

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Appeal from Aiken County  
Doyet A. Early, III, Circuit Court Judge  
Diane Schafer Goodstein, PCR Judge

---

**RECEIVED**  
JAN 16 2019  
S.C. SUPREME COURT

JAMES WHALEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA

RESPONDENT

APPELLATE CASE NO. 2017-001610

---

BRIEF OF RESPONDENT  
PURSUANT TO WHITE V. STATE

---

ALAN WILSON  
Attorney General

SAMUEL L. KEY  
Assistant Attorney General  
S.C. Bar No. 103206

Post Office Box 11549  
Columbia, S.C 29211  
(803) 734-3737

ATTORNEYS FOR RESPONDENT

## INDEX

I.	INDEX .....	i
II.	TABLE OF AUTHORITIES .....	ii
III.	PETITIONER’S STATEMENT OF ISSUE ON APPEAL .....	1
IV.	RESPONDENT’S COURTERSTATEMENT OF ISSUES ON APPEAL .....	2
V.	STATEMENT OF THE CASE .....	3
VI.	SUMMARY OF THE FACTS .....	5
VII.	STANDARD OF REVIEW .....	8
VIII.	ARGUMENT .....	9
	1. Evidence in the record supports the trial court’s finding that the three printouts of Facebook messages were properly authenticated because the relevant witness testified as to each message’s authenticity .....	9
	2. Even if the admission of the printouts of the Facebook messages into evidence constituted error, any error was harmless beyond a reasonable doubt because the trial court, sitting as the fact finder, conveyed his decision was based on Minor 2 and Minor 3’s testimony, and where a witness authenticated the messages during the sentencing phase of trial .....	12
IX.	CONCLUSION .....	14

## TABLE OF AUTHORITIES

### Cases

<i>State v. Brown</i> , 424 S.C. 479, 489, 818 S.E.2d 735, 739–40 (2018).....	8
<i>Deep Keel, LLC v. Atl. Private Equity Grp., LLC</i> , 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015).....	10, 11
<i>Drayton v. Evatt</i> , 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993).....	12
<i>State v. King</i> , 424 S.C. 188, 201, 818 S.E.2d 204, 211 (2018).....	12
<i>State v. Pagan</i> , 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006).....	12

### Rules

Rule 901, SCORE.....	9
----------------------	---

**PETITIONER'S STATEMENT OF ISSUE ON APPEAL**

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

**RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL**

1. Evidence in the record supports the trial court's finding that the three printouts of Facebook messages were properly authenticated because the relevant witness testified as to each message's authenticity.
2. Even if the admission of the printouts of the Facebook messages into evidence constituted error, any error was harmless beyond a reasonable doubt because the trial court, sitting as the fact finder, conveyed his decision was based on Minor 2 and Minor 3's testimony, and where a witness authenticated the messages during the sentencing phase of trial.

## STATEMENT OF THE CASE

James Whaley was indicted in regard to a series of incidents that occurred from 1996–2010 by the Aiken County Grand Jury for three counts of first-degree criminal sexual conduct (CSC) with a minor, one count of second-degree CSC with a minor, one count of kidnapping, two counts of committing a lewd act on a minor, one count of contributing to the delinquency of a minor, one count of indecent exposure, and one count of disseminating harmful material to minors. (App. 179–80). Whaley proceeded to a bench trial September 10–12, 2013, before the Honorable Doyet A. Early, III. He was represented by Brian Katonak. Assistant Solicitors Ashley Agnew and J. William Weeks prosecuted the case. Whaley was convicted of one count disseminating harmful material to a minor, one count of lewd act, and one count indecent exposure. (App. 179–80, 220–25). The trial court found Whaley not guilty of the seven other charges. (App. 179–80). The trial court sentenced Whaley to serve concurrent terms of imprisonment of ten years imprisonment for disseminating harmful material to a child, and fifteen years for lewd act. The trial court sentenced Whaley to serve three years imprisonment for indecent exposure—consecutive to his concurrent ten and fifteen year sentences for an aggregate term of eighteen years.

Whaley filed a notice of appeal April 10, 2014. Whaley’s direct appeal was not perfected, and the case was remitted April 28, 2014. (App. 202). Whaley commenced a PCR action June 1, 2015, alleging, among other things, ineffective assistance of counsel for the dismissal of his direct appeal. (App. 192–200).

An evidentiary hearing was held May 26, 2017, before the Honorable Diane Schafer Goodstein. At the PCR hearing, the State consented to a direct appeal pursuant to *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974); however, the State moved for summary dismissal of Whaley’s other allegations as being barred by the statute of limitations. (App. 209–14). The PCR court

granted Whaley's request for a direct appeal pursuant to *White*, but denied relief and dismissed with prejudice Whaley's other allegations as being untimely. (App. 216–19).

This brief of respondent now follows and only addresses the direct appeal issues now raised by Whaley.

## SUMMARY OF THE FACTS

Three minor children (Minor 1, Minor 2, and Minor 3) alleged James Whaley committed various acts either to them or in their presence, between 1996 and 2010. Whaley requested a bench trial on these allegations. The majority of the trial focused on Minor 1's allegations, but the trial court found Whaley not guilty on all charges relating to Minor 1. However, the Court found Whaley guilty on the charges relating to Minor 2 and Minor 3. Below are the facts relevant to the charges linked to Minor 2 and Minor 3.

### Lewd Act on Minor 2

Minor 2 was nineteen years old when she testified at trial. (App. 64, 64–90). Whaley is Minor 2 and Minor 3's uncle—Minor 2 and Minor 3 are sisters. (App. 65). Minor 2 recalled her first inappropriate encounter with Whaley occurred when she was five or six years old. (App. 66). Minor 2 was staying the night at her great-grandmother's house while her mother was at work. (App. 66). Minor 2 was lying on a couch in a bedroom of her great-grandmother's house when Whaley entered the room. Minor 3 was in the room asleep on the bed. (App. 67). Minor 2 recalled, “[Whaley] woke me up and told me to be quiet. And [Whaley] eventually got on top of me and started touching me and humping me.” (App. 67). Minor 2 stated that Whaley was touching her “whole body” with his hands, and the incident seemed to last “forever.” (App. 68). She recalled wearing a “really long t-shirt[]” and “[p]anties.” (App. 68). Minor 2 clarified that Whaley was touching and humping her over her clothes. (App. 68).

### Indecent Exposure to Minor 3

Minor 3 was eighteen years old when she testified at trial. (App. 91, 91–109). She recalled that when she was six years old, circa 2001, Whaley was babysitting herself and Minor 2. While he was babysitting Minor 2 and Minor 3, Whaley exposed his penis to Minor 3. (App. 93). Minor

3 stated Whaley had his penis exposed “[f]or a couple of seconds, then [she] ran away.” (App. 94). Minor 3 stated she told her mother about the incident. (App. 94).

Alecia Powell testified at trial. (App. 110–118). Powell is Minor 2 and Minor 3’s mother, and Whaley’s sister. (App. 110). On cross-examination, Powell recalled Minor 3 disclosing to her in 2001 that Whaley did something inappropriate while he was babysitting. (App. 114). Powell recalled that Whaley babysat Minor 3 in 2001, and that when she came home from work that night, Minor 3 told her, “Mama, don’t ever let [Whaley] watch me again. He’s gross.” Powell stated that she did not call law enforcement, but instead called Whaley to inquire about the incident. (App. 114–15). Powell stated that Whaley claimed the incident was an accident, that he stood up and his pants fell down. Powell explained she did not feel like that was sufficient reason to call law enforcement. (App. 117). Powell further explained, “I didn’t call law enforcement because I didn’t know if a six-year-old [Minor 3] understood what happened compared to a 20-some-year-old [Whaley].” (App. 117).

#### *Dissemination of Harmful Materials to Minor 2 and Minor 3*

Minor 2 and Minor 3 recalled an encounter they had with Whaley that occurred during a Thanksgiving dinner. (App. 72, 96–98). Minor 2 was either twelve, thirteen, or fourteen when the Thanksgiving incident occurred. (App. 72). Minor 3 stated she was in middle school, around twelve years old. (App. 97). During the Thanksgiving dinner, Whaley was showing Minor 2 and Minor 3 pictures from a beach vacation he and his wife had recently taken. (App. 73). While scrolling through the pictures on his phone, Whaley came across a video and stopped scrolling. Whaley played the video for Minor 2 and Minor 3. (App. 73, 98). Minor 2 described the video as, “Of someone sucking [Whaley’s] dick.” (App. 73). Minor 3 described the video as “[s]omeone giving oral sex,” and recognized the person performing the act as Whaley’s wife. (App. 98).

Minor 2 stated that after showing the video, Whaley laughed because Minor 3 saw the video and was asking about the contents of the video. (App. 74). Minor 2 claimed she snatched the phone away from Whaley. (App. 74). Minor 2 explained she did not initially disclose the incidents because, “I was scared what people might think because it was my family.” (App. 75).

Whaley’s question on appeal regards three printouts of Facebook messages—allegedly sent from Whaley to Minor 2, Minor 3, and Powell respectively—the trial court admitted into evidence. (App. 76–78, 99–101, 112–13). While the messages are not contained in the record before the Court, the record does indicate the contents of the messages. Apparently, the messages were alleged apologies from Whaley. (App. 108, 116). The authenticity of these Facebook messages is the subject of Whaley’s appeal.

### **STANDARD OF REVIEW**

The admission of evidence is within the discretion of the trial court, and the trial court's ruling will not be disturbed without an abuse of discretion and probable prejudice. *State v. Brown*, 424 S.C. 479, 489, 818 S.E.2d 735, 739–40 (2018). An abuse of discretion occurs when the trial court's ruling either lacks evidentiary support or is controlled by an error of law. *Id.* at 489, 818 S.E.2d at 740.

## ARGUMENT

Whaley asserts the trial court committed reversible error in finding three printouts of Facebook messages were authenticated through witness testimony, and requests his convictions be reversed and remanded for a new trial. Whaley argues the messages were not properly authenticated because the State could only show the messages came from a Facebook account with Whaley's name on it, not that Whaley authored the messages. He argues he was prejudiced because the messages were presented as admissions of guilt. These arguments are without merit because: (1) the witness testimony met the low threshold of authentication; and (2) the trial court's alleged error of admitting the messages without proper authentication was harmless because the trial court's finding of guilty was based on Minor 2 and Minor 3's credibility. In any event, Whaley admitted to sending the messages during sentencing so his challenge to their authenticity is disingenuous. Whaley's convictions should be affirmed.

1. **Evidence in the record supports the trial court's finding that the three printouts of Facebook messages were properly authenticated because the relevant witness testified as to each message's authenticity.**

Whaley argues the trial court erred in admitting the three Facebook messages into evidence alleging the messages were not properly authenticated. Whaley's argument is without merit. The witnesses' testimony satisfied the low threshold of authentication.

Evidence must be authenticated or identified to be admissible. Rule 901, SCRE. Specifically, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a), SCRE. "[T]he burden to authenticate . . . is not high' and requires only that the proponent 'offer[ ] a satisfactory foundation from which the jury could reasonably find that the evidence is authentic.'" *Deep Keel, LLC v. Atl. Private Equity Grp., LLC*,

413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015) (quoting *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014)).

It is important to note Whaley received a bench trial. As mentioned above, the items of evidence in dispute are three printouts of Facebook messages that Whaley allegedly sent to Minor 2, Minor 3, and Powell. Whaley, through counsel, made a preliminary objection to the admission of the message sent to Minor 2, arguing:

Judge, we're going to object to the introduction of the Facebook message. Of course, [the message is] not signed to any Facebook. There's no foundation of proof that it actually came from my client's computer. Anyone could have gone on his Facebook account and sent [the message] so we're going to object to that.

(App. 76). The trial court made a preliminary ruling to allow the Facebook message into evidence.

(App. 76). After the trial court made its preliminary ruling, Minor 2 stated that she received the message through her Facebook account, and the message came from Whaley's Facebook account. She also affirmed that one has to have a Facebook login and password to send a message through Facebook. Minor 2 stated she received the message on February 20, 2011. The State then offered the message into evidence. The trial court admitted the message into evidence, "Subject to [Whaley's] objections." (App. 76–78). On cross, Minor 2 stated that she was unsure if she and Whaley were Facebook friends; however, she stated you can send Facebook messages whether you are a friend or not. (App. 80).

Whaley made the same preliminary objection to the Facebook messages sent to Minor 3 and Powell. (App. 99, 112). The trial court made the same preliminary ruling. (App. 99, 112). Minor 3 and Powell's testimonies established the same foundation as Minor 2: the messages were sent to their Facebook accounts from Whaley's Facebook account, the messages were accompanied by Whaley's name and picture, the messages were received on February 20, 2011,

and the messages were printed out on February 26, 2011. (App. 99–101, 112–13). The State offered the Facebook messages into evidence, and the trial court admitted the messages, subject to Whaley’s objections. (App. 100, 113).

Whaley asserts the messages were not properly authenticated because “the messages purportedly written by [Whaley] were not connected to him despite the testimony from the [S]tate’s witnesses that the name on the Facebook account was [Whaley’s].” (Pet. Br. 16). Whaley also contends the messages were not properly authenticated because “the [S]tate failed to authenticate the messages based upon distinctive characteristics.” (Pet. Br. 16). Whaley cites to no binding authority for his assertions that the Facebook messages were not properly authenticated; however, he does cite to authority from other jurisdictions that support his argument. (Pet. Br. 7–17). Whaley’s arguments go to the weight to be given to the Facebook messages, rather than the messages admissibility. However, Whaley was given every opportunity to attack the weight of the evidence on cross. The facts of this case do not support the adoption of a new authentication requirement because Whaley admitted to sending the messages during sentencing. (App. 186–87).

Under South Carolina law, the State merely had to lay a sufficient foundation for the fact finder to reasonably conclude that the evidence was authentic. *Deep Keel, LLC*, 413 S.C. at 64, 773 S.E.2d at 610. The State satisfied its burden because the trial court, sitting as the fact finder, could reasonably find the Facebook messages were authentic based on the above referenced witnesses’ testimony. The Court should affirm because the three Facebook messages were properly authenticated by witness testimony.

- 2. Even if the admission of the printouts of the Facebook messages into evidence constituted error, any error was harmless beyond a reasonable doubt because the trial court, sitting as the fact finder, conveyed his decision was based on Minor 2 and Minor 3’s testimony, and where a witness authenticated the messages during the sentencing phase of trial.**

Whaley argues he was prejudiced by the admission of the Facebook messages because his trial strategy was a complete denial of the allegations against him. He argues, “[T]he messages created undue prejudice . . . because they appeared to show he admitted guilt.” (Pet. Br. 18). Whaley’s argument fails because the trial court stated he was firmly convinced by Minor 2 and Minor 3. In any event, Whaley admitted to sending the messages during sentencing so his challenge to their authenticity is disingenuous. .

“Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result.” *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006). “Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained.” *Id.* “Therefore, an insubstantial error not affecting a trial's result is harmless where ‘guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.’” *State v. King*, 424 S.C. 188, 201, 818 S.E.2d 204, 211 (2018) (quoting *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989)).

Because this case was tried from the bench, the record contains valuable insight into the fact finder’s decision. (App. 187). During sentencing, the trial court explained why he found Whaley not guilty on the charges relating to Minor 1 stating, “I was not firmly convinced that you had done all these things to her. And that was based on some of the testimony that was given.” (App. 187). However, the trial court also explained it “was *firmly* convinced beyond a reasonable doubt as to [Minor 2 and Minor 3].” (App. 187) (emphasis added). The trial court’s explanation should not be taken lightly, as it shows the trial court based its ruling on Minor 2 and Minor 3’s credibility, and not the Facebook messages. *See Drayton v. Evatt*, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) (“[Appellate courts] give great deference to a judge's findings where matters of credibility are involved since [appellate courts] lack the opportunity to directly observe the

witnesses.”). Moreover, the trial court found Whaley not guilty on the charges relating to Minor 1, when there was also a written apology from Whaley to Minor 1 in evidence. (App. 127, 135). Therefore, any alleged error in admitting the Facebook messages was harmless because the messages did not contribute to the verdict obtained. The trial court found Whaley not guilty as to Minor 1, even when there was an apology from Whaley to Minor 1 in evidence. In comparison, the Trial court was “firmly convinced beyond a reasonable doubt” by Minor 2 and Minor 3’s testimony. (App. 187).

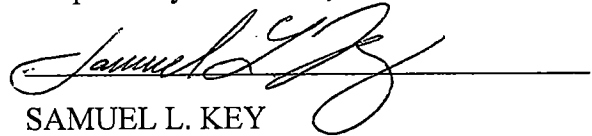
Further, even if the Court wished to adopt a new authentication requirement for social media as suggested by Whaley, the facts of this case do not support such adoption. During sentencing, after Whaley was convicted as to Minor 2 and Minor 3, the trial court asked Whaley if he wished to apologize. Whaley stated, “I’ve -- I have apologized. I’ve given written apologies.” (App. 187). This statement, while during sentencing, shows that any alleged error by the trial court in finding the messages were authenticated, was harmless because Whaley authenticated the messages by himself stating he had already provided written apologies. Therefore, any error in the admission of the Facebook messages was harmless.

This Court should affirm.

**CONCLUSION**

Whaley's convictions should be affirmed because the Facebook messages were properly authenticated by witness testimony. Any alleged error by the trial court regarding the authentication of the Facebook messages was harmless because the trial court was convinced by Minor 2 and Minor 3's testimony, and Whaley authenticated the Facebook messages during sentencing. The Court should affirm.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Samuel L. Key", is written over a horizontal line.

SAMUEL L. KEY  
Assistant Attorney General

Post Office Box 11549  
Columbia, S.C 29211  
(803) 734-3737

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

CERTIORARI TO AIKEN COUNTY

Honorable Diane Schafer Goodstein, Circuit Court Judge

Appellate Case No. 2017-001610

RECEIVED  
JAN 16 2019  
S.C. SUPREME COURT

JAMES WHALEY,.....PETITIONER,

v.

STATE OF SOUTH CAROLINA, .....RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned do hereby certifies that a true copy of the **Brief of Respondent**, has been served upon opposing counsel by mailing two (2) copies of both in the United States mail, postage prepaid:

**Victor R. Seeger, Esquire**  
**SC Commission on Indigent Defense**  
**Post Office Box 11589**  
**Columbia, South Carolina 29211**

I further certify that all parties required by Rule to be served have been served. This 16<sup>th</sup> day of January, 2019.

  
KAITLYN S. SLICE  
LEGAL ASSISTANT



ALAN WILSON  
ATTORNEY GENERAL

January 16, 2019

RECEIVED

JAN 16 2019

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse  
Clerk, Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29211

**Re: James Whaley v. State of South Carolina**  
**Appellate Case No. 2017-001610**

Dear Mr. Shearouse:

Enclosed please find the original and fifteen (15) copies of the **Brief of Respondent** in the above-referenced post-conviction relief appeal for filing with the Court. Petitioner is simultaneously being served with a copy of this Brief.

Please let me know if I can provide anything additional to the Court on this matter.

Sincerely,

Samuel L. Key  
Assistant Attorney General  
SC Bar #103206

SLK/ks

cc: Victor R. Seeger, Esquire  
Victim Advocacy Division