No. COA20-45 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Wake County
	)	
DERICK CLEMONS	)	

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DEFENDANT-APPELLANT'S BRIEF

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DEFENDANT-APPELLANT'S BRIEF

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ISSUE PRESENTED

I. Did the trial court err in admitting evidence of comments on Ms. DeJesus' Facebook page when the State never authenticated the comments as having come from Mr. Clemons?

STATEMENT OF THE CASE

On 23 October 2017, the State indicted Mr. Derick Clemons in case number 17 CRS 213180 on one count of felony violation of a protective order and one count of obtaining habitual felon status. (R p 4) On 26 March 2019, the grand jury returned a superseding indictment for obtaining habitual felon status in case number 19 CRS 71. (R p 10)

Following a trial on 27–28 August 2019, a jury found Mr. Clemons guilty of felony violation of a protective order. (R p 61) On 28 August 2019, Mr. Clemons pleaded guilty to obtaining habitual felon status. (R pp 64–67) On 28 August 2019, the Honorable Paul C. Ridgeway, judge presiding in Wake County Superior Court, entered judgment on both counts and sentenced Mr. Clemons to a minimum of 70 and maximum of 96 months' imprisonment. (R p 68) Mr. Clemons gave oral notice of appeal in open court that same day. (R p 70)

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Mr. Clemons appeals pursuant to N.C. Gen. Stat. § 7A-27(b) (2018).

STATEMENT OF THE FACTS

Mr. Clemons and Ms. Inez DeJesus have known each other since they were teenagers. They were in married in 2002 and divorced in 2011. They have three children together. (T p 66)

Following an incident in February 2012, Ms. DeJesus obtained a domestic violence protective order ("DVPO") against Mr. Clemons. (T p 70) Sometime thereafter, Mr. Clemons went to prison. In June 2017, Ms. DeJesus learned that he

was going to be released. (T p 86) She also learned that her DVPO against Mr. Clemons had expired, so she worked with an attorney to get a new one. (T p 87) Mr. Clemons appeared in court and consented to the entry of a new DVPO on 9 June 2017. (T pp 87–89) The DVPO prohibited Mr. Clemons from initiating any contact with Ms. DeJesus. (T p 91)

On 5 July 2017, Ms. DeJesus started receiving phone calls from a blocked private number. (T p 100) She never answered any of these calls, but she did receive some voicemail messages. (T p 101) On 11 July 2017, Ms. DeJesus contacted the police. Officer Luis Suero of the Raleigh Police Department responded to her home. (T p 130) Ms. DeJesus played the voicemail messages for Officer Suero. (T p 136) No one ever created or obtained recordings of the voicemail messages. (T pp 113–14) At some point prior to 13 December 2017, the voicemail messages were automatically deleted from Ms. DeJesus' phone. (T pp 114, 124, 161) Consequently, at trial, the jury never heard the voicemail messages. Ms. DeJesus testified that the voice she heard on the voicemail messages was Mr. Clemons. (T pp 102–04, 111)

Ms. DeJesus also testified about four different comments that were posted to her Facebook page during this same time period. (T p 105) All four of the comments came from the Facebook account of Ashley Clemons, who is Ms. DeJesus and Mr. Clemons' twenty-two-year-old daughter. (R pp 18–24; T p 64) Before trial, Mr. Clemons filed a motion *in limine* to exclude evidence of these Facebook comments based on a lack of any established connection between Mr. Clemons and

Ashely's Facebook account. (R p 16) During a brief pretrial hearing on the matter, the State proffered that these comments "are statements that, again, through testimony of Ms. DeJesus that will make sense to have come from—not to have come from Ashley, but rather to have come from this defendant." (T pp 42–43) After hearing this proffer, the court denied Mr. Clemons' motion. (T p 43)

To lay the foundation for the entry of the Facebook comments into evidence at trial, the State asked Ms. DeJesus to identify State's Exhibits 4, 5, and 6. She identified them as screenshots of her Facebook page. (T p 105) When asked why she took these screenshots, she replied: "Because I know my daughter wouldn't write none of this stuff on my page. She never posts on my Facebook." (T pp 105–06) Over Mr. Clemons' renewed objection, the court accepted Exhibits 4, 5, and 6 into evidence. (T p 106)

The first two Facebook comments were made in response to a link that Ms. DeJesus had posted, in which she shared the results from a questionnaire that asked, "How many people love, admire, or hate you?" (R p 19; T p 106) The two comments from Ashley's account read: "He proud of you" and "I'm home now I'm taking back what mine." (R p 19) Exhibit 4 is a screenshot of these two comments. (R pp 18–19)

The third comment was made in response to a picture of herself that Ms. DeJesus had posted. The comment from Ashley's account read: "I'm home now I'm taking back what mine." (R p 21; T p 107) Exhibit 5 is a screenshot of this comment. (R pp 20–21)

The fourth comment was made in response to a picture that Ms. DeJesus had posted of a television stand, to which she had added the following text: "I put this T.V. stand up all by myself who said a woman can't do a man job. I can yay for me." The comment from Ashley's account read: "U learn from the best." (R p 23) Exhibit 6 is a screenshot of this comment. (R pp 22–21)

At trial, the State also introduced Ms. DeJesus' Sprint phone records for the period of 5 July to 12 July 2017. (R pp 25–60; T pp 148–49) Officer Stephanie Rivers of the Raleigh Police Department had obtained the records from Sprint. (T p 147) From these records, Officer Rivers identified calls coming from the same number at times that corresponded to the times of the voicemail messages Ms. DeJesus had received. (T pp 151–60) Officer Rivers was not able to determine whether this number was a landline or a cell phone, thus she was not able to identify from where the calls had come. (T pp 161–62)

ARGUMENT

Standard of Review

"A trial court's determination as to whether a document has been sufficiently authenticated is reviewed *de novo* on appeal as a question of law." *State v. Crawley*, 217 N.C. App. 509, 516, 719 S.E.2d 632, 637 (2011) (citing *State v. Owen*, 130 N.C. App. 505, 510, 503 S.E.2d 426, 430 (1998)). This Court has repeatedly cited *Crawley* and its progeny for the proposition that issues concerning the authentication of documents are reviewed *de novo*. *State v. DeJesus*, __ N.C. App. __, __, 827 S.E.2d 744, 751 (2019); *State v. Allen*, __ N.C. App. __, __, 812 S.E.2d

192, 195, *disc. review denied*, 371 N.C. 449, 817 S.E.2d 202 (2018); *State v. Ford*, 245 N.C. App. 510, 517, 782 S.E.2d 98, 104 (2016); *State v. Hicks*, 243 N.C. App. 628, 639, 777 S.E.2d 341, 348 (2015); *State v. Snead*, 239 N.C. App. 439, 443, 768 S.E.2d 344, 347 (2015), *rev'd in part on other grounds*, 368 N.C. 811, 783 S.E.2d 733 (2016); *State v. Watlington*, 234 N.C. App. 580, 590, 759 S.E.2d 116, 124 (2014).

Nonetheless, in a concurrence in *Matter of Lucks*, 369 N.C. 222, 794 S.E.2d 501 (2016), Justice Hudson commented: "The cases from the Court of Appeals are in conflict regarding whether an abuse of discretion or de novo standard of review is appropriate in the context of authentication of documentary evidence." *Id*. at 231, 794 S.E.2d at 508 (Hudson, J., concurring). However, upon careful review, the two cases that Justice Hudson cites as proof of such a conflict do not legitimately undermine the well-settled standard articulated in *Crawley*.

The first of these two cases is *In re Foreclosure by Goddard & Peterson, PLLC*, 248 N.C. App. 190, 789 S.E.2d 835 (2016), in which this Court reviewed whether an affidavit and its attachments had been properly admitted into evidence. However, the Court did not consider the question of authentication on the merits, as it had concluded that the appellant had abandoned the issue. *Id*. at 200, 789 S.E.2d at 843.

The second is *Brown v. City of Winston-Salem*, 176 N.C. App. 497, 626 S.E.2d 429 (2006), in which this Court reviewed a challenge to the authenticity of certain spreadsheets. The Court in *Brown* cited a 2005 case, *Williams v. Bell*, 167 N.C. App. 674, 678, 606 S.E.2d 436, 439 (2005) (citing *Carrier v. Starnes*, 120 N.C. App.

513, 519, 463 S.E.2d 393, 397 (1995)), for the proposition that "the standard of review of a trial court's decision to exclude or admit evidence is that of an abuse of discretion." *Brown*, 176 N.C. App. at 505, 626 S.E.2d at 753. However, *Williams* concerned the exclusion of evidence based on relevance, not authentication. *Williams*, 167 N.C. at 678–79, 606 S.E.2d at 439.[1] The Court in *Brown* cited no case that expressly supports the proposition that questions regarding the authentication of documents are reviewed for abuse of discretion.[2]

In sum, the two cases cited by Justice Hudson do not reveal any serious split of authority as to the proper standard of review for questions of authentication of documentary evidence. The holding of *In re Goddard* did not even address the issue of authentication on its merits. Although *Brown* did review a question of

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[1] The case cited in *Williams*, *Carrier v. Starnes*, 120 N.C. App. 513, 519, 463 S.E.2d 393, 397 (1995), likewise did not involve a question of authenticity; rather, it concerned the exclusion of evidence for being unduly prejudicial or confusing.

[2] On the contrary, the only other case cited during the discussion of this issue in *Brown*, *Kroh v. Kroh*, 152 N.C. App. 347, 567 S.E.2d 760 (2002), involves review of an authentication issue in which this Court appears to have applied the *de novo* standard. The Court in *Kroh* did not explicitly identify the standard of review it applied. Nonetheless, it appears clear from the Court's analysis that it applied a *de novo* standard, rather than an abuse of discretion standard. *Id.* at 353–54, 567 S.E.2d at 764–65. That is, the Court did not consider whether the trial court's ruling was "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." *State v. Reed*, 355 N.C. 150, 155, 558 S.E.2d 167, 171 (2002) (quotation omitted). Rather, the Court appears to have "consider[ed] the matter anew and freely substitute[d] its own judgment for that of the lower tribunal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (quotation omitted). The Court in *Kroh* concluded: "[Appellant] was required to produce the original reports (under Rule 1002) and properly authenticate them (under Rule 901). Since she failed to do so, these reports were properly excluded by the trial court." *Kroh*, 152 N.C. App. at 354, 567 S.E.2d at 765.

authentication for abuse of discretion, *Brown* is an outlier, as it cites no other cases in which the Court applied the abuse of discretion standard to questions of authentication. Thus, the proper standard of review here is *de novo*.

I. The trial court erred in admitting evidence of comments on Ms. DeJesus' Facebook page because the State never authenticated the comments as having come from Mr. Clemons.

The State alleged that comments posted on Ms. DeJesus's Facebook page—comments that had been posted from the Facebook account of Ms. DeJesus and Mr. Clemons' daughter, Ashley—had been posted by Mr. Clemons. During a pretrial hearing, the State forecasted that testimony from Ms. DeJesus would lay a proper foundation to authenticate these comments as having come from Mr. Clemons. Such testimony never came. Thus, the comments were never properly authenticated.

A. The State never authenticated the comments on Ms. DeJesus' Facebook page as having come from Mr. Clemons.

Rule of Evidence 901(a) states: "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." N.C. Gen. Stat. § 8C-1, Rule 901(a). Evidence may be authenticated by "[t]estimony that a matter is what it claims to be." *Id.*, Rule 901(b)(1).

Here, the State claimed that the comments posted from Ashley's Facebook account had come from Mr. Clemons. Mr. Clemons filed a motion *in limine* to exclude evidence of the comments. (R p 16) At a pretrial hearing, Mr. Clemons argued that the State had not established any connection between Mr. Clemons and

Ashley's Facebook account. (T p 41) The State responded by forecasting that Ms. DeJesus would offer testimony during trial that would properly authenticate the comments as having come from Mr. Clemons. (T pp 43–43) However, that testimony never came.

The discussion at trial concerning the authenticity of the Facebook comments consisted of the following colloquy between the prosecutor and Ms. DeJesus:

> Q: During this same time period, did you start to receive—do you have a Facebook page?
> A: I do have a Facebook.
> Q: And is that something that has your name on it that identifies you?
> A: Yes.
> Q: Did you also start to receive comments left on posts that you made on Facebook?
> A: I did.
> PROSECUTOR: Your Honor, may I approach?
> THE COURT: Yes.
> Q: Inez, I'm showing you what's been previously marked for identification purposes as States' Exhibit 4, 5, and 6. Will you take a look at those please and let me know if you recognize them.
> A: Yep. Yes, I do.
> Q: What are State's Exhibit 4, 5, and 6?
> A: They're my posts on—Facebook posts.
> Q: And what about State's Exhibit 4, 5, and 6—did you take screenshots?
> A: I did.
> Q: Okay. Is that what these are?
> A: Yes.
> Q: And why did you specifically screenshot State's Exhibits 4, 5, and 6 from your Facebook page?
> DEFENSE COUNSEL: Your Honor, again, we would object to the questions and move to strike the testimony based on arguments previously made in court.
> THE COURT: The objection's overruled.
> A: Because I know my daughter wouldn't write none of this stuff on my page. She never posts on my Facebook.

> Q: And we'll talk about that in one second, Inez. These are messages that—
> A: Yes.
> Q: —you received on Facebook?
> A: Yes.
> PROSECUTOR: Your Honor, at this time the State moves Exhibits 4, 5, and 6 into evidence.
> DEFENSE COUNSEL: Objection on the grounds previously stated.
> THE COURT: The objection is overruled. Four, Five and Six are admitted.

(T pp 105–06)

Although Ms. DeJesus' testimony established that Exhibits 4, 5, and 6 were in fact screenshots of her Facebook page, the State was not seeking to admit them merely for the purpose of showing her Facebook page.[3] Rather, the State was claiming that the comments from Ashley's account had in fact come from Mr. Clemons. As to this specific purpose, Ms. DeJesus' testimony did not properly authenticate the comments, as her testimony did not amount to "evidence sufficient to support a finding that the matter in question [*i.e.*, the four comments from Ashley's Facebook account] is what its proponent claims [*i.e.*, four statements from Mr. Clemons]." N.C. Gen. Stat. § 8C-1, Rule 901(a).

Before Exhibits 4, 5, and 6 were admitted, Ms. DeJesus did not testify as to whether she believed the comments had come from Mr. Clemons.[4] (T pp 105–06)

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[3] Had the State sought only to admit the comments for this purpose, they would not have been relevant. *See* N.C. Gen. Stat. § 8C-1, Rule 401 (defining "relevant evidence").

[4] Notably, even after the exhibits had been admitted, Ms. DeJesus never testified that she believed the comments had come from Mr. Clemons.

Nor did she testify that the content or other "distinctive characteristics" of the comments would in any way suggest that they had come from Mr. Clemons. *Id.*, Rule 901(b)(4). In other words, before seeking to admit evidence of the comments, the State presented no evidence to authenticate the comments as having come from Mr. Clemons.

This Court considered a similar issue of authentication in *State v. Young*, 186 N.C. App. 343, 651 S.E.2d 576 (2007). In *Young*, a co-defendant testified that he had received three handwritten letters from the defendant. On appeal, the Court considered whether the letters had been properly authenticated as having come from the defendant. Rather than considering the handwriting of the letters under Rule 901(b)(2), the Court considered, per Rule 901(b)(4), the letters' "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." *Young*, 186 N.C. App. at 353, 651 S.E.2d at 583 (quoting N.C. Gen Stat. § 8C-1, Rule 901(b)(4). The Court concluded that sufficient evidence existed to authenticate the letters as having come from the defendant based on four distinct factors. First, the co-defendant testified that the defendant had told him on several occasions that he would write to him. Second, one of the letters was addressed "From Navothly to Q," which was how the two referred to each other. Third, two of the letters listed the defendant's name in the return address. Fourth, the content of the letters contained intimate knowledge of the crime they had committed. *Id.* at 353–54, 651 S.E.2d at 583.

A similar authentication issue arose in *State v. Hunnicutt*, 44 N.C. App. 531, 261 S.E.2d 682 (1980). In *Hunnicutt*, Gary Durham, a jailer, testified about the contents of a note he found in a deck of cards that the defendant had handed to him. The note read: "Silence is golden, don't let them trick you, you've done nothing. Tear note up, flush it. H.U.N." *Id.* at 534, 261 S.E.2d at 685. As in *Young*, the authentication of the note did not depend on the handwriting, but on the note's content and other circumstantial factors. First, Durham testified that the defendant had handed him the deck of cards and asked him to pass it along to another inmate named Lawson. Second, the defendant and Lawson were the only inmates who had been charged in a murder that was under investigation at the time. Third, the defendant was the only inmate with the initials "H.U.N." Fourth, Durham had seen the defendant previously sign his name using his initials. Fifth, the deck of cards was in Durham's exclusive possession from the time the defendant handed it to him until the time he discovered the note. Based on these factors, the Court concluded that sufficient evidence existed to authenticate the note as having come from the defendant. *Id*. at 536, 261 S.E.2d at 686.

The type of evidence supporting authentication in *Young* and *Hunnicut* is lacking here. Before admitting Exhibits 4, 5, and 6 into evidence, the court simply did not hear any testimony concerning any "distinctive characteristics" that would have suggested that Mr. Clemons had posted the comments to Ms. DeJesus' Facebook page. Nor did the court hear any evidence to explain how Mr. Clemons would have had access to Ashely's Facebook account (*e.g.*, that Ashely had shared

her Facebook password with her father). The only evidence that the court heard was Ms. DeJesus' testimony that Ashley never posted comments to her mother's Facebook page and that Ashley "wouldn't write none of this stuff." (T pp 105–06) But that testimony only suggested that the comments were not posted by Ashley. Absent any consideration of the content of the comments, this testimony did not suggest in any way that the comments had been posted by Mr. Clemons.

A more old-fashioned analogy helps to illustrate the point. Suppose the following: Ms. DeJesus received a handwritten letter on her daughter's stationary, which had her daughter's name preprinted in its header. The State claimed this letter had been written and sent by Mr. Clemons, rather than Ashley. Ms. DeJesus testified that Ashley never sends her letters and that Ashley "wouldn't write none of this stuff" that appeared in the letter. However, she offered no explanation as to how Mr. Clemons came to be in possession of Ashely's stationary. Such testimony may suggest that Ashley had not authored and sent the letter to her mother. However, such testimony would not suggest in any way that Mr. Clemons had instead authored and sent the letter. The same reasoning applies here. The fact that Ms. DeJesus did not believe Ashley had posted the comments to her Facebook page does not, standing alone, suggest in any way that Mr. Clemons had posted them.

As in *Young* and *Hunnicutt*, testimony about the content of the Facebook comments could have possibly served as evidence of authentication. However, Ms. DeJesus only testified about the content of the Facebook comments *after* they had

been admitted into evidence. To the extent that such post-admission testimony may have suggested that Mr. Clemons had posted the comments, it came too late.

Authentication is a condition *precedent* to the admissibility of evidence. N.C. Gen. Stat. § 8C-1, Rule 901(a). Any "evidence sufficient to support a finding" of authenticity must necessarily be limited to evidence presented *prior to* the court's authenticity determination. *See id.* This Court has said: "Generally, a writing must be authenticated *before* it is admissible into evidence." *Milner Hotels, Inc. v. Mecklenburg Hotel, Inc.*, 42 N.C. App. 179, 180, 256 S.E.2d 310, 311 (1979) (citing *Walton v. Cagle*, 269 N.C. 177, 152 S.E.2d 312 (1967)) (emphasis added). Evidence addressing the authenticity of the Facebook comments—*i.e.*, evidence suggesting that they were, as the State claimed them to be, statements from Mr. Clemons—is limited to evidence that was presented *prior to* the admission of Exhibits 4, 5, and 6. As explained above, this evidence consists only of Ms. DeJesus' very brief testimony about Ashley never posting to her account and her belief that Ashley "wouldn't write none of this stuff" on her Facebook page. Again, this testimony fails to suggest in any way that Mr. Clemons had posted the comments. Thus, this testimony does not amount to "evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a). Consequently, the State never authenticated the Facebook comments as having come from Mr. Clemons.

B. Mr. Clemons was prejudiced by the admission of the Facebook comments.

There is no question that Mr. Clemons was prejudiced by the court's decision to admit evidence of the Facebook comments. "A defendant is prejudiced . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a).

The State alleged that Mr. Clemons had violated the DVPO in two different ways: phone calls and Facebook posts. As to the phone calls, the jury never saw or heard tangible evidence that Mr. Clemons made any calls to Ms. DeJesus. Because Ms. DeJesus and the State failed to preserve the voicemail messages, the jury never heard them. The jury did see Ms. DeJesus' phone records, but because the State never investigated the matter further, the suspect phone number from those records was never identified as belonging to Mr. Clemons.

When the members of the jury went into the deliberation room to decide Mr. Clemons' fate, the only tangible evidence of any alleged wrongdoing that they could actually hold and see was the screenshots of the Facebook posts. Without the Facebook posts, the State's entire case rested on Ms. DeJesus' word that the phone calls had come from Mr. Clemons. Evidence of the Facebook posts was therefore not duplicative or ancillary. Rather, evidence of the Facebook posts was a critical and unique part of the State's case against Mr. Clemons. It's no surprise, then, that the State repeatedly referenced the Facebook posts in its opening and closing arguments to the jury. (T pp 60, 174, 177–80, 183–84)

For these reasons, without evidence of the Facebook posts, there is a reasonable possibility that the jury would not have convicted Mr. Clemons. Thus, Mr. Clemons was prejudiced by the court's decision to accept evidence of the Facebook posts.

CONCLUSION

Based on the foregoing, the Defendant-Appellant, Mr. Derick Clemons, respectfully requests that this Honorable Court vacate the judgment for felony violation of a protective order.

Respectfully submitted, this 17th day of February, 2020.

electronically submitted
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CERTIFICATE OF COMPLIANCE

I hereby certify that Defendant-Appellant's Brief is in compliance with N.C. R. App. 28(j)(2), in that the body of the brief, including footnotes and citations, contains no more than 8,750 words as indicated by Microsoft Word, the program used to prepare the brief.

This the 17th day of February, 2020.

electronically submitted
Benjamin J. Kull

CERTIFICATE OF FILING AND SERVICE

This is to certify that the undersigned has this date filed and served a copy of the Defendant-Appellant's Brief upon the State by electronic filing and service by email, as indicated below:

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This the 17th day of February, 2020.

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