STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Laurens County
The Honorable Donald B. Hocker, Circuit Court Judge

On Certiorari to the South Carolina Court of Appeals

Opinion No. 5659 (S.C.Ct.App. filed June 26, 2019)

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S.C. SUPREME COURT

THE STATE,

Respondent,

v.

FABIAN LAMICHAEL GREEN,

Petitioner.

Appellate Case No. 2019-001435

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit
P.O. Box 516
Greenwood, South Carolina 29648

ATTORNEYS FOR RESPONDENT

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ISSUES PRESENTED

I. Did the Court of Appeals err by holding the state "overthrew the presumption of prejudice" created by a juror asking a bailiff about the consequences of an impasse and the bailiff informing the juror that the judge would issue an *Allen* charge and require jurors to continue to deliberate where the factual findings on which the Court based its decisions were not supported by the record and the Court's legal analysis contravened controlling authority?

II. Did the trial judge err in permitting the state to introduce messages allegedly obtained from the deceased's Facebook account where the state failed to authenticate the messages?

(BOP, p. 2).

RESPONDENT'S COUNTERSTATEMENT OF ISSUES PRESENTED

I. The Court of Appeals did not err in finding the record supported the trial judge's determination a mistrial was not warranted on the basis of the bailiff's inappropriate comments to the jury foreperson when the evidence received dispelled any reasonable probability those comments influenced either the jury's impartiality or the jury's verdict.

II. The Court of Appeals did not err in applying the standard, well-established evidence authentication rules in affirming the trial court's admission of social media messages when evidence was offered under Rule 901(b)(4), SCRE to support authentication by circumstantial evidence showing distinct connections to the victim, Petitioner's co-conspirator, and the circumstances of the crime.

STATEMENT OF THE CASE

A Laurens County grand jury indicted Petitioner Fabian Green in July 2016 on the charges of murder (2016-GS-30-1078), and desecration of human remains (2016-GS-30-1077). (R. pp. 643-644 and pp. 640-641). Tristan Shaffer, Esq., represented Green on the charges. (See R. p. 15). A jury trial was held May 30th, through June 2nd, 2017, before the Honorable Donald B. Hocker. (See R. p. 15). The jury found Green guilty as charged. (R. p. 553, l. 23 – p. 554, l. 8). Judge Hocker sentenced him to concurrent sentences of forty-five (45) years imprisonment for murder, and ten (10) years imprisonment on the desecration conviction. (R. p. 587, ll. 16-19). Green served and filed a timely notice of appeal.

After briefing, but without argument, the South Carolina Court of Appeals issued a published opinion affirming the conviction. (App. pp. 1-10).[1] Green petitioned for rehearing on July 11, 2019. (App. pp. 11-41). The Court of Appeals denied the petition on July 31, 2019. (App. p. 43).

Green then filed a petition for writ of certiorari in this Court on August 28, 2019. Respondent made its return on October 7, 2019. By Order dated January 16, 2020, this Court granted Green's petition. Green filed a Brief of Petitioner on February 24, 2020. This Brief of Respondent follows.

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[1] Published at 427 S.C. 223, 830 S.E.2d 711 (Ct. App. 2019).

RESPONDENT'S STATEMENT OF THE FACTS

In the early evening of May 8, 2016, the victim, Edwin Diaz Charinos, received several flirtatious Facebook messages from a "Ruby Rina" soliciting him to come over to her house located at 108 Queens Circle. (R. p. 129, ll. 1-23; p. 183, l. 21 – p. 184, l. 9; p. 352, p. 19- p. 353, l. 18; p. 354, l. 13- p. 359, l. 12). Ruby Rina was a nickname used by Karina Galarza, who happened to be Green's current girlfriend. (R. p. 180, l. 15 – p. 181, l. 7). The victim and Galarza had been romantically involved sometime in the past. (See R. p. 355, l. 13 – p. 358, l. 24). However, the messages sent to Edwin on May 8th, were a conspiracy between Galarza and Green to lure Edwin to the house so that the couple could murder him. (R. p. 182, l. 1 – p. 189, l. 9; p. 99, l. 19- p. 101, l. 14). When Edwin arrived, Green emerged from a backroom and beat him to death with the blunt end of a claw hammer. (R. p. 185, l. 14 – 189, l. 13). Green's cousin, Davian Holman,[2] was also present. (R. p. 180, l. 9-12; p. 184, l.13- p. 189, l. 13).

After the murder, Green and Holman loaded Edwin's body in the back seat of Edwin's Ford Mustang and drove it out to a rural location in Lauren's county. (R. p. 131, ll. 12-20; p. 189, l. 14 – p. 193, l. 17). Once they arrived, Green removed the body from vehicle and partially set it on fire. (R. p. 193, l. 18 – 195, l. 25; p. 44, ll. 12-20). After failing to completely burn the body, Green and his cousin proceed to a nearby family member's house, Willie Williams, where they asked for lighter fluid or alcohol. (R. p. 196, l. 11 – p. 197, l. 12; 266, l. 12 – p. 271, l. 22). In the meantime, Galarza was at the house attempting to clean up the large amount of blood from the murder scene. (R. p. 191, l. 15 – p. 192, l. 3).

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[2] Testimony from trial reflects that Mr. Holman suffers from some level of intellectual disability. (R. p. 229, l. 4-18; p. 317, ll. 7-11).

After putting out a missing person report for Edwin Charinos, Law Enforcement received several cellphone screen shots from the victim's parents showing some of the Facebook messages sent to Edwin from Ruby Rina. (R. p. 129, l. 8 – p. 130, l. 11). The messages provided Law Enforcement with the 108 Queens Circle address and referenced Karina Galarza by name. (R. p. 132, l. 22 – p. 133, l. 21; p. 352, ll. 15- 24; p. 355, l. 13 – p. 358, l. 24; see also R. p. 602). On May 26th, Law Enforcement located Edwin's charred remains after receiving a phone tip from a local who had come across them. (R. p. 44, ll.12-20; p. 49, l. 4 – p. 50, l. 14; p. 94, l. 15 – p. 96, l. 14; p. 122, l. 19 – p. 126, l. 13). Law Enforcement also located the family member Green approached for lighter fluid or alcohol on May 8th, and they corroborated the unusual event. (R. p. 266, l. 12 – p. 272, l. 11; p. 299, ll. 8-20).

Law Enforcement eventually went to 108 Queens to investigate. (R. p. 141, l. 14 – p. 142, l. 20). While there they received information from Karina Galarza. (R. p. 141, ll. 2-13). With this information Law Enforcement were able to get arrest warrants for Green and Holman. (R. p. 141, ll. 2-23). Officers arrested Holman and took him to Laurens County Sheriff Headquarters for questioning. (R. p. 198, l. 15 – p. 199, l. 25; p. 204, l. 4-16). Holman provided Law Enforcement with a detailed confession implicating Green and Galarza. (R. p. 179, l. 22 – p. 205, l. 21; p. 315, l. 8 – p. 317, l. 24). Later on, during a search of the Galarza house, SLED located blood splatter on a china cabinet near the living room couch. (R. p. 154, ll. 17-25; p. 162, l. 23 – p. 166, l. 1). This blood was later confirmed as belonging to the victim. (R. p. 379, l. 3 – p. 381, l. 8). Lastly, while Green was in jail awaiting trial, the detention center staff intercepted a letter that Green had attempted to surreptitiously forward to another inmate. (R. p. 337, l. 4 – p. 339, l. 11). In that letter Law Enforcement discovered a detailed account of the murder, including references to the Facebook messages. (R. p. 410, l. 14 – p. 413, l. 7). Thereafter, SLED, through the use of

an exemplar, were able to confirm that the handwriting as Green's. (R. p. 406, l. 1 – p. 409, l. 4). Green later confirmed during his testimony that he did write the letter, though he contended at trial that he had falsified the information "to give a sense of reality" and to encourage people to think he was "crazy" so they would "leave him alone." (R. p. 445, l. 3- p. 446, l. 5).

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001) (citing *State v. Cutter*, 261 S.C. 140, 199 S.E.2d 61 (1973)). This Court considers itself "bound by the trial court's factual findings unless they are clearly erroneous." *Id.* (citing *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000)).

Motions for Mistrial – Juror Impartiality

Disposition of a motion for mistrial is in the sound discretion of the trial judge. *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 627- 28 (2000). A ruling on a motion for mistrial will not be disturbed on appeal absent an abuse of discretion. *Id.* To warrant the granting of a mistrial, the defendant must show error and resulting prejudice. *State v. Kelly*, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998) (citing *State v. Wasson*, 299 S.C. 508, 386 S.E.2d 255 (1989)). "A mistrial should not be granted except in cases of manifest necessity and ought to be granted with the greatest caution for very plain and obvious reasons." *Wasson*, 299 S.C. at 510, 386 S.E.2d at 256 (citing *State v. Prince*, 279 S.C. 30, 301 S.E.2d 471 (1983)). "The trial judge is in the best position to determine the credibility of the jurors; therefore, this Court grants him broad deference on this issue." *Harris*, 340 S.C. at 63, 530 S.E.2d at 628.

Evidentiary Rulings - Authentication Challenges

Evidence rulings are similarly reviewed for abuse of discretion '"and will not be reversed absent an abuse of discretion.'" *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). '"An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.'" *Id.* (quoting *Pagan*, 369 S.C. at 208, 631 S.E.2d at 265). '"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.'" *State v. Brown*, 424 S.C. 479, 488, 818 S.E.2d 735, 740 (2018) (quoting Rule 901(a), SCRE).

ARGUMENT

I. The Court of Appeals did not err in finding the record supported the trial judge's determination a mistrial was not warranted on the basis of the bailiff's inappropriate comments to the jury foreperson when the evidence received dispelled any reasonable probability those comments influenced either the jury's impartiality or the jury's verdict.

Relevant Facts:

As the Court of Appeals summarized: "After the jury deliberated for close to four hours, the trial court was alerted to questionable contact between a bailiff and a juror. While the trial court conferred with counsel about the contact, the jury reached a verdict." (App. p. 3). The record supports this summary. The trial judge received the jury verdict, then questioned each juror individually concerning the inappropriate communication. (R. p. 553, l. 5 – p. 554, l. 21). The judge asked variations of these basic questions:

1. Was the juror's guilty verdict still the juror's verdict
2. Was the juror's guilty verdict "based one-hundred percent on the evidence and testimony and the law presented in this case"
3. Was the juror's guilty "verdict influenced in any way whatsoever by any communications that you may have had with any of the bailiffs or any other persons outside the twelve member jury"
4. Whether there was communication between the juror and bailiffs, and, if so, to repeat the communications to the judge.

(See R. p. 555, l. 13 – p. 568, l. 25 [all 12 jurors questioned individually]).

Each of the jurors affirmatively indicated that the guilty verdicts on both charges were their own verdicts, and further affirmed the verdicts were based "one-hundred percent" on the testimony, evidence, and law charged. They also each affirmed no outside communications affected their verdicts; and, that they were not influenced in any way by any improper communication. (R. p. 555, l. 13 – p. 568, l. 25). Two of the jurors (Byers and Pace) indicated that they did have communication with the bailiffs, but that the communication was limited to

entering and exiting the jury room and taking breaks – professional communications not related to the case. (R. p. 561, l. 20 – p. 562, l. 7 (Byers); p. 565, l. 19 – p. 566, l. 21(Pace)).

Thereafter, the judge permitted Defense Counsel to question Bailiff Johnny Bolt. Mr. Bolt testified that some jurors expressed some concern about passive aggressive acts from Appellant's family being directed toward the jurors. (R. p. 572, l. 3 – p. 573, l. 18). Counsel asked:

> Q: Did any, at any point during their deliberations did they ever mention to you that they may be deadlocked?
>
> A: No, no. But they just, the Foreman did say, what happens if we can't reach a, reach a, you know, that, we can't reach any verdict. And I said, well, the Judge will give you some details on that if something happens, that you will need to write him a note and I will have to take it to him.
>
> Q: Okay. Did you ever tell them anything about an Allen Charge?
>
> A: Well, I was familiar and I said, well, he will give an Allen charge, you know, because I have been doing a lot, I have seen this and I just mentioned, you know, that is usually the procedure that they do. And I said, yeah, he would probably give you an Allen charge. I said, well, he will just give you a charge and probably want to see if, see if you can stay later, something or another, of that nature.

(R. p. 573, l. 19 – 574, l. 11).

Another bailiff, Mr. Easley, testified that he heard nothing of an *Allen* charge from the jury, "Mr. Bolt never said anything to [him] personally about the Allen charge," and that the jury never indicated it was deadlocked. (R. p. 576, l. 11 - p. 577, l. 2).

Based upon Mr. Bolt's testimony, Defense Counsel moved for a mistrial. (R. p. 580, l. 4 –p. 581, l. 14; p. 582, ll. 3-15). After hearing the parties' positions, and considering the responses from the jurors and testimony from the bailiffs, the judge concluded:

> Well, here is how I view this. First of all, certainly the existence of some communication of some sort with the Bailiffs caused me enough concern to where I immediately got the lawyers back in-chambers to, not only to explain to you

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

(R. p. 582, l. 18 – p. 583, l. 17).

The Court of Appeals correctly noted that appellate review was restricted to whether the trial judge abused his discretion in light of the evidence of record. (App. p. 8). The Court also correctly noted its deference to the trial judge's credibility determinations given his "superior position to gauge credibility in the juror misconduct context." (App. p. 9). The Court then detailed five specific points supporting the trial judge's decision:

> First, the trial court found no evidence the comment was communicated to anyone but the foreperson. *State v. Kelly,* 331 S.C. 132, 141-42, 502 S.E.2d 99, 104 (1998) (holding number of jurors exposed to improper communication relevant to determining whether misconduct influenced jury). Second, there is no evidence the jury was ever deadlocked or even having difficulty reaching a verdict. Third, the bailiff s comments, while astonishingly inappropriate, did not reference facts about the case and cannot be reasonably spun as an *Allen* charge; the bailiff emphasized the *court* might give them an *Allen* charge (there is no evidence the bailiff knew or conveyed what the charge included) in the event of a deadlock, and the *court* might "see if you can stay later," which suggested an invitation rather than a coercive command. Fourth, none of the jurors testified there was any communication with the bailiff, other than about incidental administrative matters. The trial judge took this to mean not even the foreperson perceived the bailiff's remark as worthy of attention or remembrance. Fifth, all of the jurors testified there was no extraneous influence on their verdict.

(App. pp. 9-10).

The Court of Appeals "commend[ed] the trial court's deft handling of this issue," and found "the evidence excludes any reasonable possibility that the bailiff's misconduct influenced the jury's impartiality or its verdict," thus, Green failed to show an abuse of discretion. (App. p. 10).

Analysis of Petitioner's Argument:

Green concedes the Court of Appeals correctly identified the structure of review. (BOP, p. 8). He contends, however, the Court of Appeals erred in affirming the trial judge's determination the improper communication was not prejudicial. (BOP, pp. 8-9). The record supports the Court of Appeals' opinion affirming the trial court's ruling.

Green contends essentially that the trial judge erred in finding the jurors did not perceive the communication to be something of note. (BOP, pp. 19-20). He contends the jurors intentionally did not disclose substantive communication while the bailiffs did; therefore, there was "intentional concealment" that supported Green's mistrial motion. (BOP, p. 20). He presumes there must have been an inquiry based on actual deadlock. (BOP, p. 20). From there, he leaps to the conclusion the vague comments by the bailiff on what *may* occur amounted to an improper, coercive charge as opposed to a proper charge under *Allen v. United States*, 164 U.S. 492 (1896). (BOP, p. 31). However, the record shows Green would stretch the testimony too far. The Court of Appeals properly rejected such argument reasoning, "the bailiff's comments, while astonishingly inappropriate, did not reference facts about the case and cannot be reasonably spun as an *Allen* charge." (App. p. 9). Green argues, though, that the record does not support the Court of Appeals. (See BOP, pp. 21-22). A true reading of the record does so.

Mr. Bolt testified there was no report of deadlock at any point in deliberations. (R. p. 573, lines 19-21). Mr. Bolt testified, at some point – a point not clearly identified in testimony –

"the Foreman did say, what happens *if* we can't reach ... any verdict," and Mr. Bolt responded, "the Judge will give you some details on that *if* something happens," instructing that "you will need to write him a note and I will have to take it to him." (R. p. 573, line 21) (emphasis added). Mr. Bolt was pressed fairly hard by defense counsel, but he was consistent that he spoke in terms of procedure, that instruction would come from the judge, and the judge "*may* ask you to stay...." (R. p. 574, l.4 – p. 575, l. 3) (emphasis added). Corroborating the testimony that there was no report of deadlock from the jury after deliberations began, Mr. Easley testified he did not know anything about the jury being deadlock, and Mr. Bolt had not told him the jury had said anything about being deadlocked. (R. p. 576, l. 11 – p. 577, l. 2).

The forelady was Juror Thomas. (See R. p. 554, l. 4). Ms. Thomas testified that she had no communication with a bailiff that influenced the verdict. (R. p. 555, ll. 21-25). Critically, she answered that her verdict was based "one-hundred percent on the evidence and testimony," and the law as instructed by the trial judge, and not by "communication" with a bailiff or "any other person outside of the twelve" jurors. (R. p. 555, ll. 17-25).

In light of the totality of the testimony received, the trial judge reasonably resolved that the forelady did not perceive the bailiff's comments as any type of "instruction" communication at all. (See R. p. 583, ll. 8-10). There was certainly no improper influence on the juror's verdict as demonstrated by the trial judge's careful questioning.

"It is the duty of the trial judge to see that a jury of unbiased, fair and impartial persons is impaneled. *State v. Powers*, 331 S.C. 37, 43, 501 S.E.2d 116, 119 (1998) (citing *State v. Matthews*, 291 S.C. 339, 353 S.E.2d 444 (1986); *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990)). A "trial judge's determination of the neutrality or impartiality of a juror should not be disturbed unless error is manifest." *DeLee v. Knight*, 266 S.C. 103, 111-12, 221 S.E.2d 844, 847

(1975) (citing *Irvin v. Dowd*, 366 U.S. 717 (1961)). Deference should be given to the trial judge's decision regarding the qualification of the jury as the trial judge is able to actually see and hear the jurors in assessing their demeanor, credibility, and impartiality. *State v. Evins,* 373 S.C. 404, 418, 645 S.E.2d 904, 911 (2007). "The findings of the trial court on questions of fact relating to the fitness of a juror are conclusive, and will not be disturbed on review unless manifestly erroneous." *State v. Maxey*, 218 S.C. 106, 110, 62 S.E.2d 100, 102 (1950).

When carefully considered, Green's argument is simply the trial judge should not have *weighed* the juror's testimony as he did. (See BOP, p. 20, "... most of the jurors denied any communications at all, which is unbelievable in light of the relationship the bailiffs have with the jurors by the nature of the bailiff's jobs" and wholesale denial "lacked all credibility.").[3] The Court of Appeals cannot be faulted for applying correct principles of appellate review. *See e.g., State v. Perez*, 423 S.C. 491, 499, 816 S.E.2d 550, 554 (2018), *reh'g denied* (Aug. 2, 2018) ("credibility analysis inappropriate for appellate review"); *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000) ("The trial judge is in the best position to determine the credibility of the jurors; therefore, this Court grants him broad deference on this issue."); *see also McGill Bros. v. Seaboard Air Line Ry.,* 75 S.C. 177, 55 S.E. 216, 217 (1906) ("...the reasons for refusing to interfere with the discretion of a circuit judge in matters involving the purity of the jury box and the integrity of verdicts are peculiarly strong. He is in the atmosphere of the trial, and has

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[3] The argument also suffers from overstatement. That two jurors who responded explained there were "professional" communications between them and the bailiffs, but nothing about the case, (R. p. 561, l. 20 – p. 562, l. 7 (Byers); p. 565, l. 19 – p. 566, l. 21(Pace), highlights an important difference. The jurors did not have communication that would influence the verdict or the case. That is the type of communication at issue, not a morning greeting or directions to the jury room. Straining the responses to find the jurors "concealed" communication(s) that actually did influence the verdict – simply because ten of the twelve did not explain, when two of the twelve did explain– is not warranted under a plain and logical understanding of the careful questioning and responses in context.

opportunity to estimate the character and intelligence of the jurors, as well as of the person charged with improper conversation or corrupt dealings with them."). The Court of Appeals properly affirmed the trial judge when the record supports a careful and considered ruling.

Here, the trial judge determined, based upon the testimony received, that only one juror was even exposed to the bailiff's statement. (*See* R. p. 582, l. 18 – p. 583, l. 17). Further, each juror confirmed he or she had remained impartial and that their decision was based solely upon the evidence presented at trial. The judge found the testimony to be truthful, and as to denial of "communication," he reasonably determined that the foreperson "did not perceive that as a communication or something that would arise to having a communication." (R. p. 583, ll. 4-10). *See State v. Kelly,* 331 S.C. 132, 143, 502 S.E.2d 99, 105 (1998) ("The trial judge did not find members of the jury were being untruthful. We respect this finding."). There is no error – either by the Court of Appeals or the able trial judge.

The Court of Appeals also properly rejected the suggestion the comments amounted to a coercive *Allen* charge established prejudice sufficient to warrant a mistrial. In particular, the Court of Appeals found this case distinguishable from *State v. Cameron*, 311 S.C. 204, 207–08, 428 S.E.2d 10, 12 (Ct. App. 1993), and *Blake by Adams v. Spartanburg Gen. Hosp.*, 307 S.C. 14, 413 S.E.2d 816 (1992). (App. p. 10). A review of those cases supports the Court of Appeals' reasoning.

Cameron concludes that a new trial should not be granted "when the subject matter of the communication was harmless and could not have affected the verdict." *State v. Cameron*, 311 S.C. 204, 207–08, 428 S.E.2d 10, 12 (Ct. App. 1993) (quoting *Holmes v. United States*, 284 F.2d 716, 718 (4th Cir.1960)) (emphasis added). The court reasoned that "[t]he mere fact ... that some conversation occurred between a juror and the court official would not necessarily prejudice a

defendant." *Id.* at 207–08, 428 S.E.2d at 12. It is difficult to comprehend how the bailiff's brief comment to the jury foreperson could have had any effect on the jury's guilty verdict. It was given in response to a juror's hypothetical question.[4] There is no evidence in the record that the jury had, in fact, reached an impasse. Moreover, the trial judge carefully instructed the jury that a verdict must be unanimous. (See R. p. 549, ll. 20-22).

In *Blake*, at issue was the effect of bailiff comments to a juror that "urg[ed] the jury to reach a verdict," including "the trial judge did not like a hung jury, and that a hung jury places an extra burden on taxpayers." 307 S.C. at 16, 413 S.E.2d at 817. Here, the bailiff simply indicated the jury would be charged and the judge would address them if deadlock occurred. (App. p. 9; see also R. pp. 573-74). But again, there was no suggestion of deadlock. (See R. p. 573, ll. 19-21; p. 576, ll. 23-25).

In sum, Green asks this Court to re-evaluate credibility rulings on a record that shows a careful consideration of the evidence gathered on the bailiff communication. Green fails to show error either by the Court of Appeals or the trial judge. The Court of Appeals' opinion should be affirmed.

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

II. The Court of Appeals did not err in applying the standard, well-established evidence authentication rules in affirming the trial court's admission of social media messages when evidence was offered under Rule 901(b)(4), SCRE to support authentication by circumstantial evidence showing distinct connections to the victim, Petitioner's co-conspirator, and the circumstances of the crime.

Relevant Facts:

At a pre-trial hearing, the State explained that messages were obtained from the victim's Facebook account. They were sent to the victim from an account using the alias "Ruby Rina." (R. p. 2, ll. 4-20). The State was able to gain access through the victim's father, who had acquired the victim's password. (R. p. 2, l. 21 – p. 3, l. 3). The Solicitor further testified that the messages indicated that there was a prior relationship between the victim and Karina Galarza, and that the victim had been invited to murder scene on the day of his death. (R. p. 3, ll. 4-14). The State confirmed that it had a witness that would testify that Ruby Rina was the Facebook "alias" used by Karina Galarza. (R. p. 2, ll. 16-20; p. 3, ll. 15-23). Further, the State would show Green's letter mentioned using Facebook to lure the victim to the murder scene. (R. p. 7, ll. 11-18).

The Defense raised a concern as to authentication as neither party to the conversation would be testifying. (R. p. 16, ll. 1-20). The State responded that it had a portion of the messages where the victim referred to the individual as Karina, and repeated that a witness would also testify that is was Karina Galarza's account. (R. p. 16, l. 22 – p. 17, l. 15).

The judge found no authentication issue. (R. p. 20, 11. 2-3). He explained that if the father testified "this was Edwin's Facebook account, I've got the password," and the State could authenticate the identity of Ruby, then the messages were authenticated, as far as the judge was concerned. (R. p. 20, 11. 3-7).

Prior to the victim's father testifying, the defense objected again to lack of proper authentication. (R. p. 114, 11. 4-6). The judge indicated that he would hold off on ruling until

the State sought to move the messages into evidence. However, he expressed that he felt the testimony from the victim's father, who had gained access to his son's Facebook account, could adequately authenticate the messages. (R. p. 114, l. 17 – p. 115, l. 7).

The victim's father, Mr. Cruz, explained that his son had a Facebook account. (R. p. 128, 11. 12-25). The father testified that he was able to access the account after his son went missing on May 8, 2016. (R. p. 129, 11. 1-4). The father then provided law enforcement with screenshots of relevant portions of the Facebook messages he retrieved. (R. p. 129, 11. 19-23; R. 130, 11. 9-11). From this, Investigators proceeded to the Queens Circle address sent from "Ruby Rina." (R. p. 132, 1. 22 – p. 133, 1. 18; p. 134, 11. 1-8). There they found both Green and Galarza. After interviewing Galarza, Investigators attained sufficient information to arrest both of them. (R. p. 141, 11. 2-13).

Green's cousin, Holman, confirmed in his trial testimony that "Ruby Rina" was, in fact, Karina Galarza, and that Green and Galarza were dating on the day of the murder. (R. p. 180, l. 15 – p. 181, l. 7). He also testified that Galarza resided at 108 Queens Circle, and in the hours leading up to the murder the couple spent a lot of time typing and laughing on a cell phone. (R. p. 183, l. 21- p. 184, l. 5).

Thereafter, the State presented testimony from Investigator Walter Bentley. He testified that he gained access to the victim's Facebook account and reviewed the messages in preparation for trial. (R. p. 349, ll. 9-25). He then copied the messages to a Word Document to submit at trial. (R. p. 350, l. 21 – p. 351, l. 2). Investigator Bentley testified that he was familiar with Karina Galarza's mother, Minerva Tapia, who had assisted Bentley several times in the past with translations when he was employed with the Lauren County Sheriff's Department. He was also aware that Tapia had a daughter named Karina, and that the family resided at the Queens Circle

address. (R. p. 351, l. 12 – p. 352, l. 14). After Investigator Bentley's testimony, the State sought to introduce the substance of the Facebook messages which the judge accepted, having found them sufficiently authenticated. (R. p. 353, l. 24 – p. 354, l. 12). The judge noted Defense Counsel's prior objections. (R. p. 354, ll. 8-10). Within the messages, the victim identified the other party as Karina and was invited to 108 Queens Circle on the day of his murder. (R. p. 352, ll. 19-24; p. 358, l. 11 – p. 359, l. 13; see also R. p. 602). The record also has "Ruby" referencing "Julissa," Julissa being Karina's sister, who had a bedroom in the Queens Circle home. (R. p. 593; see also p. 188, lines 2-6; p. 352, line 19 – p. 353, line 5; p. 436, ll. 16-19).

Towards the end of the State's case, the State introduced a letter Green had written that was intercepted and seized as contraband while he was in jail awaiting trial. (R. p. 337, l. 5 – p. 339, l. 11; p. 408, l. 24 – p. 409, l. 4). In the letter, Green acknowledges Facebook messages were used to lure the victim to the home. (R. p. 410, l. 25 – p. 411, l. 8).

The Court of Appeals found that authentication was established by circumstantial evidence such that the dictates of Rule 901(b)(4), SCRE were met. (App. p. 6). In particular, the Court resolved:

> We find the content of the messages was distinctive enough that a reasonable jury could find Galarza wrote them. Numerous facts link the Facebook messages to Galarza and, consequently, Green: the use of the screen name "Ruby Rina," which Holman testified was Galarza's; reference to "Julissa" on the messages, which testimony showed was Galarza's sister's name; Ruby Rina's invitation to her home, which she stated was at 108 Queens Circle; Victim's reference to Ruby Rina as "Karina," Galarza's real first name; comments throughout the messages about Ruby Rina's erstwhile boyfriend that were consistent with her relationship with Green; the timing of the messages; and the tragic fact that Victim disappeared shortly after Ruby Rina invited him to 108 Queens Circle, where his blood was later discovered. Taken together, these circumstances serve as sufficient authentication to meet the low bar Rule 90l(b)(4), SCRE, sets.

(App. p. 7).

Analysis of Petitioner's Argument:

Green contends that there should be a greater authentication burden for electronically stored information than merely establishing account ownership. (BOP, pp. 27-28). He complains as to the messages at issue here that not only did no participant to the conversations testify, but also that the evidence was not otherwise sufficient to show "distinctive characteristics" to meet authentication demands. (BOP, p. 27). His position lacks supports.

"A party offering evidence must meet '[t]he requirement of authentication ... as a condition precedent to admissibility.'" *Deep Keel, LLC v. Atl. Private Equity Grp.*, LLC, 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015) (quoting SCRE 901 (a)). "The authentication requirement 'is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.'" *Id.* Importantly, "the burden to authenticate evidence is not high and requires only that the proponent of the evidence offer a satisfactory foundation from which the jury could reasonably find the evidence is authentic." *Deep Keel, LLC*, 413 S.C. at 64, 773 S.E.2d at 610 (internal quotations omitted).

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

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

Id.

The Court of Appeals correctly reasoned this holding is properly applied here. (See App. p. 6). Petitioner makes arguments based on speculation of whether another could have made the communications, (see BOP, pp. 28-29), but that does not defeat the circumstances noted for admissibility (nor does it somehow prohibit making those arguments to a jury). Again, the circumstances noted support admissibility based on well-established rules of evidence. And the record supports the Court of Appeals determination "the content of the messages was distinctive enough that a reasonable jury could find Galarza wrote them." (App. p. 7).

First, Holman confirmed that "Ruby Rina" was Galarza. (R. p. 181, ll. 6-7). Second, "Julissa" was referenced in the message and that is Galarza's sister's name. (R. p. 353, ll. 2-5). Third, the victim referred to the other party as "Karina" and the user did not seek to deny or correct the assumption. (R. p. 352, ll. 19-24). Further, when asked for her address, Galarza provided that of her residence at 108 Queens Circle. (R. p. 358, l. 11 – p. 359, l. 13; p. 352, ll. 4-14). Fourth, references to "Ruby Rina's" boyfriend were consistent with the relationship she had with Green. (R. p. 435, l. 22- p. 436, l. 1). Fifth, the timing of the message was consistent with the crime. (R. p. 184, ll. 1-5; p. 354, l. 16- p. 359, l. 12). Sixth, victim disappeared after this invitation to 108 Queens Circle, and his blood was found there. (R. p. 379, ll. 3-11). As the Court of Appeals determined, "[t]aken together, these circumstances serve as sufficient authentication to meet the low bar Rule 901 (b)(4), SCRE, sets. (Ap. p. 7).[5]

[5] As it did in its brief before the Court of Appeals, Respondent also asserts that even if improperly admitted, admission of the messages could only have been harmless. Error "is harmless where ... guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." *State v. Collins*, 409 S.C. 524, 538, 763 S.E.2d 22, 29-30 (2014), *reh'g denied* (Sept. 24, 2014). The State presented Green's graphic letter admitting the murder; Holman's testimony describing the murder and the actions to destroy the body; Willie's Williams' testimony on Green's search for lighter fluid or alcohol, and the DNA evidence found at the scene linked victim to the murder scene. The evidence presented by the State was

Petitioner's arguments to non-binding precedent from other jurisdictions are inadequate to undermine applicability of Rule 901(b)(4). (See BOP, pp. 28-39). These cases are immediately distinguishable as the bulk of the arguments Petitioner keys in upon rest on the question of authentication by account ownership. As demonstrated, the State presented significantly more evidence than a simple profile printout to support "Ruby Rina's" true identity. Petitioner has also failed to adequately address other evidence of record which is critical in authentication and/or a harmless error analysis. *See Com. v. Williams*, 456 Mass. 857, 926 N.E.2d 1162 (2010) (concluding that admission of improperly authenticated contents of social networking Internet website messages did not create a substantial likelihood of a miscarriage of justice in first-degree murder trial, where content of messages was rendered insignificant by testimony of two witnesses who identified defendant as the shooter and corroborative testimony of other witnesses.); *United States v. Vayner*, 769 F.3d 125, 132 (2d Cir. 2014) (finding lack of authentication establishing account holder when government failed to present *any supporting evidence* other party's VK page which included name, photograph, and some details about his life consistent.) (emphasis added). *See also Tienda v. State*, 358 S.W.3d 633, 647 (Tex. Crim. App. 2012) ("Because there was sufficient *circumstantial evidence* to support a finding that the exhibits were what they purported to be—MySpace pages the contents of which the appellant was responsible for—we affirm the trial judge and the court of appeals which had both concluded the same.") (emphasis added); *United States v. Barnes*, 803 F.3d 209, 217 (5th Cir. 2015) ("The Government laid sufficient foundation regarding Holsen's Facebook and text messages. Holsen testified that she had seen Hall use Facebook, she recognized his Facebook account, and the Facebook messages matched Hall's manner of communicating . . . Regardless,

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overwhelming and supported the verdict that Green murdered the victim at his girlfriend's house, moved his body to a nearby rural area, and then attempted to burn the victim's remains.

any potential error in admitting the text and Facebook messages was harmless. . . *the content of the messages was largely duplicative of what Holsen and numerous other witnesses testified to directly.*") (emphasis added). Instead, Green rests on what appears to be argument raising a mere possibility of doubt rather than addressing the standard for authentication as explained in *Hightower, supra,* or the overwhelming evidence of guilt. Green's reliance on the non-binding cases and the possibility of doubt for authentication is misplaced.

Moreover, it would appear that Green argues for the "Maryland Rule" compared to the "Texas Rule." The Court of Appeals acknowledge these "rules" which really reflect a "debate" over the level and/or method of authentication for social media; however, the Court of Appeals resolved "these labels seem to complicate the simple concept embodied in Rule 901, SCRE, and by which writings have long been authenticated." (App. p. 7). As demonstrated by the Court of Appeals, recent precedent embraces the guidance long set out by our Rule 901, citing to similar guidance referenced in federal precedent from the Sixth Circuit, Fifth Circuit, and Third Circuit, and state precedent from Delaware, Texas, Massachusetts. (App. pp. 7-8). The Court of Appeals recognized there is a risk of fabrication in social media – as there is a risk in fabrication in any writing. (App. p. 8). Depending on the circumstances, perhaps "more technical methods of authentication" may be warranted, but, here, where "facts link the Facebook messages to Galarza and, consequently, Green," the evidence adduced at trial fairly satisfied the threshold finding. (App. p. 7). See also Aviva Orenstein, *Friends, Gangbangers, Custody Disputants, Lend Me Your Passwords*, 31 Miss. C.L. Rev. 185, 203 (2012) ("Unlike hearsay, which is very technical and categorical, authentication is ultimately more flexible and practical, but less uniform and predictable."). For a hyper-technical approach to be mandated in all cases for fear fraud is not only not necessary, but may "lead to the unnecessary loss of valuable evidence."

Id., at 221-22. "True, Facebook pages can be faked. So can written documents." *Id.*, at 222. In this case, Green's request for more is a jury argument, not an authentication for admissibility argument. Again, nothing prevents a defendant from arguing that the jury should reject the evidence.

Petitioner has failed to show either factual or legal error by the Court of Appeals or by the trial judge. The Court of Appeals opinion should be affirmed.

CONCLUSION

For all of the foregoing reasons, Respondent submits the Court of Appeals opinion should be affirmed.

Respectfully submitted,

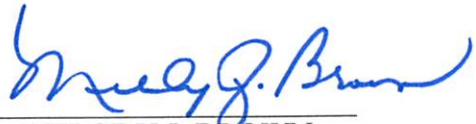
ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

By: 

MELODY J. BROWN
S.C. Bar No. 14244

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT[6]

April 21, 2020.

[6] Respondent acknowledges the work of Samuel M. Bailey, a former Assistant Attorney General who had been assigned this matter while it was pending in the Court of Appeals. Portions of that work are incorporated herein.