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STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

Appeal from Hampton County

The Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

Respondent,

v.

GREGORY SANDERS

Appellant.

Appellate Case No. 2018-000911

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Did the judge err by allowing the state to introduce the contents of a text message allegedly written by a person who did not testify because (1) the text message was inadmissible hearsay for which there was no exception and (2) the state failed to authenticate the text message, and the erroneous admission of the text message permitted the state to use the contents of the message to argue that Appellant was not without fault in brining on the difficult to defeat his claim of self-defense?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

Whether the circuit court abused its discretion and committed reversible error by admitting a text message into evidence.

STATEMENT OF THE CASE

In February 2017, a Hampton County grand jury indicted appellant for murder and possession of a firearm during the commission of a violent crime. (Indictment Nos. 2016-GS-25-00177 and 00178; R. 460-461; 463-464). The solicitor called the case for trial on May 7, 2018, before the Honorable Carmen T. Mullen. (R. 3, l.15-24). Assistant Solicitors Tameka Legette and Bryan Hollen represented the State of South Carolina. (R. 1). Attorney Stephen Plexico represented appellant. After a three-day trial, the jury convicted appellant on both counts. (R. 454, l.24, 455, l.2). Judge Mullen sentenced appellant to life in prison for murder and five years (concurrent) for possession of a firearm during the commission of a violent crime. (R. 456, l. 22, 457, l. 1-5). This timely appeal follows.

STATEMENT OF FACTS

Murder of Tyhira Harrington

Tyhira Harrington (victim) lived at the Fairwood Apartments in Estill, South Carolina with her mother and two young children. (R. 60, l. 16-24). She stood approximately five feet, six inches tall and weighed 105 pounds.[1] (R. 324, l. 3-4). In addition to raising her children, she worked at several restaurants on Hilton Head Island. (R. 61, l. 11-13, 32, l. 22-23). Initially, Tyhira and appellant had a friendly relationship. (R. 132, l. 20.). In fact, appellant would regularly come by the apartment with his girlfriend for dinner. (R. 63, l. 10-11). Tyhira even occasionally braided appellant's hair when he visited the apartment. (R. 63, l. 23-25).

But their relationship drastically changed in the days leading up to Tyhira's murder. On May 7, 2016, the victim's mother was walking to a convenience store in Estill when she passed by appellant sitting on the porch of an abandoned home. (R. 6, l. 9-20, 82, l. 12). Appellant yelled, "you better get a black dress because I'm going to kill your daughter." (R. 66, l. 14-15). According to appellant, Tyhira had taken him to Allendale, as part of a "set up." (R. 66, l. 16). The victim's mother verbally confronted appellant, but the argument did not escalate to physical violence. (R. 66, l. 17-21, 67, l. 18-25). Instead, the victim's mother walked away and texted her daughter about the incident. (R. 67, l. 1-11, 458). Not only was she worried about the threat, but she also wanted Tyhira to know that she would support her regardless of what appellant claimed. (R. 71, l. 24-25, 72, l. 1-3).

Two days later, Tyhira was out with two friends when she received a call from her mother. (R. 134, l. 17-23). Appellant was at her apartment to "clear his name" regarding the

[1] In contrast, appellant was described as "cocky" with "a little muscle, a little weight." (R. 124, l. 11-14).

threat involving the black dress. (R. 136, l. 12-24, 177, l. 2). Tyhira and her two friends returned to the apartment, and what began as a calm discussion turned into a heated verbal exchange with various gang references. (R. 137, l. 19-24). According to the victim's mother, appellant threw down a blue bandana and said "it's on the five." (R. 73, l. 17-24). Appellant refused to pick the bandanna up, stating, "no, it's on there on the five," which apparently carried gang significance. (R. 73, l. 17-24, 88, l. 17-22). Another witness testified that appellant was talking about "earning stripes," which was also gang-related. (R. 177, l. 7-9, 198, l. 11-17). Ultimately, Tyhira asked appellant to leave, and he did without any physical altercation. (R. 137, l. 10-19, 178, l. 19).

When appellant left, Tyhira drove her mom to a new apartment that her mom had moved into earlier that day. (R. 178, l. 22-24). One of Tyhira's friends rode with her, while the other stayed behind at the apartment with an individual named Johnny McKnight. (R. 139, l. 14-23, 141, l. 9-12, 31, l. 12-25). After dropping off her mom, Tyhira picked up Randy White and his friend, Marquis Alston. (R. 178, l. 22-25, 179, l. 1-8). Randy White was Tyhira's boyfriend and is a distant cousin of appellant. (R. 95, l. 16, 96, l. 17, 350, l. 20).

Meanwhile, back at Tyhira's apartment, her friend noticed that someone was outside the apartment fiddling with the front doorknob. (R. 140, l. 3-6). The friend later testified that "we called Tyhira" to let her know "somebody's trying to get in her house, and to be careful." (R. 140, l. 9-17). Johnny McKnight also called Tyhira's mother to say that appellant was at the apartment fiddling with the door. (R. 75, l. 8-12). In addition to the phone call, McKnight sent a text to Tyhira's mother that read, "I just seen Hard[2] gf walkn behind da apts. He probably hidn 2. Tryn sum." (R. 75, l. 20-22, 459). Tyhira's mother believed the text meant that appellant and

[2] Appellant went by the nickname "Hard." (R. 48, l. 10, 64, l. 5, 171, l. 17).

his girlfriend were trying to lure Tyhira out of her apartment. (R. 80, l. 4-5). Upon hearing from McKnight, she immediately relayed his warning to Tyhira. (R. 80, l. 13-24). She would never speak with her daughter again. (R. 81, l. 2).

Once Tyhira learned that appellant had returned to her apartment, she hung up the phone and drove home. (R. 100, l. 18-25, 180, l. 6-11). Riding with her in the car was Randy White, Marquis Alston, and her friend, Daisy.[3] (R. 178, l. 23-25, 179, l. 1-8). As they approached the apartment, they saw appellant and his girlfriend standing outside the laundromat of the apartment complex. (R. 101, l. 14-21, 157, l. 25, 180, l. 12). Tyhira got out of the car and walked towards appellant's girlfriend in the street. (R. 121, l. 17, 181, l. 14, 183, l. 2-17). An argument ensued in the street, first between Tyhira and the girlfriend, and then between Tyhira and appellant. (R. 125, l. 9-12, 183, l. 2-17). Although Tyhira was angry (R. 120, l. 18, 181, l. 22), she never attempted to hit appellant or his girlfriend. (R. 102, l. 21-25, 103, l. 8-13, 181, l. 20, 182, l. 16-24). Moreover, her friends stood in the background and did not engage appellant or his girlfriend. (R. 125, l. 11-25, 191, l. 12-14).

As the argument continued, appellant said to Randy White, "[l]eave, you don't want to be a witness." (R. 128, l. 12). Appellant then positioned himself to get a better angle on Tyhira and asked, "all these people out here, and how many people you think are gonna ride for you?"[4] (R. 184, l. 12-14, 186, l. 5-10). Tyhira had no chance to respond before appellant took out his gun and shot her in the face. (R. 102, l. 4-5, 186, l. 15-21, 187, l. 9). Tyhira dropped to the

[3] Daisy's legal name is Yhantyse Priester. (R. 167, l. 13-25).

[4] The jury previously heard testimony that the phrase "ride or die" means that someone would stand by another's side during a conflict. (R. 71, l. 25-25, 72, l. 1-3).

ground, and appellant walked away.[5] (R. 103, l. 18). Although her friends rushed her to Hampton Regional Medical Center, the attending physician pronounced Tyhira dead on arrival. (R. 40, l. 13).

Law enforcement responded to shots fired at the scene at approximately 1:00 a.m. on May 10, 2016. (R. 18, l. 1-21). When officers arrived, they found a large pool of blood in the middle of the street, two .40 caliber shell casings, and a pair of flip flops. (St. Ex. 8-10, 19, 21; R. 19, l. 8-17, 21, l. 4-17, 25, l. 9-12). Although law enforcement secured the scene and collected the evidence, the witnesses had already left the area. (R. 20, l. 9-13).

Nevertheless, law enforcement identified appellant as a suspect after speaking with Tyhira's friends at the hospital. (R. 253, l. 1-6). At around 9:00 a.m., law enforcement received a tip about appellant's whereabouts and quickly arrested him. (R. 219, l. 1-14). Appellant was found outside a house in Estill changing his pants near the trash can. (R. 219, l. 8-12). In his possession was a firearm wrapped in a bundle of clothing. (R. 220, l. 7-8). After being read his *Miranda* rights, appellant declined to speak with the police. (R. 4, l. 6-9). However, when law enforcement read him the warrant charging him with Tyhira's murder, appellant stated, "she must've been a nobody." (R. 239, l. 1-7).

Appellant's Trial

The central issue in appellant's trial was his claim of self-defense. Daisy and Randy White both testified for the State.[6] Their testimony was consistent on four key points. First,

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[5] Daisy testified that after appellant shot Tyhira, "He took off. They took off running." (R. 187, l. 25).

[6] The State also called Marquis Alston, but he was uncooperative. The circuit court declared him a hostile witness (R. 157, l. 17), and the State introduced his prior inconsistent statement that he saw appellant shoot Tyhira and calmly walk away. (R. 206, l. 15-18).

Tyhria never attempted to hit appellant or his girlfriend. (R. 102, l. 21-25, 103, l. 6-9, 181, l. 20, 182, l. 16-25, 183, l. 13-17). The only physical violence occurred when appellant pulled out his gun and shot Tyhira. (R. 122, l. 23-24). Second, neither Tyhira, nor her friends, had a weapon. (R. 121, l. 11, 182, l.20). Appellant brought the only weapon to the altercation. Third, although Tyhira's friends got out of the car, they all stayed in the background during the argument. (R. 118, l. 17, 125, l. 9-25, 126, l. 1-4, 191, l. 12-25, 197, l. 17). None of them engaged appellant or appellant's girlfriend. Fourth, the argument occurred in the middle of the street, which meant that appellant could have walked away. (R. 121, l. 16-25, 122, l. 1-14, 181, l.14, 193, l. 14-17). In short, although Tyhira was angry and confronted appellant in the street, his life was never in danger. (R. 188, l. 9-13).

In addition to eyewitness testimony, the State also presented law enforcement and expert testimony. A SLED firearms examiner matched the gun seized incident to appellant's arrest to a bullet removed from Tyhira's skull and the shell casings found at the scene. (R. 277, l. 14-23). Tyhira's autopsy also revealed stippling, or small burns to the skin from ejected gunpowder, near the bullet hole on her face. (R. 300, l. 6-12). The presence of stipling on Tyhira's skin indicated that she was extremely close to the gun when appellant fired. (R. 301, l. 3-4). According to an expert from SLED, Tyhira was probably within a few inches of the gun. (R. 301, l. 15-16). Similarly, a forensic pathologist estimated the distance from between three or four inches to potentially a couple of feet. (R. 320, l. 20-21). Given the puddle of blood found in the middle of the street (St. Ex. 8-10, 19, 21), the minimal distance between the gun and Tyhira's face corroborates Randy White and Daisy's testimony that appellant was standing in the middle of the street and could have walked away from the argument. Therefore, in contrast to appellant's testimony, his back was not against the wall when he fired the fatal shot.

Appellant took the stand in his own defense. He denied making the threat about the black dress, or even ever going to Allendale with Tyhria.[7] (R. 332, l. 21, 336, l. 6). Appellant claimed that earlier in the day, friends of the father of Tyhira's children "lynched" him twice. (R. 332, l. 1-15). When he went to Tyhira's apartment to clear his name, Tyhira allegedly punched him in the eye. (R. 334, l. 16-20). Tyhira's three female friends subsequently jumped him and he had to fight his way out of the apartment. (R. 334, l. 20-23). Appellant introduced photographs taken incident to his arrest that purportedly showed the injuries he sustained that day.[8] (R. 335, l. 8-19; Def. Ex. 1).

After he left the apartment, appellant testified that he and his girlfriend were simply walking down the street when Tyhira sped past them, slammed on the brakes, and pulled into the apartment complex. (R. 338, l. 7-18). All four doors of the car opened up, and Tyhira began threatening appellant and his girlfriend. (R. 340, l. 1-2). According to appellant, Tyhira implied that she a gun in the car. (R. 341, l. 14-15). Appellant stood in front of his girlfriend and began backing up. (R. 340, l. 14-15). Ultimately, he claimed that Tyhira and her friends had him surrounded with his back against the wall of the laundromat. (R. 342, l. 4-7). At that point, he shot and killed Tyhira so he and his girlfriend could escape. (R. 345, l. 19).

After appellant testified, the circuit court charged the jury on the law. Both parties agreed that the jury should not be charged with any lesser included offenses, such as voluntary manslaughter. (R. 330, l. 17-25, 582, l. 1-4). The jury was out for less than an hour before

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[7] In its case-in chief, the State introduced a text message from Tyhira's mother referencing the threat and its connection to Allendale, as described above. (R. 458). The text was sent several days before Tyhira's murder. (R. 70, l. 17-20).

[8] One of the arresting officers testified that appellant said he sustained a black eye after he got caught cheating on his girlfriend. (R. 240, l. 16-17).

finding appellant guilty as charged of both murder and possession of a firearm during the commission of a violent crime. (R. 453, l. 16-21). The court sentenced appellant to life imprisonment for murder and five years (concurrent) for possession of a firearm during the commission of a violent crime. (R. 456 l. 22-25, 457, l. 1-5).

STANDARD OF REVIEW

The standard of review for the admission or exclusion of evidence is an abuse of discretion. State v. Douglas, 411 S.C. 307, 316, 768 S.E.2d 232, 237 (Ct. App. 2014). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Anderson, 386 S.C. 120, 126, 687 S.E.2d 35, 38 (2009)(quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)).

ARGUMENT

The Circuit Court Did Not Abuse Its Discretion in Admitting the Text Message Because It Was Properly Authenticated and Was Not Inadmissible Hearsay.

Relevant Facts

As discussed above, on the night of Tyhira's murder, appellant came to her apartment to "clear his name" after he allegedly threatened to kill her. (R. 136, l. 12-24, 177, l. 2). Tyhira's mother, step-father, and several friends were present at the apartment when he arrived. (R. 137, l. 14). An argument ensued, and Tyhria asked appellant to leave. (R. 137, l. 21-24, 138, l. 10-12). Tyhira subsequently drove her mother home and met up with friends. (R. 178, l. 22-24). Later that night, Tyhria's mother received a phone call from Johnny McKnight. (R. 75, l. 8-12). Prior to the mother's testimony, the jury learned that Johnny McKnight drove Tyhira to the hospital after she was shot. (R. 31, l. 12-25).

During the mother's testimony, appellant objected to her description of the content of her phone call with Johnny McKnight. (R. 75, l. 13-18). The State agreed to strike the testimony, but then asked whether she also received a text message. (R. 75, l. 20-21). Tyhira's mother responded that she did receive a text message from Johnny McKnight. She knew McKnight sent the text because she had his number programmed into her cell phone as "Johnny Blaze." (R. 76, l. 1-6). Tyhira's mother testified that State's Exhibit 25 was an accurate copy of that text message because she still had the original text message saved in her phone. (R. 77, l. 4-9). The text read, "I just seen hard[9] gf walkn behind da apts. He probably hidn 2. Tryn sum." (R. 79, l. 23-25, 459).

[9] As noted above, appellant went by the nickname "Hard." (R. 48, l. 10, 64, l. 5, 171, l. 17).

When the State offered the text message into evidence, appellant objected that it was hearsay and the sender's identity was unknown. (R. 78, l. 3-13). After an off the record bench conference, the court admitted the text message subject to appellant's objection. (R. 79, l. 1-2). Tyhira's mother explained that she understood the text to mean that appellant and his girlfriend had returned and were trying to lure Tyhira out of the apartment. (R. 80, l. 1-10). Without objection, Tyhria's mother also testified that she subsequently called Tyhira to relay McKnight's warning. (R. 80, l. 13-14). Specifically, she told Tyhira that "Johnny just text me and said that Hard and his girlfriend -- Mr. Sanders and his girlfriend was going back behind your apartment." (R. 80, l. 21-24).

A. The Text Message Was Properly Authenticated Because It Was From A Known Number and Its Contents Provided Circumstantial Evidence Establishing Its Authenticity.

To authenticate evidence under Rule 901, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Rule 901(a), SCRE. For example, a witness with knowledge may testify "that an item is what it is claimed to be." Rule 901 (b)(1), SCRE. Additionally, distinctive characteristics, such as appearance, contents, or substance can establish an item's authenticity. Rule 901 (b)(4) SCRE. Simply put, "[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. Atlantic Private Equity Group, 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)(citations and alterations omitted)). The circuit court's ruling on authentication will not be reversed absent an abuse of discretion. State v. Anderson, 386 S.C. 120, 126, 687 S.E.2d 35, 38 (2009). "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 State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

The circuit court's ruling should be affirmed because there is evidentiary support that the exhibit was what the State purported it to be: a text message from Johnny McKnight. Tyhira's mother already had McKnight's cell phone number plugged into her phone, so when she received a text from that number, she knew it was from him. (R. 76, l. 1-6). This fact alone should be sufficient for a jury to find the evidence is authentic. Every day the average juror receives texts that they know are authentic for precisely the same reason: they have the sender's number plugged into their phone.

The record also reveals that McKnight called Tyhira's mother contemporaneously with sending the text message. During the mother's testimony, she stated that "I got a call from Johnny -- Johnny McKnight saying -- calling and said" that appellant and his girlfriend were at the apartment. (R. 75, l. 8-12). Appellant objected on hearsay grounds to the content of McKnight's statement, which the court sustained. The solicitor then asked "did you also get a text message from anyone?" (R. 75, l. 20-21)(emphasis added). The mother responded, "Mr. Johnny McKnight." (R. 75, l. 22). Therefore, according to this passage, McKnight called Tyhira's mother in addition to texting her. McKnight's phone call confirms she had the correct number plugged into her phone and that McKnight later sent the message.[10]

Furthermore, the content of the message provides additional circumstantial evidence that McKnight sent it. The jury already heard testimony that: (1) appellant and Tyhira had been involved in an ongoing dispute, (2) appellant and his girlfriend were at the apartment earlier and

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[10] Appellant appears to take the position that there was no phone call in addition to the text message. (App. Brief 6-7). The plain text of the above cited passage indicates otherwise. (R. 75, l. 6-25).

an argument arose, and (3) McKnight subsequently took Tyhria to the hospital after she was shot.[11] Because the text message referenced the ongoing dispute in which McKnight ultimately became involved, its content corroborates the mother's belief that McKnight sent it. Had the message offered a great deal on life insurance, a chance to win a trip to the Caribbean, or any other statement indicating someone other than McKnight was the sender, then the jury might reasonably conclude that the number belonged to someone else.

Although the text message contained circumstantial evidence confirming McKnight was the sender, appellant argues that the State did not explain how Tyhira's mother knew McKnight or how she obtained his phone number. (App. Brief 27). But authentication does not require this level of proof. In fact, this Court rejected a similar argument in Deep Keel, LLC v. Atlantic Private Equity Group, LLC, 413 S.C. 58, 773 S.E.2d 607 (Ct. App. 2015).

In Deep Keel, LLC, Atlantic Private Equity Group executed a promissory note to a bank for a commercial loan. The note was secured by real estate in Beaufort County. Deep Keel, LLC later purchased the note and brought a foreclosure action when Atlantic defaulted. Deep Keel sought to introduce the original loan documents between Atlantic and the bank through its sole member, who purchased the note from the bank. The witness testified that he examined and received the loan documents while negotiating the transaction with the bank. Atlantic argued

[11] In addition to this factual basis that preceded the admission of the text message into evidence, the jury subsequently heard additional circumstantial evidence confirming McKnight sent the text. Tyhira's best friend, Kywana Bradley, testified that when Tyhira left the apartment to take her mother home, Kywana stayed behind at Tyhira's apartment with "Johnny." (R. 130, l. 17, 139, l. 14-23). Kywana testified that she later heard someone playing with the front doorknob, so "we called Tyhira." (R. 140, l. 3-9). Although Kywana did not give Johnny's last name, the jury could reasonably infer it was Johnny McKnight because she also testified that Johnny took Tyhira to the hospital. (R. 141, l. 9-12). As noted above, prior to the admission of the text message into evidence, the jury learned that Johnny McKnight took Tyhira to the hospital after she was shot. (R. 31, l. 12-25).

that his testimony was insufficient because the witness could not articulate "when, how, or by whom the documents were prepared, how they came to be in the possession of [the bank], or how they were maintained by that bank." Id. at 65, 773 S.E.2d at 611.

This Court disagreed, noting that "[t]he authentication requirement does not demand this degree of proof." Id. Rather, the witness's testimony demonstrating his personal knowledge that the loan documents offered into evidence were the same ones he reviewed when he purchased the note from the bank was sufficient. Id. at 66, 773 S.E.2d at 611. Furthermore, the specific and distinctive information on the loan documents, such as the date of the loan, the amount of the loan, and the loan number, also supported a finding of authenticity. Id.

Like the witness in Deep Keel, LLC, Tyhira's mother provided enough information for a juror to conclude that McKnight sent the text. Appellant's argument that the State did not sufficiently articulate how Tyhira's mother knew McKnight or how she obtained his phone number (App. Brief 27), mirrors the argument in Deep Keel, LLC that the witness did not articulate how the bank prepared, took possession of, and maintained the loan documents. The argument fails for the same reason: authentication does not require that level of proof. Deep Keel, LLC, 413 S.C. at 65, 773 S.E.2d at 611. In both instances, despite challenges to the basis of the witness's knowledge, a juror could conclude that the evidence is what it was purported to be. Furthermore, like the loan documents in Deep Keel, LLC, the distinctive characteristics of the text, i.e., the phone number and content of the text message, support a finding of authenticity.

Although there is no South Carolina case law specifically dealing with the authentication of text messages, this analysis is consistent with decisions from other jurisdictions. For example, in Pierce v. State, 807 S.E.2d 425 (Ga. 2017), the State of Georgia offered text messages recovered from a teenage victim's cell phone in a child molestation case. The State purported

the texts were between the victim and defendant based on circumstantial evidence. The victim testified the text came from the defendant, but conceded that the defendant did not personally give him his phone number. Instead, the victim received the number from other teenage victims. However, the content of the messages was consistent with testimony from other victims that the defendant offered pills in exchange for sexually explicit text messages. Furthermore, the victim received one message with the defendant's first name.

The defendant argued that this circumstantial evidence was insufficient to authenticate the texts. He acknowledged the messages came from one of four cell phone numbers assigned to his business, but claimed family members or employees could have sent them. The Supreme Court of Georgia disagreed, noting:

> [w]ith all electronic sources of information there often are two authentication issues: what computer or other digital device generated the communication and second, who was using the device at that time. Although there may exist evidence that a specific phone sent a certain text message, that does not prove who used the phone .... **Every form of electronic communication can be "spoofed," "hacked," or "forged." But this does not and can not mean that courts should reject any and all such communications. Indeed the vast majority of these communications are just as they appear to be—quite authentic.** The goal is to supply sufficient, nonhearsay evidence as the identity of the source such that a reasonable factfinder could conclude that the evidence is what it is claimed to be.

Id. at 433 (quoting Paul S. Milich, Georgia Rules of Evidence § 7:6 at 194 (2017-2018) (emphasis added). The court found that the State presented sufficient evidence to support a finding the defendant sent the text messages.

The Fourth Circuit Court of Appeals also recently addressed the issue in United States v. Davis, 918 F.3d 397 (4th Cir. 2019). The case involved text messages the defendant allegedly sent to a confidential informant prior to a controlled purchase of methamphetamine. The informant did not testify at trial, and the government offered no evidence that the defendant's

phone number matched the number on the texts the informant received. Instead, an officer testified that he observed the informant texting and receiving messages from someone identified in the informant's phone as "Joseph Davis"[12] and "Joseph Other." Id. at 401. The messages arranged a purchase of two ounces of methamphetamine at a mailbox outside of the defendant's apartment. After the exchange of text messages, officers observed the defendant arrive at the mailbox and sell the informant two ounces of methamphetamine. The defendant argued that the government failed to produce any evidence that he actually sent the texts, such as by offering evidence that the defendant's phone number matched the number for "Joseph Davis" and "Joseph Other." In fact, the defendant took the stand and suggested that other individuals had access to the cell phone. Id. at 403.

The court was not persuaded, noting that "the burden to authenticate under Rule 901 is not high."[13] Id. at 402 (quoting United States v. Recio, 884 F.3d 230, 236-37 (4th Cir. 2018)). The trial "court must merely be able to conclude that the jury *could* reasonably find that the evidence is authentic, not that the jury necessarily *would* so find." Id. at 402 (emphasis in original). Admission only requires a prima facie showing that the true author is who the proponent claims it to be, which may be accomplished through circumstantial evidence. Id. The defendant's arrival at the mailbox and participation in the controlled buy was enough circumstantial evidence to establish a prima facie showing that he sent the text message. Id. Any doubts whether the defendant was actually "Joseph Davis" or "Joseph Other," was for the jury to resolve. Id. at 403.

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[12] The defendant's full name was Joseph Howard Davis. Id.

[13] With the exception of section (b)(10), South Carolina Rule of Evidence 901 is "identical to the federal rule." Section (b)(10) was modified from the federal rule "to make the language applicable to South Carolina statutes and rules." Note, Rule 901, SCRE.

The key takeaway from these cases is that text messages do not require an enhanced showing of proof for purposes of authentication. The burden to authenticate a text message is the same as any other piece of evidence, which is "not high." See e.g. Davis, 888 F.3d at 402; Deep Keel, LLC, 413 S.C. at 64, 773 S.E.2d at 610. The State met that burden by showing the text message came from a known number and referenced the ongoing dispute. Therefore, the circuit court's ruling had evidentiary support and should be upheld.

In arguing that the circuit court abused its discretion, appellant cites several cases from other jurisdictions dealing with social media accounts, like Facebook. (App. Brief 17-26). These cases are instructive on authentication issues arising in the social media context, but they do not specifically address the technology in this case: text messaging. Although text messages and social media posts both involve digital information visible on a screen, they are qualitatively different from an authentication perspective. The unique phone number associated with each text message makes it significantly easier to identify the sender. In contrast, social media accounts lack a similar mechanism to ensure the sender's identity. From the user's perspective, the identifier of a social media account is a profile name and picture. Unlike a phone number, profile names and profile pictures do not have to be unique to other social media accounts. Therefore, a text message from a known number is inherently more reliably authentic than a social media post. As such, applying case law from social media accounts to analyze the authentication of a text message is comparing apples to oranges.

B. The Text Message Was Not Inadmissible Hearsay.

i. *The text message fell within the Present Sense Impression Exception to the Hearsay Rule.*

Hearsay is an out of court statement offered to prove the truth of the matter asserted. Rule 801(c), SCRE. However, under the "Present Sense Impression" exception to the hearsay

rule, "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" is admissible. Rule 803(1), SCRE. In order to fall within this exception, "(1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have personally perceived the event." State v. Washington, 424 S.C. 374, 399, 818 S.E.2d 459, 472 (Ct. App. 2018)(quoting State v. Parvin, 413 S.C. 497, 503, 777 S.E.2d 1, 4 (Ct. App. 2015).

Johnny McKnight's text message to Tyhira's mother falls within the exception because it contains all three of these elements. First, by its terms, the text message describes and explains an event: appellant's girlfriend loitering behind the apartment complex. Second, the word "just"[14] indicates that the declarant made the statement contemporaneously with the event or "immediately thereafter." In fact, the second sentence of the text –that appellant *is* probably hiding– indicates that the event is still ongoing. Finally, the words "I seen" indicates that the declarant personally perceived the event. Thus, there was sufficient evidence for the circuit court to find the text message qualified as a present sense impression.

Appellant argues that although the first sentence of the text message appears to fall within the exception, the second sentence does not. (App. Brief 11-12). According to appellant, the second sentence is nothing more that the declarant's opinion, not a description of an event he actually perceived. (App. Brief 11-12). However, Rule 803(1) encompasses both statements that describe an event and statements that "explain" an event. In this case, the first sentence is a pure description of the event—the girlfriend walking behind the apartment. The second sentence provides additional explanation. It explains the relevance of the girlfriend walking behind the

[14] The American Heritage College Dictionary defines "just" as "only a moment ago." The American Heritage College Dictionary 738 (3d ed. 1997).

apartment, i.e., that appellant is likely there too. It also conveys the declarant's suspicion about the nature of the event perceived. In other words, had the declarant seen the girlfriend walking towards the laundromat with a basket of clothes, then he probably would not have sent a text at 12:41 a.m. (R. 459). Accordingly, because the second sentence explains the event perceived, the entire text message should be read as one statement falling within the present sense impression exception.

ii. *Appellant suffered no prejudice from the admission of the text message because it was cumulative to other evidence.*

To the extent that any portion of the text message exceeded the scope of the hearsay exception, appellant suffered no prejudice. As the Court is aware, "[t]he improper admission of hearsay is reversible error only when the admission causes prejudice. State v. Weston, 367 S.C. 279, 288, 625 S.E.2d 641, 646 (2006). Here, appellant suffered no prejudice because the message was cumulative to other evidence. See e.g. State v. Jennings, 394 S.C. 473, 478, 716 S.E.2d 91, 93-94 (2011)("Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless.").

As discussed above, the circuit court admitted the text message over appellant's objection, and Tyhira's mother read it to the jury. She later testified, without objection, that after receiving the text, she called Tyhira to tell her "Hard and his girlfriend behind the apartment." [sic](R. 80, l. 13-14). When the solicitor asked her to clarify, she testified, again without objection, that "Johnny just text me and said that Hard and his girlfriend -- Mr. Sanders and his girlfriend was going back behind your apartment." (R. 80, l. 21-24). Therefore, the actual text message is cumulative to the mother's subsequent testimony describing how she relayed that message to Tyhira.

The mother's subsequent testimony makes this case analogous to State v. Parvin, 413 S.C. 497, 777 S.E.2d 1 (Ct. App. 2015). In Parvin, a witness testified that a murder victim said "he was with an American" and "the American had given him $200 to buy beer because he wanted to have sex." Id. at 504, 777 S.E.2d at 4. The defendant objected on hearsay grounds, but was overruled. Later at trial, one investigator testified that during an interview, the witness told him that the victim was with the American who gave him $200 to have sex. A second investigator also testified that the witness made a similar statement during an interview. The defendant did not object to either investigator's testimony. On appeal, the State argued that the defendant suffered no prejudice because the out of court statement was cumulative to the investigators' subsequent testimony regarding the same statement. In response, the defendant claimed that once he objected during the witness's direct exam, he was relieved of any duty to object during the investigator's subsequent testimony.

This Court disagreed, noting that the defendant should have objected during the investigators' testimony. Id. at 506, 777 S.E.2d at 5. The original out of court statement became cumulative when he failed to do. Thus, the defendant suffered no prejudice from the statement's admission into evidence. Id. Similarly, in this case appellant failed to object during the mother's subsequent testimony explaining the content of the text message to Tyhira. (R. 80, l. 13-24). Once the jury heard that testimony, the text message became cumulative. As such, appellant suffered no prejudice from its admission.

In addition to the mother's testimony, the jury heard additional evidence that also renders the text message cumulative. Multiple witnesses established that Tyhria received a phone call, immediately drove back to her apartment, and found appellant and his girlfriend there. For example, Randy White testified that Tyhira received a phone call, floored it back to the

apartment, and found appellant and his girlfriend standing outside. (R. 100, l. 24-25, 101, l. 16-17). Daisy testified that Tyhira received a call that someone was at the back door, so they returned to the apartment and found appellant. (R. 180, l. 7-11). Kywana Bradley testified that she was inside Tyhira's apartment and heard someone fiddling with the front door knob. (R. 140, l. 3- 13). She called Tyhira to tell her, and "the next thing [she] remembered" was Tyhira had been shot. (R. 140, l. 14-23). In other words, to the extent the text message showed appellant was at Tyhira's apartment and therefore at fault in bringing about the confrontation, it is cumulative to the testimony of these witnesses. As such, its admission caused appellant no prejudice. See e.g. State v. Hendricks, 408 S.C. 525 (Ct. App. 2014)(holding that the defendant suffered no prejudice from improperly admitted hearsay evidence because it was cumulative to live testimony); State v. Townsend, 321 S.C. 55, 467 S.E.2d 138 (Ct. App. 1995)(holding that improperly admitted hearsay identifying the defendant was cumulative to other circumstantial evidence and the defendant's own admission).

iii. *Alternatively, the text message could have been admitted to explain the effect on the listener.*

Although not presented to the circuit court, the text message could have been admitted to show the effect on the listener. See e.g. Fields v. Reg'l Med. Ctr. of Orangeburg, 363 S.C. 19, 31-32, 609 S.E.2d 506, 512 (2005)(noting testimony is not hearsay where it is offered to explain the statement's effect on the listener). On appeal, a respondent may raise "any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." Equivest Financial, LLC v. Ravenel, 422 S.C. 499, 507-08, 812 S.E.2d 438, 442 (Ct. App. 2018)(quoting I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000)); See also Rule 220(c), SCACR. In

other words, this Court "may affirm on any ground appearing in the record." State v. Griffin, 339 S.C. 74, 78 n. 2, 528 S.E. 2d 668, 670 n. 2 (2000).

In this case, the record reveals that the text message could have been offered to explain: (1) why Tyhira returned to the apartment, and (2) her state of mind when she returned. Simply put, in assessing appellant's claim of self-defense, Tyhira's conduct is relevant. The jury had to consider whether her actions gave appellant a reasonable belief of imminent and serious bodily harm. See e.g. State v. Bryant, 336 S.C. 340, 345-46, 520 S.E.2d 319, 321-22 (1999)(outlining the necessary elements to claim self-defense). The text message gives her actions context.

Because the text message could have been offered to show the effect on the listener, the case is similar to State v. White, 425 S.C. 304, 821 S.E.2d 523 (Ct. App. 2018). In White, the defendant was charged with assault and battery with intent to kill after cutting another man's throat. The defendant claimed self-defense and testified that the victim said he had weapons underneath the seat of his moped. This Court ruled that the testimony was admissible because it was not offered for the truth of the matter asserted—that the victim actually had weapons underneath the seat of his moped. Instead, it was offered to show that the defendant *believed* the victim had weapons. Id. at 310, 821 S.E.2d at 527 (emphasis in original). In other words, the statement was relevant for the jury to consider whether the defendant thought he was in imminent danger and whether that belief was reasonable. Id. at 310-11, 821 S.E.2d at 527.

This case is similar to White in that the text message could have been offered not to prove appellant was actually behind the apartment, but rather that Tyhira *thought* he was. Tyhira's belief that he was at her apartment explains why she returned to confront appellant. It also sheds light on her intent when she arrived. The jury had to determine where Tyhira's actions fell on the spectrum from yelling to committing substantial bodily harm. By giving

context to her actions, the text message assists the jury in determining where Tyhira's actions fell on that spectrum.

Although admission for this purpose would have precluded the State from arguing that the text message itself proved appellant was "behind the house trying something," the State had other evidence to do so. As discussed above, one witness testified that someone was fiddling with the front door knob and trying to get in. Shortly thereafter, two other witnesses saw appellant and his girlfriend at the apartment complex even though he did not live there. (R. 354, l. 17-19). Given the escalating conflict between appellant and Tyhira, a reasonable inference is that appellant was "behind the house trying something." See e.g. State v. New, 338 S.C. 313, 526 S.E.2d 237 (Ct. App. 1999)("If a Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs.").

The record reveals that the State never explicitly used the text message, as opposed to the other evidence, in its argument that appellant's presence at the house meant he was at fault in bringing on the confrontation. As close as the State came was during its closing argument when the solicitor stated:

> Greg Sanders started the whole thing. He threatened to kill her. Her mother told her what he said. She was confronting him about what he said and why he had said it. Not only that, but Greg Sanders was behind the house. Someone called and told her this information. Somehow, she realized Greg Sanders, what are you doing. So yes, she accosts him, but Greg Sanders started the entire thing.

(R. 390, l. 19 – 25, 391, l. 1). Although the solicitor stated "[s]omeone called and told her this information," she was explaining why Tyhira "accosts him." The solicitor never argued that the text message proved appellant was behind the house. Therefore, the record supports admission of the text message to show effect on the listener. Accordingly, this court can affirm on that basis.

CONCLUSION

The circuit court's decision to admit the text message had evidentiary support and should be upheld on appeal. The text message was properly authenticated and fell within an exception to the hearsay rule. Alternatively, the text message could have been offered to show the effect on the listener. Furthermore, appellant can show no prejudice because the text message was cumulative to other evidence. For these reasons, the State respectfully submits that the appeal should be dismissed.

Respectfully submitted,

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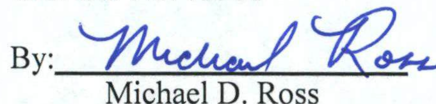
By: 
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May 24, 2019

STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

Appeal from Hampton County
The Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

Respondent,

v.

GREGORY SANDERS

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

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