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Sep 07 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Cherokee County

Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRYSON JAMAR SMITH,

APPELLANT

APPELLATE CASE NO. 2020-001499

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in allowing the state to introduce Facebook messages of an incriminating nature that were allegedly sent by Appellant where the state failed to authenticate the messages?

STATEMENT OF THE CASE

Appellant was indicted by the Cherokee County Grand Jury for possession with intent to distribute marijuana, possession with intent to distribute cocaine, possession with intent to distribute fentanyl, trafficking methamphetamine, and trafficking heroin. R. 515-524. Appellant's trial was held before the Honorable R. Keith Kelly and a jury from November 3 – 6, 2020. Appellant was represented by Joshua Schultz. The state was represented by Kim Leskanic and Matt Kendall. R. 1.

The jury found Appellant guilty as charged on each count. R. 492, l. 24 – 494, l. 2. The judge sentenced Appellant to concurrent terms of twenty-five-years imprisonment for the trafficking heroin, trafficking methamphetamine, and the possession with the intent to distribute cocaine charges. The judge sentenced appellant to a concurrent term of twenty-years imprisonment for the possession with intent to distribute marijuana. Lastly, the judge sentenced Appellant to a consecutive term of fifteen-years imprisonment for the possession with intent to distribute fentanyl. R. 500, ll. 12 – 24.

This appeal follows.

STANDARD OF REVIEW

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). “An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” Whitner, 399 S.C. at 557, 732 S.E.2d at 866.

STATEMENT OF FACTS

On August 12, 2019, John Fuller, with the Cherokee County Sheriff's Office, along with several other officers went to an address on Maplewood Drive to serve an arrest warrant on Appellant. R. 129, ll. 3 – 21. Appellant's mother came to the front door and allowed the officers to come inside to look for Appellant. Fuller recalled that the first room he looked in appeared to be a storage room. The second room was a bedroom and had an odor of marijuana and Fuller observed marijuana laying on the bed. R. 130, ll. 4 – 21. Fuller also observed the "guts" of a cigar, a bag of marijuana, crack cocaine, and a digital scale in the bedroom. R. 132, ll. 2 – 25.

Officers obtained a search warrant for the house so that they could conduct a more thorough search. R. 244, ll. 16 – 19. In searching the house, the officers found paperwork and mail with Appellant's name on it along with a box that had Appellant's initials on it in the second bedroom. R. 261, l. 20 – 262, l. 3; R. 267, ll. 3 – 10; R. 269, ll. 12 – 18. In that same bedroom, several different forms and amounts of drugs were located including 149 grams of marijuana. R. 189, l. 17 – 190, l. 13.

Other drugs that were found were: 2.55 grams of cocaine; 84 fentanyl pills; 69 pills containing both heroin and fentanyl with a weight of 7.78 grams; 50 more fentanyl pills; and 73 pills of methamphetamine with a weight of 11.15 grams. R. 207, l. 22 – 208, l. 18. However, the SLED analyst who tested the drugs admitted that she did not test every single pill that was obtained, but instead only tested a portion of a single tablet. The analyst then extrapolated the results from one tablet to the rest of the pills that were found. R. 219, l. 2 – 222, l. 10.

ARGUMENT

The trial judge erred in allowing the state to introduce Facebook messages of an incriminating nature that were allegedly sent by Appellant because the state failed to authenticate the messages.

Relevant Facts

Defense counsel made a pretrial motion to exclude Facebook messages that were allegedly between Appellant and other individuals that dealt with illegal drug transactions. R. 58, l. 21 – 59, l. 6. Counsel argued that the messages could not be authenticated and were inadmissible pursuant to State v. Green, 427 S.C. 223, 830 S.E.2d 711 (Ct. App. 2019). R. 59, ll. 7 – 18.

The solicitor called Randy Gardner with the Cherokee County Sheriff's Office who testified that he retrieved Facebook records for an account with the name "Buddy Dawkins." R. 60, l. 19 – 61, l. 10. Gardner claimed that he knew Appellant went by the nickname Buddy. R. 66, l. 19 – 67, l. 24.

Gardner acknowledged that it was possible that the Facebook messages were not sent by Appellant but rather someone else posing as Buddy. R. 68, l. 15 – 69, l. 15. Gardner also admitted that he never established an internet protocol ("IP") address to determine where the messages were sent from. R. 69, ll. 16 – 25. Gardner explained that the IP address could be used to show what device and internet connection were used to make a post on social media but that he did not attempt to determine what IP address was used to post the messages alleged to have been sent by Appellant. R. 70, l. 1 – 71, l. 4. Gardner also failed to obtain any metadata or hash values associated with Buddy's Facebook account. R. 85, ll. 13 – 17.

Joshua Mata also testified at the pretrial hearing and said that he had been friends with Appellant for several years and that they routinely communicated with one another through Facebook. R. 86, l. 21 – 87, l. 16. Mata said that Appellant communicated with him using the Facebook name Buddy Dawkins and that he knew it was Appellant because they would video chat through Facebook and Mata could see Appellant on the video using the Buddy Dawkins account. R. 88, l. 14 – 89, l. 14. Mata further claimed that he and Appellant would communicate about meeting each other in person through the Buddy Dawkins Facebook account and that when Mata arrived at the meeting location, Appellant would be there. R. 89, l.15 – 90, l. 20. The state also introduced a recording of a phone call that Appellant allegedly made while incarcerated in which Appellant stated, “they got a warrant for my Facebook but it’s not even in my name.” State’s Exhibit 21 track 3 at 9:00 (Disk of jail calls on file with this Court).

The solicitor argued that the Facebook records were authenticated by the jail call, and by Mata’s testimony that he communicated with Appellant through the Buddy Dawkins account and physically observed Appellant through video communications. R. 99, l. 6 – 101, l. 9. Defense counsel responded that the state failed to authenticate the Facebook records because it failed to show any evidence of an IP address that was used or any connection from an IP address to Appellant. R. 101, l. 14 – 102, l. 21. The trial judge denied counsel’s motion to exclude the Facebook records finding that the state had properly authenticated them. R. 106, l. 7 – 107, l. 23.

Defense counsel renewed his objection to the Facebook records during Mata’s trial testimony. The judge admitted the records over counsel’s objection. R. 145, l. 12 – 146, l. 24; R. 510-514. Counsel also renewed his objection to the Facebook records during Gardner’s trial testimony which were introduced over counsel’s renewed objection. R. 158, l. 1 – 159, l. 19; R.

507-509; 514. Gardner read portions of the Facebook records to the jury which included statements about distributing narcotics. R. 159, l. 21 – 161, l. 23.

Discussion

Prior to evidence being admitted in a trial, the proponent of the evidence must satisfy “[t]he requirement of authentication or identification” by presenting evidence that is “sufficient to support a finding that the matter in question is what its proponent claims.” Rule 901 (a), SCRE; see also State v. Rich, 293 S.C. 172, 173, 359 S.E.2d 281, 281 (1987) (noting that an exception to the hearsay rule does not “absolve the offering party from the usual requirements of authentication”).

“The trial judge acts as the authentication gatekeeper, and a party may open the gate by laying a foundation from which a reasonable juror could find the evidence is what the party claims.” State v. Green, 427 S.C. 223, 230, 830 S.E.2d 711, 714 (Ct. App. 2019). “[T]he ‘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.’” United States v. Davis, 918 F.3d 397, 402 (4th Cir. 2019) (quoting United States v. Recio, 884 F.3d 230, 236-37 (4th Cir. 2018)). The burden to authenticate evidence is not high, but it does require the proponent to offer “a satisfactory foundation from which the jury could reasonably find that the evidence is authentic.” United States v. Hassan, 742 F.3d 104, 133 (4th Cir. 2014) (quoting United States v. Vidacak, 553 F.3d 344, 349 (4th Cir. 2009)).

Evidence can be authenticated in many ways, including testimony by a witness that the evidence is what it claims to be, or through a showing that the evidence has distinctive identifying characteristics. Rule 901 (b), SCRE; see State v. Anderson, 386 S.C. 120, 129, 687 S.E.2d 35, 39-40 (2009) (holding that fingerprint card was properly authenticated where a

fingerprint expert testified that the prints “were taken at a correctional facility, on a specific date, and assigned a unique state identifying number”). Conversely, in State v. Brown, 424 S.C. 479, 482, 818 S.E.2d 735, 736, (2018), the Supreme Court held that the accuracy of GPS evidence was not authenticated by a probation agent testifying that “we use it in court all the time.” Once the trial judge has determined that the proponent of evidence has made a prima facie showing that the evidence is authentic, the evidence is admitted and it is for the jury to determine whether to accept the evidence or what weight to give the evidence. United States v. Branch, 970 F.2d 1368, 1370-72 (4th Cir. 1992).

As this Court noted in State v. Green, 427 S.C. 223, 230, 830 S.E.2d 711, 714 (Ct. App. 2019), “[s]ocial media messages and content are writings, and evidence law has always viewed the authorship of writings with a skeptical eye.” To authenticate a writing, the proponent must put forth evidence connecting the writing to the person who is alleged to be the author because fraud in writings is a significant concern. Id. In Green, this Court noted that “[m]ost writings” are authenticated through Rule 901(b)(4), SCRE, which allows evidence to be authenticated by showing it has distinctive identifying characteristics. Id. at 232, 830 S.E.2d at 715.

Here, the trial judge erred in allowing the state to introduce the Facebook records because there was not sufficient evidence to show that Appellant was the author of the messages on the Facebook account bearing the name Buddy Dawkins. Significantly, the state failed to show what IP address was used to post the messages or what device was used to post the messages. The state also failed to show any metadata or hash values that indicated Appellant was the author of the messages. Gardner, the officer who obtained the Facebook records for the Buddy Dawkins account, acknowledged that it was possible that Appellant was not the person who sent the messages in the records he obtained. R. 68, l. 15 – 69, l. 15.

Without the technical method of using IP addresses, metadata or hash values, the state could not sufficiently show that the Facebook records were authentic, and the trial judge erred in allowing them into evidence. Appellant was prejudiced because the Facebook messages contained incriminating statements regarding the distribution of drugs for which Appellant was on trial. Appellant's convictions should be reversed.

CONCLUSION

By reason of the foregoing argument, Appellant's attempted murder conviction should be reversed, and this case remanded to the Cherokee County Court of General Sessions for a new trial.



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of September, 2021.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Bryson Jamar Smith 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. Keith Kelly, which was held on November 3-6, 2020, 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 Bryson Jamar Smith.

Respectfully Submitted,

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of September, 2021.

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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) Entire trial transcript;
- (3) State's Exhibit 10 (Facebook posts);
- (4) State's Exhibit 11 (Facebook posts);
- (5) State's Exhibit 20 (Facebook posts);
- (6) State's Exhibit 21 (Disk of jail calls).

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



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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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September 7, 2021.