IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

APPELLATE CASE NO: **09-AP-67**
LOWER COURT CASE NO: 48-2009-MM-231-E

GABE RHENALS,
Appellant,
vs.

STATE OF FLORIDA,
Appellee.
_____/

Appeal from the County Court for Orange County, Florida, Ken Barlow, County Court Judge

J. L. Perez and Jeffrey D. Deen, Regional Counsel, Office of Criminal Conflict and Civil Regional Counsel, for Appellant.

No appearance for Appellee.

Before Thorpe, G. Adams, and Evans, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING TRIAL COURT

Gabe Enrique Rhenals appeals the final Order of Judgment and Sentence rendered on October 7, 2009 in case number 2009-MM-231-E. The State did not file an Answer brief. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1). After consideration of the record on appeal and Appellant's brief, this Court dispenses with oral argument pursuant to Florida Rule of Appellate Procedure 9.320, and affirms the ruling of the trial court.

Rhenals was charged with stalking. His initial trial ended in a mistrial. Prior to

the second trial, he filed a Motion in Limine, seeking to prevent the victim or witnesses from using the word "stalking, but the lower court denied this motion based on rulings from the prior trial. The State offered a Facebook document and various e-mail documents into evidence. Rhenals objected on various grounds, including improper foundation, improper authentication, and hearsay, but the lower court admitted these documents into evidence and found them authentic. Rhenals was convicted as charged.

Issues on Appeal

I. The lower court erred in denying his Motion in Limine to exclude the use of the word "stalking" by the State's witnesses.

II. The State failed to properly authenticate the Facebook page and e-mail documents before they were admitted.

III. The Facebook page and the e-mail were inadmissible double hearsay.

The standard of review of a trial court's ruling on a motion in limine is abuse of discretion. *Mackey v. State*, 55 So. 3d 606, 609 (Fla. 4th DCA 2011). The same is true for rulings on the admissibility of evidence. *Stallworth v. State*, 53 So. 3d 1163, 1165 (Fla. 1st DCA 2011).

Claim I

Rhenals argues the lower court erred in denying his Motion in Limine to exclude the use of the word "stalking" by the State's witnesses because the word is a legal conclusion, which cannot be made in good faith by a person who lacks proficiency in the law. He further argues the word "misled, confused, and prejudiced the jury" against him in violation of Florida Rule of Evidence 90.403.

Rhenals presents no case law in support of this argument, and the Court finds none in Florida. However, the Kansas Supreme Court addressed a similar claim in *State v. Whitesell*, 13 P. 3d 887, 904-905 (Kan. 2000) and held it was not an abuse of discretion to allow testimony in which the words "stalked" or 'stalking" was used. "Neither of the statements were made to suggest a legal conclusion or to summarize the legality of Whitesell's actions. ... [H]er statement was not a legal conclusion but a representation of her fear." *Id*. at 905.

Claim II

Rhenals argues the State failed to properly authenticate the Facebook page and the e-mail document before they were admitted into evidence. In support, he cites *State v. Love*, 691 So. 2d 620, 621 (Fla. 5th DCA 1997),[1] wherein the Fifth District Court of Appeal held that section 90.901 of the Florida Statutes requires the introduction of prima facie evidence to prove that the proffered evidence is authentic. "Evidence may be authenticated by appearance, contents, substance, internal patterns, or other distinctive characteristics taken in conjunction with the circumstances." *Id.* Authentication is merely presenting sufficient evidence that "the proffered evidence is what it purports to be." *U.S. v. Caldwell*, 776, F.2d 989, 1002 (11th Cir. 1985).

Evidence that the defendant's name is written as the author of an e-mail or that the message originates from a social networking site such as Facebook is not sufficient,

[1] *Love* appears to be the only Florida case dealing with the requirements for authentication of electronic communication, as raised in the instant case.

standing alone, to authenticate the electronic communication as having been written or sent by the defendant. *Commonwealth v. Purdy*, 945 N.E. 2d 372, 381 (Mass. 2011). "There must be some "confirming circumstances" sufficient for a reasonable jury to find by a preponderance of the evidence that the defendant authored the e-mails." *Id.* (citations omitted).

In *Commonwealth v. Williams*, 926 N.E. 2d 1162 (Mass. 2010), the Massachusetts Supreme Court held there was insufficient evidence to authenticate messages purportedly sent to a My Space account, where there was no testimony regarding how secure a My Space Web page is, who can access it, whether codes are needed for access, etc.

However, in *Purdy*, the following confirming circumstances were found sufficient to meet the threshold: one message included an attached photograph of the defendant and in another, the author described the "unusual set of services provided by the salon" he operated. (The defendant was charged with driving support from the earnings of prostitution and maintaining a house of prostitution.) *Purdy*, 945 N.E. 2d at 381. His uncorroborated testimony that others used the computer went to the weight, not the admissibility, of the evidence. *Id*. at 382.

Furthermore, in *Bobo v. State*, 285 S.W.3d 270, 275 (Ark. App. 2008), the juvenile victim testified that he sent or received mail from the defendant, and the defendant admitted sending mail, although she denied the sexual content of the mail. The appellate court, noting that one example of authentication is the "testimony of a witness with knowledge that a matter is what it is claimed to be" held the e-mails were properly

authenticated.

In the instant case, the victim testified Rhenals was a student in a class she taught at the University of Central Florida. She said she knew the e-mails were from him because he used the same signature, "GR," when he sent correspondence to her, and he referred to an article from class. Although the court in *Love* articulated eleven identifying features, these two are sufficient to authenticate the document. Rhenals argues the victim admitted the Facebook page had been altered, but she merely indicated "it seems to be cut off here because there's another line that he – that he wrote" and there was no signature on the document introduced at trial.

Rhenals took the stand in his own defense, but in doing so, he helped establish the elements of the state's case. He acknowledged that he responded with "a very coy yes" when Detective Powers asked if he was attracted to the victim in a sexual way. He also acknowledged that he contacted the victim via e-mail and Facebook and that he received a temporary injunction. On cross-examination, he continued to assert that his contacts were school-related, but acknowledged telling her that he was obsessed with her, which was "probably not" something she wanted to hear. He told her he knew it was inappropriate and she needed to tell him to knock it off." He acknowledged the victim got a police escort because of his behavior, but thought it was still okay to contact her because he "thought she was being influenced by other professors." He did not deny sending the e-mails. He admitted sending the e-mail about an article he read, which he found on the website of the class syllabus, "because it showed that I was still interested,

and that I wasn't some creepy stalker that I still had a very fervent interest in the material that she was providing to her students." On re-direct, he tried to clarify that being obsessed with her meant he was obsessed with the fact she accomplished so much, he could relate to her, and held her in high esteem.

Rhenals' acknowledgment that he contacted the victim through e-mail and Facebook, together with the victim's testimony that she received the e-mail and Facebook contacts, was more than sufficient to authenticate the documents under *Love* and *Bobo*.

Claim III

Rhenals argues that even if the documents are deemed authentic, they are inadmissible hearsay within hearsay. In support, he cites *Thomas v. State*, 993 So. 2d 105 (Fla. 1st DCA 2008), where the State sought to introduce an e-mail from one apartment complex employee to another regarding a phone call from a resident of the complex, the woman Thomas was accused of murdering. The victim purportedly told the first employee that Thomas had been living in her apartment for a year, although he was not on the lease, "and now she wants him out but he refuses to leave." *Id.* at 106. The trial court admitted the e-mail based on the business record exception. *Id.* at 107. The First District Court of Appeal held the employee's e-mail itself was hearsay because it was an out-of-court document being offered for the truth of the matter asserted, and the statement from the victim to the employee was also hearsay. *Id.* at 108.

a. Facebook

Regarding the first level of hearsay, Rhenals argues the State entered the

document for the truth of the matter it asserts and although the victim testified about her familiarity with the conversation depicted in the document, she was not called as the custodian of records for Facebook.

The State argued at trial that the e-mails constituted admissions by a party-opponent under section 90.803 of the Evidence Code. This argument remains persuasive. Section 90.803(18) of the Evidence Code establishes an exception to the hearsay rule for statements that are offered against a party and that are the party's own statement. Furthermore, pursuant to section 90.801(2), a statement is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement, and the statement is inconsistent with his trial testimony.

As for the failure to call the custodian of records for Facebook, that argument goes to authentication, not to the issue of whether the evidence constitutes hearsay.

Regarding the second level of hearsay, Rhenals notes the State's argument that the statements qualified as an admission by a party opponent, and relies on his claim that the State failed to make a prima facie showing of authenticity. As a result, he claims, there is insufficient evidence to show he is the author of the statements in the Facebook message. This claim lacks merit, because the statements were properly authenticated.

b. e-mails

Rhenals makes the same arguments set forth in sub-section (a), above, and this claim lacks merit for the reasons already noted.

Based on the foregoing, it is ORDERED AND ADJUDGED that the judgment and sentence of the trial court are AFFIRMED.

DONE AND ORDERED on this ____1st___ day of ____August_____ 2011.

_/S/_____
JANET C. THORPE
Circuit Court Judge

_/S/_____
GAIL A. ADAMS
Circuit Court Judge

_/S_____
ROBERT M. EVANS
Circuit Court Judge

Certificate of Service

I certify that a copy of the foregoing Final Order Affirming Trial Court has been provided this ___1st____ day of ___August_____ 2011 to Alicia Levetta Peyton, Assistant Public Defender, 435 North Orange Avenue, Suite 400, Orlando, Florida 32801; and the Office of the State Attorney, 415 North Orange Avenue, Orlando, Florida 32801.

__/S/_____
Judicial Assistant