

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

**RECEIVED**

**Nov 12 2020**

**SC Court of Appeals**

Appeal from Jasper County

Honorable R. Ferrell Cothran, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID ERIC HUGUE, JR.,

APPELLANT.

APPELLATE CASE NO. 2020-000238

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER  
Appellate Defender

South Carolina Commission on Indigent Defense  
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**STATEMENT OF ISSUE ON APPEAL**

Whether the trial court erred in admitting unauthenticated text messages into evidence?

## **STATEMENT OF THE CASE**

Appellant was indicted by a Jasper County grand jury for murder and a weapons charge and on October 28, 2019, appellant was tried before the Honorable R. Ferrell Cothran, Jr. and a jury. R. 1. Dustin Whetsel and Mary Jones represented appellant and Diane Dewitt and Caroline Carmody represented appellant. R. 2. The jury convicted appellant. R. 403. Judge Cothran sentenced appellant to thirty years' imprisonment for murder and a concurrent five-year term on the weapons charge. R. 409. Appellant's motion for a new trial was heard on January 27, 2020. R. 411. On February 3, 2020, Judge Cothran denied the motion for a new trial. R. 426. This appeal follows.

### **STANDARD OF REVIEW**

The standard of review is whether the trial court “abused its discretion, meaning the ruling was based on an error of law or lacked evidence to support it.” State v. Green, 427 S.C. 223, 229, 830 S.E.2d 711, 714 (Ct. App. 2019) aff’d as modified State v. Green, \_\_\_ S.C. \_\_\_, \_\_\_ S.E.2d \_\_\_, Op. No. 28001 (filed Nov. 12, 2020).

## ARGUMENT

### The trial court erred in admitting unauthenticated text messages.

The State's case against appellant for the murder of Lamont Heyward rested primarily on the testimony of Gary Scott and Kyle Riley. Scott was a convicted forger and shoplifter. R. 162. Scott testified that appellant was at his trailer on the day of the shooting and he had an "issue" with Heyward. R. 175-76. Appellant left. R. 164. Scott left, then returned to his home. R. 164-65. Brent Walker, a man named "Marquee," Heyward, and Riley were at Scott's home. R. 164-166.

Appellant returned to the trailer and came inside. R. 166-67. Heyward told appellant, "You thought I was playing. I told you to stay away. Come outside." R. 167. After hearing the door close, Scott heard a gunshot. R. 167. He went outside and saw Heyward on the ground and appellant was gone. R. 167. Walker and Marquee "ran off." R. 167. Scott also fled the scene because he had an outstanding warrant. R. 168. Scott then lied to the police, telling them he was not there during the shooting. R. 170.

Riley said appellant arrived and the two men left to get some food from another house. R. 137. They got the food and went back to Scott's trailer. R. 138. When they got inside, Heyward saw appellant, put on his shoes, and told appellant to see him outside. R. 138. They went outside and Riley heard a gunshot. R. 140. He went outside and saw Heyward, his uncle, on the ground, and used Heyward's phone to call 911. R. 140-41. He claimed to see appellant run away. R. 143. Riley also claimed to see appellant with a gun. R. 147. Riley did not deny telling 911 that he did not know who shot Heyward and could not remember telling the police that he did not know what happened. R. 148-51. He also could not recall telling the police that nobody was at the house but him and Heyward. R. 148-51.

During pretrial motions, the State told the judge about its intention to introduce text messages supposedly authored by appellant during the trial. R. 55-62. The State obtained the content of the text messages from the wireless carrier. R. 55-62. Appellant objected on authentication grounds because the phone was a prepaid phone with no name on the account, was not taken from appellant, and insufficient proof tied appellant to the messages. R. 55-62. The State claimed that it could authenticate the messages through appellant's grandmother, who supposedly gave the police the phone number, and the court deferred ruling until it could hear the testimony. R. 55-62.

When the State called appellant's grandmother, Linda Hugue, she could not remember appellant's phone number. R. 206. She did not deny talking to the police. R. 206. She remembered giving the police a phone number she associated with appellant. R. 206. Even when prompted with the phone number, appellant's grandmother still could not remember the number. R. 209-10. Officer Jared Phillips then testified about the number which the grandmother could not remember. R. 221-22. The police then obtained a search warrant and received the data from Verizon for the number. R. 223-24.

After the grandmother and officer's testimony, the court again took up whether to admit the text messages. R. 298-306. Citing the Court of Appeals' Opinion in State v. Green, 427 S.C. 223, 229, 830 S.E.2d 711, 714 (Ct. App. 2019) aff'd as modified State v. Green, \_\_\_ S.C. \_\_\_, \_\_\_ S.E.2d \_\_\_, Op. No. 28001 (filed Nov. 12, 2020),<sup>1</sup> the State argued there was a low bar for authentication and the grandmother's testimony together with the use of appellant's nickname "D" in the messages satisfied its burden. R. 298-306. Appellant distinguished Green because no testimony showed appellant with that phone versus evidence in Green that the defendant used the

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<sup>1</sup> The Supreme Court did not modify this Court's decision on the authentication issue in Green.

computer. R. 298-306. The court admitted the messages, finding the State met the requirements of Rule 901, SCRE, and that appellant's objections went to the weight of the evidence and could be addressed through cross-examination. R. 298-306.

The State called Jennifer Dalmida, a records custodian from Verizon. R. 307. When the State moved information obtained from Verizon into evidence, Judge Cothran said it was "in over objection and subsequently admitted the text messages. R. 311-13. The solicitor had the Verizon witness read the content of each text message. R. 312-322. The messages included:

- This D.
- Reactivate my Facebook delete.
- Delete it ASAP.
- What dude I find out let me know what he said.
- Tell Lex to delete my Facebook.
- Delete my Facebook text me.
- What all you heard?
- They say I need to leave. Text me Chris cuz number PR. I want to be safe. RHO ain't answer.
- Just need to lay low, but I'm up. Imma see how the night come.

R. 312-22.

Appellant gave two statements to the police which were admitted into evidence. (State's Ex. 2, 27). Appellant repeatedly denied shooting Heyward. (State's Ex. 2, 27).

The trial court erred in admitting the text messages because it did not meet the threshold for authentication under Rule 901 or Green. “Authentication is a subspecies of relevance, for something that cannot be connected to the case carries no probative force.” Green at 230, 830 S.E.2d at 714. While Green holds that the “authentication standard is not high,” it does require the State to make a prima facie showing of who the true author is. Id.

Here, the State failed to make this showing. Appellant’s grandmother was the only link to the messages. She could not remember her grandson’s phone number, even when prompted with it by the solicitor. The text messages themselves do not bear circumstantial distinctive characteristics. The State’s strongest argument here is that one text says, “This D,” which was appellant’s nickname. But this nickname is so common, so many names begin with the letter “D,” and shortening names to their first letter is such a common text messaging convention that this message has almost no probative value. Therefore, the court erred in finding the State met its burden under Green and this Court should reverse this case that stood on the shoulders of two witnesses of dubious credibility.

**CONCLUSION**

For the foregoing reasons, this Court should reverse appellant's convictions and remand for a new trial.

s/David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of November, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for David Eric Hugue states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge R. Ferrell Cothran, which was held on October 28 - 31, 2019, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for David Eric Hugue.

Respectfully Submitted,

s/David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT

This 12<sup>th</sup> day of November, 2020.

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**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s):
- (2) Trial Transcript
- (3) Transcript of hearing dated Jan. 27, 2020
- (4) Motion for a new trial
- (5) Order denying motion for a new trial
- (6) State's Ex. 30-49
- (7) State's Ex. 1, 2, 27 (to be transported)

I certify that this designation contains no matter which is irrelevant to this appeal.

s/David Alexander  
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**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

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