

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

STATE OF DELAWARE, :
 : I.D. No. 1208018630
v. :
 :
JERMAINE M. ZACHARY, :
 :
 :
Defendant. :

Oral Argument: July 15, 2013
Decided: July 16, 2013

ORDER

Upon Defendant's Motion in Limine to
Exclude Text Messages. *Granted.*

R. David Favata, Esquire of the Department of Justice, Dover, Delaware; attorney for the State.

William J. Rhodunda, Jr., Esquire of Rhodunda & Williams, Wilmington, Delaware; attorney for the Defendant.

WITHAM, R.J.

I. Issue

Whether the Court should grant Defendant's motion in *limine* to exclude certain text messages sent from Defendant's cell phone in the hours before the victim's death?

II. Factual and Procedural Background

On September 25, 2009, at approximately 2:50 p.m., Robert Watkins (hereinafter "Watkins") was shot and killed during an apparent robbery in Dover, Delaware. Watkins and his girlfriend, Rosita Brady (hereinafter "Brady"), had agreed to meet the defendant, Jermaine Zachary (hereinafter "Defendant"), and the shooter at a residence on Jeffrey Drive with the intent to purchase pit bull puppies from a man named "Jonesy." Brady told police that they drove to the residence with \$1,800. When they arrived at the residence, Defendant got into the rear passenger seat of the vehicle and asked Brady if her vehicle was for sale. At this time, the shooter, who was standing outside the vehicle, pulled out a handgun and pointed it at the victim. Watkins was shot once in the torso and later pronounced dead at Christiana Hospital.

Delaware State Police questioned Defendant on the day of the murder. Brady identified Defendant as "Jonesy." However, no arrests were made in the case until July 2012, when Detective Mark Ryde, who had been recently assigned to the case, reviewed the Defendant's cellular phone records. Ryde discovered a series of text messages exchanged by the Defendant and the user of a prepaid cell phone number with the number 202-236-4884 (hereinafter "the 202 number") between 12:20 p.m. and 12:48 p.m. on the day of Watkins' death. The State alleges that these text

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messages are strong circumstantial evidence that Defendant conspired with the user of the 202 number, which the State purports was the alleged shooter,¹ to rob Watkins and Brady.

Defendant was arrested and indicted on one count of Murder in the First Degree, two counts of Attempted Robbery in the First Degree, one count of Conspiracy in the Second Degree, and two counts of Possession of a Firearm during the Commission of a Felony. In a motion in *limine* filed on April 30, 2013, Defendant challenges the admissibility of the following text messages exchanged between Defendant's cell phone and the 202 number in the hours preceding the shooting:

Sent to 202-236-4884 at 12:24 p.m.: 'Kum Rob Dub \$RootOfAllEvil'

Received from 202-236-4884 at 12:24 p.m.: 'Were u at'

Sent to 202-236-4884 at 12:25 p.m.: 'Murda im about a shoot dice \$RootofAllEvil'

Received from 202-236-4884 at 12:25 p.m.: 'He shootn now'

Sent to 202-236-4884 at 12:28 p.m.: 'were u at \$RootofAllEvil'

Received from 202-236-4884 at 12:29 p.m.: 'Felton'

Sent to 202-236-4884 at 12:29 p.m. 'Oh I ant even gonna start shootn then \$RootofAllEvil'

Received from 202-236-4884 at 12:29 p.m.: 'Ight'

Sent to 202-236-4884 at 12:48 p.m.: 'Yo u still dwn there he got like 1500 on em \$RootOfAllEvil'

Received from 202-236-4884 at 12:48 p.m.: 'Dam yea get em or stay wit him.'

Defendant challenges the admissibility of these text messages on the grounds that they cannot be properly authenticated, are irrelevant, and are unduly prejudicial under

¹ The alleged shooter has not been charged for his role in Watkins' death. The Court will thus abstain from identifying this individual by name.

Rule 403 of the Delaware Rules of Evidence (hereinafter “D.R.E.”). The State responded to Defendant’s motion in *limine* on May 10, 2013. In its response, the State contends these text messages both prove the existence of a conspiracy to rob the victim and his girlfriend, and serve as statements made in furtherance of that conspiracy. Thus, the State argues that the text messages are highly relevant, and that their probative value is not outweighed by their prejudicial effect.

III. Discussion

The first issue raised by Defendant’s motion in *limine* is whether the State can adequately authenticate the aforementioned text messages sent from the 202 number (hereinafter “the 202 messages”) to Defendant’s phone. Authentication is an indispensable condition precedent to the admissibility of documentary evidence.² This requirement is satisfied when the proponent of the writing or document in question produces evidence “sufficient to support a finding that the matter in question is what its proponent claims.”³ Potential methods of authentication are illustrated in Rule 901(b).⁴ The most germane to the present case is found in D.R.E. 901(b)(4), which provides that a finding of authenticity may be based entirely on circumstantial evidence, including the document’s “[a]pppearance, contents, substance, internal

² See D.R.E. 901(a).

³ *Id.*

⁴ See D.R.E. 901(b). Potential methods of authentication include testimony by a witness with knowledge that the document is what the proponent claims it to be; circumstantial evidence, including the document’s own distinctive characteristics; or comparison with previously authenticated specimens by the trier of fact or an expert witness. See *id.* 901(b)(1)-(4).

patterns, or other distinctive characteristics, taken in conjunction with the circumstances.”⁵ Proof of authorship need not be conclusive,⁶ but a *prima facie* showing of the author’s identity must be established for the writing to be admissible.⁷ The issue in the present case is whether there is sufficient circumstantial indicia that the alleged shooter was the individual exchanging text messages with Defendant.

Whether text messages are subject to the same authentication requirements under D.R.E. 901 as other electronic documents appears to be a somewhat novel question of law in this jurisdiction.⁸ Thus, I find it helpful to consider the decisions of other courts that have addressed this issue. For example, in *Commonwealth v. Koch*, the Superior Court of Pennsylvania considered the authentication of text messages transcribed from the defendant’s cellular phone.⁹ The court held that the

⁵ See D.R.E. 901(b)(4); see also *Swanson v. Davis*, 2013 WL 3155827, at *4 (Del. Supr. June 20, 2013)).

⁶ *United States v. Sinclair*, 433 F. Supp. 1180, 1196 (D. Del. 1997) (interpreting the federal analogue to D.R.E. 901).

⁷ *Id.* (citing *United States v. Amer. Radiator & Standard Sanitary Corp.*, 433 F.3d 174, 192 (3d Cir. 1970), *cert. denied*, 401 U.S. 948, 91 S.Ct. 928, 28 L.Ed.2d 231 (1971)).

⁸ The Delaware Supreme Court recently had the opportunity to address whether text messages were sufficiently authenticated as to render them admissible at trial. See *id.* However, in *Swanson*, the Court’s review was limited to determining whether the Family Court abused its discretion in excluding certain text messages offered by the proponent when the proponent had not pursued any line of authentication. *Id.* The Court did not reach the question of whether text messages are subject to the same authentication requirements under D.R.E. 901 as other documents, including proof of authorship.

⁹ *Commonwealth v. Koch*, 39 A.3d 996, 1002-05 (Pa. Super. Ct. 2011).

police detective’s description of how he transcribed the text messages from the defendant’s cell phone, together with his representation that the transcription was an accurate representation of the text messages on the phone, was insufficient to authenticate the identity of the author as the defendant.¹⁰ The court observed that, as with non-electronic documents generally, the identity of the sender is critical to the authentication of text messages,¹¹ and that “the difficulty that frequently arises in ... text message cases is establishing authorship.”¹² A person cannot be identified as the author of a text message based solely on evidence that the message was sent from a cellular phone bearing the telephone number assigned to that person because “cellular telephones are not always exclusively used by the person to whom the phone number is assigned.”¹³ Thus, some additional evidence, “which tends to corroborate the identity of the sender, is required.”¹⁴ Circumstantial evidence corroborating the author’s identity may include the context or content of the messages themselves, such as where the messages “contain[] factual information or references unique to the parties involved.”¹⁵ Other jurisdictions have also looked to the context and content

¹⁰ *Id.* at 1004-05.

¹¹ *See id.*

¹² *Id.* at 1004.

¹³ *Id.* at 1005.

¹⁴ *Id.* at 1005.

¹⁵ *Id.* at 1004.

of the messages for sufficient circumstantial evidence of their authorship.¹⁶

I find the reasoning of *Koch* persuasive. Establishing the identity of the author of text messages through the use of corroborating evidence is critical to satisfying the authentication requirements of D.R.E. 901. Thus, I conclude that, in the present case, the State, as the proponent of the text-message evidence, must explain the purpose for which the text messages are being offered and provide sufficient direct or circumstantial evidence corroborating their authorship in order to satisfy the requirements of D.R.E. 901.

The State intends to offer the aforementioned text messages both as evidence that Defendant conspired with the alleged shooter to rob Watkins and Brady, and as statements of co-conspirators. As such, the messages are only relevant to the extent that the State can authenticate that the Defendant authored all of the outgoing messages and that the alleged shooter authored the incoming messages. The parties agree that Defendant authored all of the outgoing messages. Indeed, the State is prepared to corroborate that Defendant was the author of the outgoing messages with testimony from various witnesses with knowledge of Defendant's cell phone number and use of the signature "\$RootOfAllEvil."

¹⁶ See, e.g., *Dickens v. State*, 927 A.2d 32, 36-37 (Md. 2007) (identifying details in text messages that could have been known by only a small number of persons, including defendant, defendant's conduct after the messages were sent, and nickname used in one message as circumstantial evidence sufficient to link defendant to the messages); *State v. Taylor*, 632 S.E.2d 218, 230-31 (N.C. Ct. App. 2006) (pointing to information in the message and that the sender identified himself twice using the victim's first name as sufficient circumstantial evidence that the victim sent the messages).

Glaringly absent in this case is any evidence tending to substantiate that the alleged shooter wrote the 202 messages. In the present case, authentication requires more than mere confirmation that the 202 number belongs to a particular person.¹⁷ Indeed, the 202 number was issued to a prepaid cell phone, and, therefore, had no registered owner or user associated with it. Thus, the State must rely on circumstantial evidence to corroborate that the alleged shooter authored the 202 messages. At the evidentiary hearing, the State announced its intentions to authenticate the text messages by the content of the exchange. The State argued that only the alleged shooter would be inquiring into Defendant's whereabouts in the hours preceding the shooting, and that a jury could reasonably infer from the messages themselves that the alleged shooter was speaking of Watkins and Brady when he told Defendant to "kum rob dub" and "get em and stay wit him."

I disagree. The content of this conversation is somewhat cryptic. It's equally plausible to infer that Defendant was merely discussing his gambling activities with an unknown individual in this exchange. There are no contextual clues in the text messages themselves that tend to corroborate that the alleged shooter authored the incoming text messages. In other cases in which a message has been held to be authenticated by its content, the identifying characteristics have been much more distinctive of the purported author and often have been corroborated by other events

¹⁷ At the evidentiary hearing, counsel informed the Court that the payments records that the State could have used to determine the identity of the prepaid phone user were no longer available from the provider.

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or with forensic computer evidence.¹⁸ Without additional evidence from which the jury could infer that the alleged shooter authored the incoming messages, the State cannot authenticate the 202 messages. Without proper authentication, this text message exchange is simply not relevant to this case; as it does not have the tendency “to make the existence of any fact that is of consequence to the determination of the action more or less probable” than it would be without it.¹⁹ Because the State cannot satisfy the requirements of D.R.E. 901, I need not reach the additional bases for exclusion argued by Defendant.

¹⁸ See, e.g., *United States v. Siddiqui*, 235 F.3d 1318, 1322-23 (11th Cir. 2000) (e-mails authenticated not only by defendant’s e-mail address but also by inclusion of factual details known to defendant that were corroborated by telephone conversations), *cert. denied*, 533 U.S. 940, 121 S.Ct. 2573, 150 L.Ed. 737 (2001); *Dickens*, 927 A.2d at 36-37 (threatening text messages received by victim on cell phone contained details few people would know and were sent from phone in defendant’s possession at the time); *Taylor*, 632 S.E.2d at 231 (text messages authenticated by expert testimony about logistics for text message receipt and storage and messages contained distinctive content, including description of car victim was driving); *In re F.P., a Minor*, 878 A.2d 91, 93-95 (Pa. Super. Ct. 2005) (instant electronic messages authenticated by distinctive content, including author’s reference to self by name, reference to surrounding circumstances and threats contained in messages that were corroborated by subsequent actions). Compare *Griffin v. State*, 19 A.3d 415, 422-24 (Md. 2012) (admission of social media pages was reversible error where proponent advanced no circumstantial evidence of authorship); *Koch*, 39 A.3d at 1005 (text messages inadmissible where proponent offered no evidence tending to substantiate that defendant wrote drug-related text messages).

¹⁹ D.R.E. 401.

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Defendant's Motion in Limine is hereby **GRANTED**.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

oc: Prothonotary

xc: R. David Favata, Esquire

William J. Rhodunda, Jr., Esquire