



IN THE SUPREME COURT OF THE STATE OF DELAWARE

TIFFANY PARKER,)	
)	
Defendant – Below,)	
Appellant,)	
)	
v.)	No. 38, 2013
)	
STATE OF DELAWARE,)	
)	
Plaintiff – Below,)	
Appellee.)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE’S ANSWERING BRIEF

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D.R. E. 901	<i>passim</i>
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NATURE AND STAGE OF THE PROCEEDINGS

On June 14, 2012, the New Castle County Grand Jury returned a two-count indictment against Tiffany Parker alleging one count of Assault Second Degree and one count of Terroristic Threatening. A1. A three-day jury trial began on October 2, 2012. A2. Prior to the presentation of evidence, Parker raised an objection to the introduction of postings on a Facebook account purported to belong to her. A7-9. The trial judge admitted the Facebook postings over Parker's objection.¹ A25. The jury found Parker guilty of Assault Second Degree and acquitted Parker of the Terroristic Threatening charge. A2. Parker was sentenced on January 25, 2013. A3. Parker timely docketed a notice of appeal. This is the State's answering brief.

¹ On October 9, 2012, the trial judge issued a Memorandum Opinion which addressed the Court's admission of the Facebook posting into evidence. A3.

SUMMARY OF THE ARGUMENT

Appellant's argument is denied. The trial court properly admitted Parker's Facebook posting into evidence at trial. The State produced sufficient evidence under D.R.E. 901 to authenticate the posting. If this Court were to find that Parker's Facebook posting was not properly authenticated under D.R.E. 901, such error was harmless given the evidence presented at trial.

STATEMENT OF FACTS

On December 2, 2011, Felicia Johnson (“Johnson”) was driving on Clifford Brown Walk in the city of Wilmington when she observed Tiffany Parker engaged in a physical confrontation with a pregnant woman. A14-15. The pregnant woman was Sheniya Brown (“Brown”). A20-21. As Johnson approached Parker and Brown, she observed that Parker appeared to be “getting the best of the pregnant girl.” A15. Johnson saw Parker hitting Brown while Brown attempted to protect herself. A16. Parker struck Brown in the face several times causing Brown to suffer bruises across her face. A23-24. Parker claimed that Brown started the physical altercation by hitting her in the face. A32. Parker did, however, acknowledge hitting Brown during the altercation. A32. Parker and Brown were eventually separated by bystanders. A16, A20, A32. When the confrontation ended, Brown went into her home, located at 1004 Clifford Brown Walk, while Parker went to a nearby barbershop. A16, A20, A33. Brown eventually returned to the street carrying a knife. A17, A33. Another physical confrontation between Parker and Brown ensued and was quickly stopped when bystanders intervened. A17, A33. Officers from the Wilmington Police Department were called to the scene and arrested Parker. A17, A39. At the time of the assault, Brown was 8 ½ months pregnant. A20.

Both Parker and Brown have Facebook accounts and, prior to December 2, 2011, Brown and Parker exchanged messages via Parker's Facebook profile page regarding Brown's incarcerated paramour and Parker's interaction with him. A22, A25, A31. Brown believed that Parker "was looking to fight [her]" based on the posts she observed on Parker's Facebook profile page. A22. Soon after Brown was assaulted by Parker on December 2, 2012, Brown checked Parker's Facebook page after hearing from friends that Parker had posted comments regarding the altercation between the two. A25. Parker's Facebook profile page displayed a photo of Parker and listed "Tiffani Parker" as the person with whom the Facebook page was associated. A25. Brown was able to "share" Parker's Facebook post and publish it to her own Facebook page. A25. The post on Parker's Facebook page made reference to the prior Facebook comments between Parker and Brown as well as the physical altercation between the two earlier that day. A26.

ARGUMENT

THE TRIAL COURT PROPERLY ADMITTED PARKER'S STATEMENTS THAT WERE POSTED ON HER FACEBOOK PROFILE.

Question Presented

Whether the trial court abused its discretion when it found that the State presented sufficient evidence to authenticate Parker's Facebook posting under D.R.E. 901 thereby admitting the posting.

Standard and Scope of Review

This Court reviews a trial court's decisions regarding the admissibility of evidence for an abuse of discretion.²

Merits of the Argument

Under D.R.E. 901(a), "[t]he 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."³ The rule provides a list of ten non-exhaustive examples of authentication that comply with the rule.⁴ "The authentication requirement is a 'lenient burden.'"⁵ That

² *Wright v. State*, 25 A.3d 747, 752 (Del. 2011)(citing *Longfellow v. State*, 668 A.2d 1370, 1372 (Del. 1997); *Cabrera v. State*, 840 A.2d 1256, 1266 (Del. 2004)(citing *Floudiotis v. State*, 726 A.2d 1196, 1201 (Del. 1999).

³ D.R.E. 901(a).

⁴ *See* D.R.E. 901(b).

burden is “easily met” when the State “establish[es] a rational basis from which the jury could conclude that the evidence is connected with the defendant.”⁶ One way in which the State can satisfy its burden is through the introduction of circumstantial evidence under D.R.E. 901(b)(4).⁷ “The rule does not specify a minimum number or minimum quality of distinct characteristics. Accordingly, courts have relied upon a variety of factors to authenticate such evidence. For example, documents that contain information and details that only those involved in the crime could know are considered reliable.”⁸ As the United States District Court for the District of Columbia stated in *United States v. Safavian*:

The question for the Court under [Fed. R. Evid. 901] is whether the proponent of the evidence has offered a foundation from which the jury could reasonably find that the evidence is what the proponent

⁵ *Guy v. State*, 913 A.2d 558, 564 (Del. 2006)(quoting *Whitfield v. State*, 524 A.2d 13, 16 (Del. 1987).

⁶ *Cabrera*, 840 A.2d at 1264-65 (citing *Whitfield v. State*, 524 A.2d at 16).

⁷ D.R.E. 901(b)(4) provides the following example of authentication:

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns or other distinctive characteristics, taken in conjunction with circumstances.

See *Smith v. State*, 902 A.2d 1119, 1124 (Del. 2006); *Johnson v. State*, 878 A.2d 422, 429 (Del. 2005)(citing *Cabrera*, 840 A.2d at 1264); *Paron Capital Mgmt., LLC v. Crombie*, 2012 WL 214777 (Del. Ch. Jan. 24, 2012); see also *Lorraine v. Markel American Insurance Company*, 241 F.R.D. 534, 546 (D. Md. 2007).

⁸ *Smith*, 902 A.2d at 1124 (citing *United States v. Reyes*, 798 F.2d 380, 383 (10th Cir. 1986); *United States v. Helmelt*, 769 F.2d 1306, 1312 (8th Cir. 1985); *United States v. Drougas*, 748 F.2d 8, 21 (1st Cir. 1984); *United States v. De Gudino*, 722 F.2d 1351, 1355 (7th Cir. 1983); *United States v. Wake*, 948 F.2d 1422, 1434 (5th Cir. 1991)).

says it is. Federal Rules of Evidence Manual § 901.02[1] at 901-5-901-6. The Court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the *jury* ultimately might do so.⁹

Once the court determines that the proponent of the evidence has satisfied the burden, the question of authenticity and the weight to be given such evidence is for the jury to decide.¹⁰

Parker contends that the State failed to meet its modest burden of authentication of Parker's Facebook page "because the State failed to offer any extrinsic evidence describing the entries, as well as indicating how the pages in question were obtained and adequately linking both the profile and the posting to Parker."¹¹ In support of her argument, Parker relies on the decision of the Maryland Court of Appeals in *Griffin v. State*.¹² In *Griffin*, the prosecution, through the chief investigator in the case, introduced postings from Griffin's girlfriend's MySpace profile page which contained threats to a witness called by

⁹ 435 F. Supp. 2d. 36, 38 (D.D.C. 2006) (emphasis in original). The Delaware Rules of Evidence are modeled after the Federal Rules of Evidence. *Manna v. State*, 945 A.2d 1145, 1154 n.14 (Del. 2008); *Atkins v. State*, 523 A.2d 539, 542 (Del. 1987). Additionally, "[t]he Federal Rules Advisory Committee notes are 'instructive' and provide guidance." *Manna*, 945 A.2d at 1155 n.14 (citing *Atkins*, 523 A.2d at 542).

¹⁰ See *Cabrera*, 840 A.2d at 1264.

¹¹ *Open. Brf.* at 5.

¹² 19 A.3d 415 (Md. 2011).

the prosecution at trial.¹³ In addition to the threat, the profile page and postings contained a picture of a person who appeared to be Griffin's girlfriend, made reference to Griffin's nickname ("Boozy"), and described the creator of the page as a 23 year-old woman from Port Deposit, MD with the same date of birth as Griffin's girlfriend.¹⁴

Applying an enhanced standard of authentication to social media postings, the court found that the prosecution did not meet its burden to authenticate the MySpace postings introduced at trial.¹⁵ The court offered the following three methods by which a social media posting could be authenticated:

The first, and perhaps most obvious method would be to ask the purported creator if she indeed created the profile and also if she added the posting in question, i.e. testimony of a witness with knowledge that the offered evidence is what it is claimed to be. The second option may be to search the computer of the person who allegedly created the profile and posting and examine the computer's internet history and hard drive to determine whether that computer was used to originate the social networking profile and posting in question. . . . A third method may be to obtain information directly from the social networking website that links the establishment of the profile to the person who allegedly created it and also links the posting sought to be introduced to the person who initiated it.¹⁶

¹³ *Id.* at 418.

¹⁴ 19 A.3d at 419.

¹⁵ 19 A.3d at 424.

¹⁶ 19 A.3d at 427-28 (citations omitted)(internal quotes omitted).

By laying out the above possible avenues to authentication of social media postings above, the court established an enhanced standard for authentication of social media postings. While the court did not foreclose the possibility of other methods by which social media postings can be authenticated under the enhanced standard, the only guidance offered by the court was as follows: “[p]ossible avenues to explore to properly authenticate a profile or posting printed from a social networking site, will, in all probability, continue to develop as the efforts to evidentially utilize information from the sites increases.”¹⁷

Parker likewise relies on *Commonwealth v. Williams*.¹⁸ In *Williams*, the Supreme Judicial Court of Massachusetts determined that the trial court improperly admitted postings from Williams’ brother’s MySpace page. The prosecution presented the MySpace messages through testimony of a witness who received messages on her MySpace page from Williams’ brother’s MySpace page.¹⁹ The messages urged her not to testify and to claim a lack of memory when dealing with the authorities.²⁰ The court noted that “there was no testimony . . . regarding how secure such a Web page is, who can access a MySpace Web page, whether codes

¹⁷ 19 A.3d at 427 (citations omitted).

¹⁸ 926 N.E.2d 1162 (Mass. 2010)

¹⁹ *Id.* at 1172.

²⁰ *Id.*

are needed for such access, etc”²¹ Ultimately, the court found that “while foundational testimony established that the messages were sent by someone with access to Williams’s [brother’s] MySpace Web page, it did not identify the person who actually sent the communication. Nor was there expert testimony that no one other than [Williams’ brother] could communicate from that Web page.” It is clear from the language used by the court that an enhanced burden of authentication is to be applied to social media postings under Massachusetts law.²²

Parker’s reliance on *Griffin* and *Williams* is misplaced. The enhanced standard of authentication for social media postings pronounced by the Maryland Court of Appeals and the Supreme Judicial Court of Massachusetts runs contrary to the evidentiary standards of D.R.E. 901 and the Delaware cases interpreting the rule. Parker is asking this Court to apply a different set of standards for authentication to a subset of electronic evidence simply because “social media websites like Facebook are inherently susceptible to falsification.”²³ As the dissent in *Griffin* noted:

²¹ *Id.*

²² In *Griffin*, the Maryland Court of Appeals cited *Williams* for that same proposition stating “we recognize that other courts, called upon to consider authentication of electronically stored information on social networking sites, have suggested greater scrutiny because of the heightened possibility for manipulation by other than a true user or poster.” 19 A.3d at 424.

²³ *Open. Brf.* at 7. Parker offers no facts from the record or information from any other source to support this assertion.

It has been said that the “purpose of authentication is to ... filter untrustworthy evidence.” Like many filters that are unable to remove completely all impurities, Rule 5–901 does not act to disallow any and all evidence that may have “impurities” (i.e., in this case, evidence that could have come, conceivably, from a source other than the purported source). As long as a reasonable juror could conclude that the proffered evidence is what its proponent purports it to be, the evidence should be admitted. . . . The potentialities that are of concern to the Majority Opinion are fit subjects for cross-examination or rebuttal testimony and go properly to the weight the fact-finder may give the print-outs.²⁴

A similar argument was made in *In re F.P.*²⁵ The Pennsylvania Superior Court rejected the appellant’s call for an enhanced standard of authentication to be applied to electronic messages, stating:

Essentially, appellant would have us create a whole new body of law just to deal with e-mails or instant messages. The argument is that e-mails or text messages are inherently unreliable because of their relative anonymity and the fact that while an electronic message can be traced to a particular computer, it can rarely be connected to a specific author with any certainty. Unless the purported author is actually witnessed sending the e-mail, there is always the possibility it is not from whom it claims. As appellant correctly points out, anybody with the right password can gain access to another’s e-mail account and send a message ostensibly from that person. However, the same uncertainties exist with traditional written documents. A signature can be forged; a letter can be typed on another’s typewriter; distinct letterhead stationary can be copied or stolen. *We believe that e-mail messages and similar forms of electronic communication can be properly authenticated within the existing framework of Pa.R.E. 901 and Pennsylvania case law.*²⁶

²⁴ 19 A.3d. at 430 (quoting *Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc.*, 621 F. Supp. 2d 1173, 1184 (D. Utah 2009)(other citations omitted).

²⁵ 878 A2d. 91(Pa. Super. 2005)

The concerns expressed in Parker’s Opening Brief were not raised at trial and those same concerns are present with more “traditional” forms of evidence as illustrated by the Pennsylvania Superior Court above. D.R.E. 901 and the Delaware cases interpreting the rule provide the proper framework for authenticating social media postings. The standard for authentication under D.R.E. 901 should not be enhanced simply because the evidence proffered for admission is in electronic form.

In this case the trial judge found that Parker’s Facebook postings were authenticated through the use of circumstantial evidence under D.R.E. 901(b)(4).²⁷ Several courts have directly addressed the authentication of social media website postings through the use of circumstantial evidence.²⁸ In *Tienda v. State*, the Texas Court of Criminal Appeals considered whether the prosecution had properly authenticated postings from a MySpace associated with Tienda.²⁹ Tienda was

²⁶ *Id.* at 95 (emphasis added)(citations omitted).

²⁷ *State v. Parker*, Del Super., ID. No. 1112001354, Scott, J., *Mem. Op.* (October 9, 2012).

²⁸ *Simmons v. Commonwealth*, 2013 WL 674721 (Ky. Feb. 21, 2013) (Facebook postings); *Tienda v. State*, 358 S.W. 3d 633 (Tex. Crim. App. 2012) (MySpace postings); *State v. Eleck*, 33 A.3d. 818 (Conn. App. 2011) (Facebook postings); *Commonwealth v. Williams*, 926 N.E.2d 1162 (Mass. 2010) (MySpace postings).

²⁹ 358 S.W. 3d 633, 637 (Tex Crim. App. 2012).

charged with the murder of David Valdez.³⁰ At trial, the prosecution introduced postings from two MySpace accounts as well as subscriber information reports associated with the accounts.³¹ The postings made reference to David Valdez and the circumstances surrounding his murder, including references to others who were present during the murder and details about the police investigation.³² The profile pages also included photographs of a person who resembled Tienda.³³ The subscriber reports provided information about the account holder for each account including the registered name of the person who created the accounts and email addresses associated with the accounts.³⁴

Holding that the trial court did not abuse its discretion in admitting the MySpace pages and account information, the Texas Court of Criminal Appeals found that there was “ample circumstantial evidence – taken as a whole with all of the individual particular details considered in combination – to support a finding that the MySpace pages belonged to [Tienda] and that he created and maintained

³⁰ 358 S.W. 3d. at 634

³¹ 358 S.W. 3d at 635. The postings and subscriber information were introduced through one witness, the victim’s sister. 358 S.W. 3d at 634. The victim’s sister testified about how she came across the MySpace profile and postings and brought them to the prosecutor’s attention. *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* The MySpace account information revealed that the accounts were created by “Smiley Face,” which is Tienda’s nickname, and “Ron Mr. T.” *Id.*

them.”³⁵ In its analysis, the court noted that in performing its “gate-keeping function, the trial court itself need not be persuaded that the proffered evidence is authentic. The preliminary question for the trial court to decide is simply whether the proponent of the evidence has supplied facts that are sufficient to support a reasonable jury determination that the evidence he has proffered is authentic.”³⁶ The *Tienda* court distinguished the Maryland Court of Appeals holding in *Griffin*, explaining that in *Tienda*’s case there were “far more circumstantial indicia of authenticity . . . than in *Griffin* – enough, we think, to support a prima facie case that would justify admitting the evidence and submitting the ultimate question of authenticity to the jury.”³⁷

In this case, the State authenticated Parker’s Facebook posting circumstantially through the testimony of Sheniya Brown.³⁸ Brown testified that she is familiar with Facebook and that she maintained her own Facebook account and was able to access the Facebook profile page that purported to belong to “Tiffani Parker.”³⁹ Brown also testified that she had previously communicated

³⁵ 358 S.W. 3d. at 645.

³⁶ 358 S.W.3d at 638.

³⁷ 358 S.W. 3d. at 647.

³⁸ A25.

³⁹ A25. State’s Trial Exhibit 5.

with Parker by leaving messages (“inboxing”) on Parker’s Facebook profile page.⁴⁰ Displayed on the profile page is a photograph of Tiffany Parker and the name associated with the profile page is “Tiffani Parker.”⁴¹ The posting admitted into evidence was made hours after Brown was attacked and made specific reference to the altercation.⁴² The trial judge correctly found that the State authenticated the posting noting that “the court considered the content and context of the posting to be sufficient circumstantial evidence that the posting was indeed what the State said it was.”⁴³ Once the trial court performed its gate-keeping function under D.R.E. 901, authentication of Parker’s Facebook page was for the jury to decide.

Parker claims that her conviction for Assault Second Degree should be reversed because the Facebook postings admitted into evidence were “highly inflammatory and irreparably damaged her chances of receiving a fair trial.”⁴⁴ The State disagrees. As the State has argued above, the Facebook postings were properly admitted by the trial court. However, if this Court were to find that the

⁴⁰ A21, A26. Parker implicitly acknowledged that she maintained a Facebook page when testified that Brown had previously left messages on her Facebook page. A31, A35.

⁴¹ A25, State’s Trial Exhibit 5.

⁴² A25. The posting contained the following message “i seen you today . . . we said our words you put your hands on me . . . i hit you back . . .” State’s Trial Exhibit 5.

⁴³ *State v. Parker*, Del Super., ID. No. 1112001354, Scott, J., *Mem. Op.* at 5 (October 9, 2012).

⁴⁴ *Open. Brf.* at 2.

trial court abused its discretion by admitting Parker's Facebook postings, such error was harmless in light of the evidence presented at trial. "An error in admitting evidence may be deemed "harmless" when "the evidence exclusive of the improperly admitted evidence is sufficient to sustain a conviction""⁴⁵

At trial the State presented the testimony of Felicia Johnson who witnessed Parker assaulting Brown.⁴⁶ Brown also testified at trial and indicated that she was attacked and injured by Parker.⁴⁷ Officer Matthew Reiss of the Wilmington Police Department testified that when he arrived on the scene he spoke with both Brown and Parker and observed injuries sustained by Parker.⁴⁸ Parker also testified and admitted to fighting with Brown.⁴⁹ Parker claimed throughout the trial that she had been struck first by Brown and that she was only acting in self-defense. Moreover, Parker acknowledged communicating with Brown via her Facebook page on occasions prior to December 2, 2011.⁵⁰ Parker's Facebook posting was never the lynchpin of the State's case. The posting simply memorialized Parker's self-

⁴⁵ *Nelson v. State*, 628 A.2d. 69, 77 (Del. 1993) (quoting *Johnson v. State*, 587 A.2d 444, 451 (Del. 1991)).

⁴⁶ A14-16.

⁴⁷ A22-24.

⁴⁸ A28.

⁴⁹ A32.

⁵⁰ A31-32.

defense claim. Parker's claim that she was prejudiced by the admission of the Facebook posting is belied by the fact that she used the posting to buttress her self-defense claim in closing argument.⁵¹ At trial, there was ample evidence exclusive of Parker's Facebook posting to sustain her conviction.

Parker has failed to establish that the trial court abused its discretion when it found that the State had met its burden of authentication to have Parker's Facebook postings admitted into evidence. Even if this Court were to find that the trial court abused its discretion, admission of Parker's Facebook postings was harmless given the evidence presented at trial.

⁵¹ A52.

CONCLUSION

For the foregoing reasons the judgment of the Superior Court should be affirmed.

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