayne County Circuit Court's judgment of conviction for capital murder."). Other cases cited by Appellant include: *Com. v. Williams*, 456 Mass. 857, 926 N.E.2d 1162 (2010) (concluding that admission of improperly authenticated contents of social networking Internet website messages did not create a substantial likelihood of a miscarriage of justice in first-degree murder trial, where content of messages was rendered insignificant by testimony of two witnesses who identified defendant as the shooter and corroborative testimony of other witnesses.); *State v. Eleck*, 130 Conn. App. 632, 23 A.3d 818 (2011), aff'd on other grounds, 314 Conn. 123, 100 A.3d 817 (2014) (finding *defendant* failed to authenticate authorship of certain electronic messages sent to him from State's witness's account on social networking website, and *thus messages were not admissible to impeach witness's credibility.*) (emphasis added). *But see State v. Eleck*, 314 Conn. 123, 130-131, 100 A.3d 817, 820-821 (2014) ("We agree with the state. The defendant has not shown that the exclusion of the proffered evidence had a substantial impact on the jury's verdict . . . We conclude, therefore, that assuming, without deciding, that there was any evidentiary impropriety, the ruling was harmless."). *See also Tienda v. State*, 358 S.W.3d 633, 647 (Tex. Crim. App. 2012) ("Because there was sufficient *circumstantial evidence* to support a finding

that the exhibits were what they purported to be—MySpace pages the contents of which the appellant was responsible for—we affirm the trial judge and the court of appeals which had both concluded the same.") (emphasis added); *United States v. Vayner*, 769 F.3d 125, 132 (2d Cir. 2014) (finding lack of authentication establishing account holder when government failed to present *any supporting evidence* other party's VK page which included name, photograph, and some details about his life consistent.) (emphasis added); *United States v. Browne*, 834 F.3d 403, 416 (3d Cir. 2016) (quoting *United States v. Brown*, 765 F.3d 278, 295 (3d Cir. 2014)) ("Although we conclude that the District Court erred in admitting this chat log, we do not perceive grounds for reversal. Reversal is not warranted if it is 'highly probable that the error did not contribute to the judgment.'"); *United States v. Barnes*, 803 F.3d 209, 217 (5th Cir. 2015) ("The Government laid sufficient foundation regarding Holsen's Facebook and text messages. Holsen testified that she had seen Hall use Facebook, she recognized his Facebook account, and the Facebook messages matched Hall's manner of communicating . . . Regardless, any potential error in admitting the text and Facebook messages was harmless. . . *the content of the messages was largely duplicative of what Holsen and numerous other witnesses testified to directly.*") (emphasis added).

Despite Appellant's contentions that the admission of the Facebook messages was improper, any such error was harmless. The evidence presented by the State was overwhelming in proving Appellant murdered the victim at his girlfriend's house, moved his body to a nearby rural area, and then attempted to burn the victim's remains. *See State v. Adams*, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct.App.2003) ("A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or commission of legal error that results in prejudice to the defendant."); *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)

(stating error is harmless beyond a reasonable doubt if it did not contribute to the verdict obtained).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the appeal be dismissed.

Respectfully submitted,

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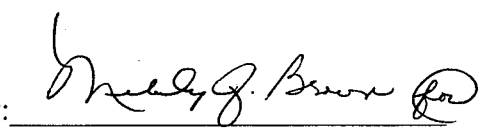
By: 
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August 6, 2018.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Laurens County

The Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

Respondent,

v.

FABIEN LAMICHAEL GREEN,

Appellant.

Appellate Case No. 2017-001332

CERTIFICATE OF COMPLIANCE

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

This 6th day of August, 2018.

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