STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County

Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DARRELL ERWIN RAINES JR.,

APPELLANT

APPELLATE CASE NO 2016-000142

FINAL BRIEF OF APPELLANT

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II.

The trial court erred reversibly in admitting texts messages purportedly sent by Myranda Southern to Appellant where the text messages purportedly sent by Southern constituted inadmissible hearsay, not fitting within any exception.

STATEMENT OF THE CASE

On November 1, 2013, the Laurens County Grand Jury indicted Appellant Darrell Raines for murder and possession of a weapon during the commission of a violent crime. R. 604 – 607.

On December 7-11, 2013, Appellant proceeded to trial before the Honorable Donald B. Hocker and a jury. R. 1. Bryan C. Able represented Appellant, and Assistant Solicitors Dale Scott and Margaret Boykin represented the State. The jury found Appellant guilty as charged. R. 591, l. 14 - 593, l. 23. The trial court sentenced Appellant to life imprisonment. R. 601, l. 14 - 602, l. 22.

This appeal follows.

ARGUMENT

I.

The trial court erred reversibly by admitting the unredacted video tape of Appellant's interrogation by law enforcement during which investigators, several of whom did not testify at trial, repeatedly called Appellant a liar, misrepresented or fabricated evidence of Appellant's guilt during the interrogation, and urged Appellant to confess to Myranda Southern's murder; all of which constituted inadmissible hearsay.

Introduction

The State accused Appellant of murdering Myranda Southern, a woman he had met on the online dating site Plenty-of-Fish. Southern went missing after finishing a shift at Charter Communications in Simponsville on August 19, 2013. On August 23, 2013, her body was found in a rural field in Laurens County just south of Woodruff. She was killed by a single gunshot wound to the back of the neck.

Confusingly, the State alleged that Appellant was motivated to murder Southern because he was obsessed with another woman, Lisa Hamlett. As will be seen *infra,* the State's case against Appellant was circumstantial. Prosecutors pieced together, and at times overstated the relevance of, an amalgamation of gun purchases, text messages, historical cell site data, and purported inconsistencies in Appellant's statements to law enforcement to allege that Appellant killed Southern.

Relevant Facts

On August 19, 2013, Miranda Southern was reported missing by her neighbor, Lauren Searcy, after Southern missed their usual morning chat from their adjoining apartment porches. R. 64, l. 16 – 66, l. 18. Calls and text messages Searcy made to Southern's cell phone went unanswered. Southern's car was also missing.

Searcy then checked Southern's Facebook page where Southern had posted that, due to stress, she was leaving the Greenville area to visit friends in Savannah. R. 69, l. 5 – 70, l. 23. Despite only knowing Southern for five months prior to her disappearance and admittedly being unfamiliar with Facebook, Searcy asserted at trial that the Facebook entries did not appear to be written by Southern. R. 68, ll. 16-25.

Searcy called the police and reported Southern missing. R. 70, l. 21 – 72, l. 16. Greenville County Investigators Tracy King and Antonio Bailey interviewed Searcy regarding the missing persons report she filed. R. 186, l. 8 – 187, l. 21. From Searcy, the officers learned that Southern was estranged from her husband, Shawn Southern, with whom she had two children. R. 73, ll. 3-15. Investigators also learned that Southern had met and begun to socialize with Appellant. R. 59, l. 11 – 63, l. 14.

Shawn and Southern had a volatile relationship. Shawn had recently moved out of their apartment. R. 109, l. 7 – 111, l. 18. At the time of Southern's disappearance, he was living with his girlfriend, Deborah Nulph. He had recently impregnated her and, by the time of Appellant's trial, had married her. *Id.* Shawn testified that Southern "exploded" when she discovered that he had impregnated Nulph. R. 123, l. 4 – 127, l. 10. Nulph was the only person able to provide Shawn with an alibi for the time period during which Southern disappeared. R. 132, l. 13 – 136, l. 6. Police eliminated Shawn as a suspect based on Nulph's averments.

Shawn was unemployed and unable to financially support the two children he had with Southern. R. 82, l. 4 – 83, l. 12. His relationship with Southern's family was so fraught that Southern's mother refused to turn her grandchildren over to his custody after Southern went missing. R. 88, ll. 4-23. Southern was employed at Charter Communications and still maintained a joint bank account with Shawn. R. 211, l. 1 – 212, l. 17.

With the impending dissolution of her marriage, Southern began online dating. R. 59, l. 8 – 60, l. 16. Only two days before she disappeared, Shawn found out that Southern was socializing with Appellant and – despite his infidelity leading to the end of their marriage – he instigated a violent fight with Southern during which he broke her cell phone and stole her big-screen television. R. 109, l. 7 – 112, l. 21; R. 124, l. 7 – 127, l. 10. However, at trial, Shawn claimed the two had reconciled and, that on the day she disappeared, Southern visited him during her break at around 8:00-8:30 pm and the two had a friendly conversation. R. 111, l. 7 – 112, l. 2.

At the beginning of their investigation, police accessed Southern's financial records. Her banking records revealed that a five hundred dollar ATM withdrawal was made at 3:30 am on August 19, 2013. R. 214, l. 1 – 220, l. 25. Southern was last seen leaving work at Charter Communications just after mid-night, early on August 19th.

Video surveillance from the ATM machine located in Berea, South Carolina, just north of Greenville showed Appellant made the withdrawal using Southern's debit card. (State's Exhibit #29). Video cameras from a convenience store established that Southern had her debit card with her until at least 8:00 pm on August 18th. R. 214, l. 1 – 220, l. 25.

Police first interrogated Appellant on August 22, 2013. R. 442, l. 11 – 447, l. 10. Investigators Antonio Bailey and Tracy King conducted the interrogation. In a written statement, Appellant explained that Southern had lent him her debit card so that he could borrow money to make a car payment. *Id.*; (State's Exhibit #26). Appellant stated that he had borrowed the debit card either the night before or the morning that Appellant disappeared. *Id.*

Appellant wrote that Southern and Shawn had been fighting because Shawn was upset about Southern dating other men. *Id.* Appellant explained that, when he texted Southern to let her know he was about to make the withdrawal from Southern's joint bank account she shared

with Shawn, she asked him to withdraw three hundred dollars for her. *Id.* At trial, Searcy confirmed that Southern also allowed her to borrow her debit card to make purchases on her behalf. R. 132, ll. 3-21.

Appellant also wrote that he owned a 9mm Hi-Point pistol that he had purchased from a Greenville area gun shop. (State's Exhibit #26). Police later interviewed the gun shop owner, who recalled that Appellant had tried to return the 9mm because rounds frequently jammed. R. 320, l. 1 – 323, l. 13. The shop owner further recalled that Appellant had remarked to him that he had a similar problem with a .380 Hi-Point pistol that he had sent to manufacturer for repairs. *Id.* Police asked him to hand over his cell phone. Appellant agreed.

On August 23, 2013, the Laurens County Sheriff's department responded to a call from Christine Yates about a body in a grass field in a rural area south of Woodruff. R. 147, l. 21 – 149, l. 2. Yates also told police that she thought she had heard two gunshots around 1:00 – 1:30 am on the morning of August 19, 2013, but did not see anything. R. 144, ll. 5-22.

The body police found in the field was badly decomposed and barefoot. The body was identified as Southern through DNA matching. R. 162, l. 3 – 168, l. 7. Laurens County law enforcement also located Southern's car in the parking lot of the Simpsonsville BI-LO, near the Charter Communications' campus. R. 262, l. 7 – 264, l. 5. Southern had been killed by a single gunshot in the back of her neck, just below her skull. R. 253, l. 21 – 255, l. 7.

SLED ballistic analyst testified the bullet recovered from Southern was "most consistent" with a .380 caliber bullet from a Hi-Point. R. 351, l. 1 – 354, l. 4. However, a 9mm Hi-Point could not be ruled out. No bullet casings were recovered from the crime scene. Police found a magazine fitting either a .380 or 9mm Hi-Point pistol about seven feet away from Southern's body. R. 162, l. 3 – 164, l. 17. No DNA or fingerprints were recovered from the magazine.

DNA taken from fingernail scrapings of Southern's right hand tested positive for Y/STR, but Appellant was excluded as a possible contributor. R. 504, ll. 3-25.

Police intercepted Appellant's .380 on its return from the manufacturer. Despite being extensively reworked, the SLED ballistics expert testified at trial that nothing done to the gun to address the jamming issue would have changed the ballistics. R. 353, l. 12 – 354, l. 21. The SLED expert also conceded that the model gun purchased by Appellant was extremely common with tens of thousands manufactured each year and sold in over fifty-seven stores within a hundred miles of Greenville. R. 371, l. 6 - 374, l. 25.

Police processed Southern's car, but found no evidence to suggest that Appellant had ever been in it. R. 313, l. 15 - 315, l. 22. Police also processed Appellant's truck, but found nothing incriminating. *Id.* The ballistics testing was inconclusive, The bullet fragments recovered from Southern's body were too degraded. R. 354, l. 15 - 355, l. 25.

Appellant's August 29, 2013 Interrogation

Police interrogated Appellant for a second time on August 29, 2013. R. 282, l. 12 – 283, l. 21; (State's Exhibit # 47). Unlike the first interrogation, Appellant was *Mirandized* and the interrogation was recorded. Laurens County Lieutenant Keith McIntosh and Investigator Bryan Cheeks led the almost two hour interrogation. R. 284, l. 10 – 308, l. 12. Other officers periodically participated in the interrogation, but were never identified by the State. *Id.*

Throughout the interrogation police, particularly Cheeks, threatened Appellant and repeatedly called him a liar. *Id.*; (State's Exhibit #47). In an effort to get a confession, investigators misrepresented evidence, telling Appellant that they had cameras showing him driving in his truck down I-385 from Greenville towards where Southern's body was discovered on the night she disappeared. *Id.*

There was no interstate video footage. R. 309, l. 10 – 317, l. 10. Nor was there any evidence that Appellant was in Laurens County on the night the State claimed Southern's was murdered. *Id.* Video footage from the BI-LO where Southern's car was found was totally obscured by foliage. *Id.* Video footage from a convenience store located near the field where Southern's body was found was likewise inconclusive, showing only unidentifiable headlights around the time Yates reported hearing gun shots. *Id.*

Law enforcement also threatened Appellant with execution for Southern's murder and gloated to him that he would never see his son again. R. 284, l. 10 – 308, l. 12; (State's Exhibit 47). During portions of the interrogation, Cheeks and other officers urged Appellant to "get right with his heart and do the right thing." R. 286, ll. 1-23. Despite the intense pressure applied by investigators, Appellant maintained that he did not kill Southern. Appellant was arrested at the end of the interrogation.

At trial, the State sought to play the entirety of the interrogation before the jury. Defense counsel objected citing to our Supreme Court's opinion in *State v. Brewer*, 411 S.C. 401, 768 S.E.2d 656 (2015). Defense counsel argued that the constant misrepresentation of evidence of by the interrogating officers and their repeated accusations that Appellant was a liar, impermissibly shifted the burden of proof to Appellant to prove that he was innocent. R. 284, l. 10 – 308, l. 12.

Many of the officers that took part in the interrogation did not testify at trial, including Investigator Cheeks who was responsible for the most egregious misrepresentations and threats. In addition, the vast majority of the statements in the interrogation were made by the investigators, not Appellant, thus constituting hearsay and violated Appellant's right to confront adverse witnesses. *Id.*

Oddly, the State countered that the defense should be happy that the State was trying to enter the interrogation into evidence because it showed the police being "overly aggressive, foaming at the mouth, acting like a jerk, you and there [Appellant] is being cool, calm, and [collected]. R. 289, l. 8 – 291, l. 5. The solicitor noted that he did not recall the police calling Appellant a liar, but that he certainly planned to call him a liar during closing arguments. The State further argued that it was unfair to hold the solicitor responsible for the manner in which the police interrogated Appellant. *Id.*

The court conceded that police, led by Investigator Cheeks, had told Appellant at least fourteen times that he was a liar. R. 302, ll. 6-12. Nevertheless, the court agreed with the State and allowed the video into evidence. R. 302, l. 20 – 303, l. 17. However, the court ordered that the threat to have Appellant executed for Southern's murder and the end of the interrogation where Appellant is placed in handcuffs had to be redacted. *Id.* The court also instructed the jury that "anything that the police officers say during the course of this interview is not evidence and is not to be considered whatsoever as evidence." R. 304, ll. 18-25.

Additional Evidence

At trial, the State introduced Appellant and Southern's cellular account records that law enforcement obtained during their investigation. Appellant had an account with Verizon. R. 611 - 620. Southern has an account with Sprint. R. 608 – 611.

From these cell carrier records, the State complied a summary of calls made by Appellant, including several calls to Hi-Point's factory, the Simpsonville BI-LO, and Southern. R. 531, l. 2 – 537, l. 20. The State also collected into a spreadsheet all of the communications (text and phone calls) between Appellant and Southern from August 16th through August 19th. R. 460, L. 2 – 487, L. 14; R. 621 – 629.

Finally, the State utilized historical cell site data contained in the Sprint and Verizon records in an effort to determine the approximate locations of Appellant and Southern on August 18-19, 2013. R. 531, l. 2 – 537, l. 20. Using a law enforcement mapping program, the State alleged that the historical cell site data showed that Appellant's cell phone connected to a cell tower near I-385 and Gray Court at 7:38 pm on August 18, 2013.

Appellant and Southern's cell phone both connected with towers around Simpsonville near mid-ngiht when Southern's shift at Charter Communications ended on August 18, 2013. *Id.* Southern's phone next connected with a tower outside of Woodruff at 12:57 a.m. on August 19, 2013. *Id.*

Appellant's phone next connected with a tower in downtown Greenville at 3:30 am followed by connections to towers in the Berea area near Appellant's house. *Id.* The last connection by Southern's cell phone was to a cell phone tower in downtown Greenville at 4:05 am. *Id.*

The State argued that the historical cell site data contradicted Appellant's statements to law enforcement and showed that he was near Southern's place of work when she was about to finish her shift. The defense countered that none of the historical cell site data established that Appellant was with Southern's phone in the Woodruff area around 1:00 – 1:30 am when the State alleged that Southern was shot. R. 543, l. 14 – 546, l. 5.

The law enforcement officer who mapped the historical cell site data conceded that the coverage area for cell towers varied widely and that historical cell site data is not designed to accurately track customers' movements, but rather to insure adequate network coverage. *Id.* The officer further admitted that cell phones connect to the tower with the strongest signal and that the strongest tower is not necessarily the closest tower. *Id.*

In addition to the cellular records, the State also called a series of Appellant's friends and former girlfriends who testified regarding Appellant's brief relationship with Lisa Hamlett. R. 379, l. 21 - 386, l. 20. Lisa Hamlett took the stand and explained that she had a brief sexual relationship with Appellant, but broke up with him when she discovered he was still married and had gotten a co-worker pregnant. R. 403, l. 5 – 413, l. 5.

Hamlett also detailed Appellant's increasingly eccentric and troubling efforts to re-establish their relationship, such as driving around her neighborhood at odd times. *Id.* She testified that, shortly before Southern went missing, she had received a Facebook message from Southern – whom she did not know – stating that Hamlett's current boyfriend had cheated on her with Southern. R. 416, l. 25 – 424, l. 13. Hamlett would recall that Southern had, during the message exchange, suggested that Hamlett break-up with her current boyfriend. *Id.*

Discussion

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion.'" *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012) (*internal quotations omitted*). Here, admitting the video tape of Appellant's second interrogation without redacting the investigator's statements was an abuse of discretion. The questions, statements, and accusations lodged against Appellant during the interrogation constituted inadmissible hearsay that unfairly prejudiced Appellant.

Leaving investigators' statements unredacted impermissibly shifted the burden of proof by intimating to the jury that Appellant had to somehow refute the State's evidence, much of it actually non-existent, in order to prove his innocence. Compounding the unfair prejudice to Appellant, he was denied the opportunity to confront many of the officers involved in the interrogation because the State did not have them testify at trial.

This case is on "all fours" with our Supreme Court's opinion in *State v. Brewer*, 411 S.C. 401, 768 S.E.2d 656 (2015). In *Brewer*, the defendant was arrested following two separate shootings at a night club in Beaufort. 411 S.C. at 403-404, 768 S.E. at 657. The first shooting occurred when the night club owner confronted Brewer over the gun he was carrying. *Id.* Brewer responded by pulling out his pistol and pointing it at the owner's head. *Id.* Brewer then fired a shot inside the night club, hitting a nearby bystander. *Id.*

The second shooting occurred while Brewer and his friends fled the night club. Shots were fired by at least two individuals, including Brewer and one other identified person. *Id.* Another bystander was struck during the second shooting and killed. For unknown reasons, police only pursued Brewer for the second shooting. *Id.* at 405, 768 S.E.2d at 658.

Beaufort County Sheriff's Deputies interrogated Brewer. He waived his *Miranda* rights and denied any involvement in the shootings. *Id.* Investigators repeatedly told Brewer that numerous witnesses had identified him as the shooter in what the Court decribed as "hearsay-laden questions and comments." *Id.* Brewer attempted to stop the interrogation on several occasions, but the police persisted. During the interrogation, investigators repeatedly urged Brewer to "prove his innocence" and to produce his gun so that they could clear him from suspicion. *Id.*

The Court reversed Brewer's conviction for the fatal, second shooting holding that the investigators repeated references to eyewitness identifying Brewer as the shooter constituted inadmissible hearsay. *Id.* at 406-407, 768 S.E.2d at 659. "During the interrogation, investigators frequently referenced *and quoted* many purported eyewitnesses . . . . This evidence was hearsay, offered for the sole purpose of proving the truth of the matter asserted, establishing Brewer's guilt to all charges." *Id.*

The Court specifically rejected the State's argument that the investigators questions were necessary to understand the context of the interrogation. *Id.* While not creating a categorical rule against allowing investigators' questions to be played before the jury, the Court stressed that "caution must be exercised in the admission of such evidence to ensure that all out of court statements" are properly admissible. *Id.*

Despite not being raised by the defense on appeal, the Court made clear that the admission of investigator's repeated insistence that Brewer prove his innocence was a "grave Constitutional error." *Id.* at 408, 768 S.E.2d at 659.

The Court also rejected the State's contention that the admission of the interrogation video was harmless error with respect to Brewer's murder conviction. *Id.* at 409-410, 768 S.E.2d at 660. The Court held that the evidence of Brewer being the second shooter was circumstantial and there were at least two shooters. Under these circumstances, the improper admission of the interrogation was not harmless.

In a concurring opinion, Justice Beatty held that the admission of the interrogation video constituted a structural error, rendering harmless error analysis improper. *Id.* at 410-412, 768 S.E.2d at 661-662. "[T]he jury was repeatedly bombarded with the unconstitutional notion that Brewer had to prove that he was innocent." *Id.*

In Appellant's case, the jury was "repeatedly bombarded" with the accusation that Appellant was a liar. (State's Exhibit # 47). Cheeks never testified, nor did many of the other unidentified officers who spoke during the interrogation. Admitting their questions via the interrogation video violated Appellant's right to confront adverse witnesses. *State v. Gillian*, 360 S.C. 433, 449–450, 602 S.E.2d 62, 71 (Ct.App.2004) ("The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered

through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence.").

Moreover, the State was clearly offering Cheeks accusations, that Appellant was a liar, for the truth of the matter assert. See *Ezell v. State*, 345 S.C. 312, 315, 548 S.E.2d 852, 853 (2001) (finding out-of-court statements on an audiotape identifying the defendant as a drug dealer were inadmissible hearsay.) The State wanted to convince jurors that Appellant's explanations for his actions were untrue and that he killed Southern. *Brewer*, 411 S.C. at 406-407, 768 S.E.2d at 658. The repeated accusations by the officers that Appellant was liar when coupled with the flagrant misrepresentation of the evidence against Appellant improperly shifted the burden of proof from the State to Appellant. *Id.*

Any distinction between the police calling Appellant a liar and misrepresenting evidence in this case and the police urging Brewer to prove his innocence, is a distinction without a difference. Cheeks' accusatory questions challenged Appellant to explain how incriminating evidence – that did not actually exist – was consistent with him being innocent. Obviously, under those circumstances crafting a coherent explanation was impossible.

The admission of the interrogation video without redacting the investigators' hearsay questions could not have been harmless. The interrogation lasted over an hour and half, and the trial court's instructions – that jurors ignore the police officers' questions – could not adequately cure the unfair prejudice of admitting the tape largely unredacted. R. 284, l. 10 – 308, l. 12.

The video of Appellant's interrogation was crucial to the State's circumstantial case against Appellant. No witnesses placed Appellant and Southern together at the time that she disappeared. The State had no evidence that Appellant was even in Laurens County on the night that they alleged Southern had been killed. The historical cell site data could only establish the

general proximity of Appellant to Southern and, crucially, never placed Appellant south of Simpsonville on the night the State alleged Southern was shot.

The make and model of the .380 pistol owned by Appellant was extremely common and the specific gun owned by Appellant at the time of Southern's disappearance could not be linked to the bullet recovered from Southern's body. R. 354, l. 15 - 355, l. 25. No DNA or fingerprints were recovered from the .380 magazine found several feet away from Southern's body. R. 181, ll. 3-19; R. 309, l. 10 - 310, l. 13

DNA tests on scrapings taken from the fingernails of Southern's right hand excluded Appellant as a contributor. R. 505, l. 4 - 506, l. 17. The State presented no evidence Southern had ever been in Appellant's truck. In contrast, Shawn Southern's volatile behavior and weak alibi presented the jury with an alternative possible suspect that the police utterly failed to investigate. R. 109, l. 7 - 115, l. 22; R. 459, ll. 2-11.

Finally, the State presented no obvious, rational motive for Appellant to kill Southern. Appellant had no prior criminal record. All of the witnesses called by the State to testify about his purported obsession with Lisa Hamlett, including Hamlett, stated that Appellant was not a violent person. Under the facts of Appellant's case, the trial court's error in admitting the almost completely unredacted video of Appellant's interrogation could not have been harmless as there was not overwhelming evidence of Appellant's guilt. *Brewer*, 411 S.C. 401, 768 S.E.2d 656.

II.

The trial court erred in admitting texts messages purportedly sent by Myranda Southern to Appellant where the text messages purportedly sent by Myranda Southern constituted inadmissible hearsay, not fitting within any exceptions.

Relevant Facts

The State sought to introduce a series of text messages they alleged were sent between Appellant and Southern in the days leading up to her disappearance and murder. R. 235, l. 15 – 246, l. 9; R. 459, l. 9 – 479, l. 23; R. 621 - 629. The police discovered the text messages between Appellant and Southern after Appellant handed over his cell phone. Several of the messages had been deleted by Appellant. *Id.*

However, law enforcement conceded that deleting messages seemed to be Appellant's regular practice. R. 491, l. 4 – 493, l. 24. Southern's cell phone was never recovered and the State produced no witnesses who could testify that Southern had sent the text messages the State was seeking to introduce. R. 480, l. 1 – 482, l. 22.

Prior to the messages being admitted into evidence, the defense objected on the grounds that Southern's text messages were inadmissible hearsay. R. 238, l. 3 – 239, l. 23. In response, the State argued that none of the texts were being offered for the truth of the matter asserted. *Id.* Rather the State, like the prosecution in *Brewer*, maintained that texts were necessary to provide the jurors with the larger context of the crime. 411 S.C. at 406-407, 768 S.E.2d at 659.

"It all fits into a larger theory that the State is trying to show. None of this, Your Honor, is really being offered for proof of the contents." R. 241, l. 9 – 242, l. 2. The defense then posited that "I don't know what it would be offered for except for the truth of the matter asserted." R. 242, ll. 22-23.

The court agreed with the State that the texts messages purportedly from Southern were admissible. The court ruled that the texts were not hearsay and were needed by the State establish their theory that Appellant was using Southern's cell phone and Facebook accounts to cover-up the murder. R. 242, l. 3 – 243, l, 14.

In its ruling, the Court attempted to use a text from Southern to Appellant complaining about her computer having a low battery to illustrate its reasoning. However, the example failed to show how the text messages were not hearsay:

> "[T]hey talked about her computer going dead and then recharging it. I mean, because I don't know where – how that is really helpful to the State's case. But, you know, offered for – it's not offered for the truth of the matter asserted that she had a dead computer. You see what I'm saying.

R. 243, ll, 1-6. The text messages spanned from August 16, 2013 until Appellant texted Southern at 11:55 pm on August 19, 2013 stating that he was worried about Southern's disappearance. R. 621 – 629.

Some of the most relevant texts to the State's case were those discussing Appellant's desire to buy a gun. *Id.* The State also stressed messages regarding the two's plan to help Appellant win back Hamlett that included having Appellant send Hamlett a Facebook message from Southern's account claiming to have slept with Hamlett's current girlfriend. R. 417, l. 7 - 424, l. 15; R. 453, l. 8 - 471, l. 24.

Discussion

The text messages purportedly sent by Southern to Appellant constituted inadmissible hearsay not fitting within any exception. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the

truth of the matter asserted." Rule 801(c), SCRE. Hearsay is inadmissible except as provided by the South Carolina Rules of Evidence, by other court rule, or by statute. Rule 802, SCRE.

On appeal, evidentiary rulings will not be reversed absent an abuse of discretion or the commission of legal error that prejudices the defendant. *State v. Rice,* 375 S.C. 302, 314, 652 S.E.2d 409, 415 (Ct.App.2007); *see also State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). The trial court abuses its discretion when the ruling is based on an error of law or factual conclusion that is without evidentiary support. *Id.* at 315, 652 S.E.2d at 415;

Furthermore, "[i]mproper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice." *State v. Garner*, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct.App.2010). Such error is deemed harmless when it could not have reasonably affected the result of trial, and an appellate court will not set aside a conviction for such insubstantial errors. *Id.*; *see also Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

Clearly, the text messages at issue constituted written assertions by their sender, who never testified. *Com. v. Koch*, 39 A.3d 996, 1005 (Pa. 2011) (holding that text messages constituted hearsay in a drug distribution case as the "only relevance of the text messages and precisely the reason the Commonwealth sought to introduce them was because they demonstrated an intent to deliver.").

The State argued that it was not offering the text messages to prove the truth of the matter asserted in the messages, rather the text messages provided the context surrounding the crime. R. 238, l. 3 – 239, l. 23. This argument mischaracterized how the State used the text messages sent from Southern's phone to Appellant's phone when arguing its case to the jury.

Notwithstanding the solicitor's claim to the contrary, the State argued that the content of the text messages sent from Southern's phone should be accepted by the jury as true. *Brewer*,

411 S.C. at 406-407, 768 S.E.2d at 659. For example, the State theorized that Appellant had access to Southern's Facebook password and had used her account to send a message to Hamlett stating that her current boyfriend had cheated on her with Southern. R. 461, l. 9 - 477, l. 8; R. 621 – 629.

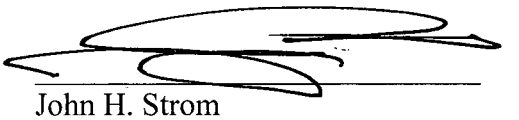
In support of this theory, the State cited to text messages that they claimed showed Appellant and Southern discussing Hamlett's reaction to the Facebook message sent from Southern's account. *Id.* More generally the State alleged that the text messages were proof that Appellant was obsessed with Hamlett and that he only used Southern, who was vulnerable because of the dissolution of her marriage, in an effort to rekindle his relationship with Hamlett.

Accordingly, the text messages sent from Southern's phone to Appellant constituted inadmissible hearsay and the trial court reversibly erred in admitting a summary of the messages into evidence. *See State v. King*, 412 S.C. 403, 412, 772 S.E.2d 189, 193-194 (Ct. App. 2015) (holding that police officer's testimony as to number of gunshots fired was hearsay in prosecution for attempted murder, testimony was based on statements made by witnesses and state offered testimony to prove truth of witnesses' statements.).

CONCLUSION

By reason for the forgoing arguments, Appellant Darrell Raines respectfully requests this Court reverse his convictions and remand his case for a new trial.

Respectfully Submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of June, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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."

June 1, 2017

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