THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY

Court of General Sessions
The Honorable Clifton Newman, Circuit Court Judge

Court of Appeals Case No. 2022-000361

THE STATE,

Respondent,

v.

MICHAEL DEANGLO CORBITT,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in allowing an expert witness to testify beyond the scope of Rule 801 (d)(l), SCRE, in a criminal sexual conduct case, where the witness exceeded the lawful bounds of the rule and told the jury in Appellant's case about much more than time and place of the incident?

COUNTER-STATEMENT OF ISSUES ON APPEAL

I.

Has Appellant preserved any issue for appeal where the trial court's ruling was based on two grounds, he only raised one ground at trial, and he argues a different ground on appeal?

II.

Did the Court commit reversible error in allowing the sexual assault nurse examiner, who performed the sexual assault examination upon the victim, to testify as to what the victim said had happened to her when such was either not hearsay under Rule 801(d)(1)(D), SCRE, or was relevant to the medical examination and treatment of the victim and admissible under Rule 403(4)?

STATEMENT OF THE CASE

Appellant was indicted for the offenses of first degree criminal sexual conduct, kidnapping, first degree assault and battery, and carjacking without great bodily harm (Indictments 2019-GS-38-0483 – 0486). He pled not guilty and was tried before a jury in Orangeburg County on March 7-9, 2022. At the conclusion of his trial, the jury found Appellant guilty as charged. The trial court thereafter sentenced Appellant to a 16-year term of imprisonment on each of the criminal sexual conduct, kidnapping, and taking or attempting to take a motor vehicle from a person by force without great bodily harm convictions, and a 10-year term of imprisonment on the assault and battery in the first degree conviction, with all sentences ordered to run concurrently.

This appeal follows.

STATEMENT OF FACTS

On the morning of September 23, 2018, Keandra Nickens (hereafter referred to as the victim) met Johnny Brown, who she had been dating for a couple of years. (Tr. p. 122, lines 1-11; p. 124, lines 1-20.) They had consensual sex, during which Mr. Brown, who was not wearing a condom, ejaculated inside her. (Tr. p. 122, line 8; p. 122, line 20; p. 123, line 25 – p. 124, line 3.)

Afterward, the victim received a call from Appellant, who she was also dating. (Tr. p. 124, lines 4-5; p. 124, lines 10-11.) He asked her to go eat breakfast with him. She drove her car, a black Nissan Altima, to the house of Appellant's mother in Springfield to pick him up. (Tr. p. 124, lines 4-9; p. 125, line 4 – p. 126, line 1.)

After the victim picked Appellant up, he drove them in her car to the Sonic in Orangeburg. As they were in the drive-through, Appellant made a comment about a guy to whom he thought she was "talking." (Tr. p. 125; line 15 – p. 126, lines 10-15.) Appellant said, "[I]f you're going to talk to him you might as well let us run a train on you." (Tr p. 126, lines 15-16.) As a result, the victim adopted an attitude. (Tr. p. 126, line 17.) After they received their food, they left, and Appellant drove them back toward his home in Springfield. (Tr. p. 125, lines 17-19; p. 126, lines 22-25; p. 127, lines 7-12.) While he was driving, the victim, who was tired, was leaning and closing her eyes when Appellant hit her "out of the blue." (Tr. p. 127, lines 16-22.) He hit her in the face and eye. (Tr. p. 127, line 23 – p. 128, line 1.) The victim then leaned over, holding her face and crying. (Tr. p. 128, lines 6-7.) Appellant told her to "shut up, it didn't hurt." (Tr. p. 128, lines 7-8.) He grabbed her by her hair and held her hair the whole time until they arrived at his mother's house. (Tr. p. 128, lines 8-10.) When they arrived there, they did not get out of the car and did not stay there long. (Tr. p. 128, lines 11-19.) Instead, Appellant held her head down all the way, pulling her hair until he turned around and drove out of his mother's yard. (Tr. p. 128, lines 14-24.)

Appellant drove down to a road that was further down the road from the mother's house. (Tr. p. 128, lines 22-24.) When Appellant turned onto that road, he drove further down it, turned the car around, and put it in park. He then got out of the car, went over to the passenger side where he tried to pull the victim out. (Tr. p. 129, line 3 – p. 130, line 6.) Because she held onto the steering wheel, he pulled her hair until she eventually let go and he was able to pull her out of the car. (Tr. p. 130, lines 13-17.) Appellant then started punching, choking, and hitting the victim along with screaming and yelling at her. (Tr. p. 130, lines 17-19.) He told her he was going to kill her. (Tr. p. 130, lines 19-20.) He then pulled her pants down and penetrated her, first with his fingers and then his penis. (Tr. p. 130, line 25 – p. 131, line 2.) He did not ejaculate inside her. (Tr. p. 131, lines 18-21.) The victim said, "oh, [G]od," and Appellant replied that "[G]od can't help you now." (Tr. p. 131, lines 2-4.) He also told her he was going to kill her and that he wanted her to return everything he had ever given her, including the money he had paid for her hair, nails, gas, and food. (Tr. p. 131, lines 11-17.) The victim told him she would give him the money if he took her to an ATM. (Tr. p. 131, line 15 – p. 132, line 4.) As she lay on her back on the ground crying, Appellant said, "bitch, get up." She kept crying. He grabbed her by her hair and pulled her into the car; he then got in on the driver's side and drove them away from that area. (Tr. p. 132, lines 6-12.)

Appellant drove them to the Horizon convenience store in Springfield. The victim tried to get the "dirt and stuff" off her, in an effort to make herself look presentable to go into the store and convinced Appellant to go into the store with her. (Tr. p. 132, lines 12-23; p. 151, line 23 – p. 154, line 24.) He got out of the driver's side of the car and walked around to the passenger side. The victim, who was afraid of Appellant, started to get out of the car, but when he got closer to her, she jumped back in the car, locked the door, and got in the driver's seat. She did not want to

honk the horn or get the attention of anyone inside the store; she was afraid and just wanted to get away. The keys were still in the car, and she started it. (Tr. p. 132, line 24 – p. 133, line 21; p. 152, line 5 – p. 153, line 3.)

Appellant jumped on top of the car's hood, and the victim, still afraid, just drove off. Heading out of town toward Blackville, she drove fast – maybe 55 or 60 miles per hour. Appellant held on. (Tr. p. 133, line 21 – 134, line 19.) She was driving so fast over a bridge at one point that the car was "jumping," and Appellant was "being lifted" off the car. (Tr. p. 134, lines 19-22.) Not wanting to run him over and hurt him, she stopped the car. She told him to get off her car. She was screaming. She cracked her window and yelled at him to get off her car and away from her. (Tr. p. 134, line 20 – p. 135, line 2.) Appellant was crying, and the victim thought he was "believable." Then Appellant started reaching in through the window. The victim thought originally that he was trying to hit her, so she leaned away from the window but then thought he was letting the window down. (Tr. p. 135, lines 2-17.) Appellant then jumped through the driver's window into the car and got on top of her, punching her in the face and fighting her. (Tr. p. 135, lines 17-25.) The victim was trying to get away from him, but, as he was fighting her, she started to defend herself by fighting back. (Tr. p. 136, lines 1-7.) The car was still on and still in drive; as he was hitting her, the car was moving. Her foot hit the gas, and the car accelerated. The victim then slammed on the brakes causing Appellant to fly into the windshield (Tr. p. 136, lines 8-13.) When he came away from the windshield, he continued to fight her, punching her in the face and hitting her. He then started biting her – he kept trying to sit on her and drive off by biting her on the hand and legs, trying to get her to take her foot off the brake. He kept trying to put the car in drive, and she kept putting it in park. (Tr. p. 136, lines 13-24.)

At first, no one else was in the area. (Tr. p. 137, lines 1-2.) But as the assault continued,

cars were passing, and she stuck her hand and arm out the window to get someone's attention; she did not care who. (Tr. p. 137, lines 3-9.)

At that same time – midday after lunch – Hunter Johns and Eric Walker were headed home to Lexington from a friend's farm in Blackville. Mr. Johns was driving his truck. It was a clear, sunny day, and as he was driving about 55 miles per hour on Highway 3, Mr. Walker saw a car driving erratically. Mr. Johns slowed down. The car came to a stop as they came up to it. (Tr. p. 161, lines 1-18; p. 183, lines 10-13; p. 193, lines 3-5; p. 194, lines 18-25.) Both he and Mr. Walker looked to see if something was going on or if someone was waving for no reason. Mr. Johns saw a lady waving her hand out the window, yelling for help. Mr. Walker saw two people "entangled in the car" and it looked like the woman's life was in danger. Mr. Johns stopped a little way past the car, put his car in park, jumped out, and ran to the car. (Tr. p. 137, lines 6-14; p. 138, lines 1-9; p. 161, lines 18-21; p. 181, lines 12-25; p. 193, line 7 – p. 194, line 17.)

The victim was sitting in the driver's seat, while Appellant was beating her up. He was punching her, and they were wrestling and fighting. Mr. Johns could see the victim had a bloody lip and bruised, swollen eyes, and blood somewhere on her face, lip, or nose. (Tr. p. 161, line 25 – p. 162, line 5; p. 182, lines 3-6.) Mr. Johns yelled something and went to open the door. As he did so, Appellant yelled at him – something like, "stop, this is my wife." The victim begged him not to leave her and said he was going to kill her. (Tr. p. 137, lines 21-23; p. 182, lines 6-16.) At that time, Mr. Johns was an arm's length from Appellant and got a pretty good look at him.[1] Mr.

[1] At trial, Mr. Johns made an in-court identification of Appellant as the man he saw in the car beating the victim. (Tr. p. 184, lines 6-15.) In explaining his ability to recognize him and why he did not provide as complete a description of him to the police on the day of the incident as he did in court, he said:

- he barely wrote a page and did not include every single detail because he was "amped up from the altercation" (Tr. p. 185, lines 16-24);

Johns opened the door, and Appellant threw the victim out. Mr. Johns tried to open the door again, but Appellant shut it and sped off. (Tr. p. 137, line 13 – p. 138, line 20; p. 162, lines 6-17; p. 182, line 6 – p. 183, line 4).

By the time Mr. Walker got out of the truck and "wheeled" himself to the other side, the victim was on the ground and the car was speeding off. He then called 911 and provided the plate number of the car. (Tr. p. 193, lines 19-23; p. 195, lines 1-12; p. 197, line 20 – p. 198, line 5; p. 289, lines 19-20.) Mr. Johns and Mr. Walker stayed with the victim until Investigator Stuke, with the Orangeburg County Sheriff's Office arrived, comforting her and giving her a baggy of ice for the injuries to her face and some Advil. (Tr. p. 184, line 24 – p. 185, line 5.) She identified her assailant to them as Appellant. (Tr. p. 185, lines 6-8.)

When Investigator Stuke arrived, he found the victim, Mr. Johns, and Mr. Walker. (Tr. p. 288, line 23 – p. 289, line 8.) He observed her injuries and took statements from the two men. (Tr. p. 289, line 9 – p. 290, line 4.) The victim was very upset and being helped by the men, so he did not take a statement from her immediately. (Tr. p. 289, lines 12-20.)

The victim told Investigator Stuke that Appellant physically assaulted her, but – because she was embarrassed – she did not talk about the sexual assault until later after that day. (Tr. p. 139, lines 3-14; p. 142, lines 13-20; p. 144, line 25 – p. 145, line 10.) He took photographs of her, showing her busted lip, black eye, where her hair was pulled out, scratches and blood on her shirt, her ripped shirt, and the bite marks on her thigh and hand. (Tr. p. 130, lines 21-23; p. 141, line 19 – p. 142, line 11; p. 290, lines 5-7.) He also had her show him, as he drove, where Appellant had

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- he knew Appellant was the person he saw "[j]ust because it's, you know, a once in a lifetime thing to come across something like that and I – really his eyes. You know, I looked him dead in the eyes and I won't forget them." (Tr. p. 186, lines 2-5.); and
- he was 100% positive Appellant was the man he saw that day. (Tr. p. 186, lines 8-11.)

taken her that day. (Tr. p. 142, line 22 – p. 143, line 14; p. 290, line 11 – p. 291, line 6.) When they went down the back road where it turned into just a dirt road – where the sexual assault occurred, she saw and recognized the Monster energy drink can and blue straw she had been drinking. (Tr. p. 143, line 15 – p. 144, line 15; p. 292, line 1 – p. 293, line 5.) After she directed Investigator Stuke to where Appellant had taken her, her mother came, and they left together. (Tr. p. 144, lines 16-23.)

The next day, she went to the hospital to tell them about the physical and sexual assaults. She said that Appellant had done it, told them what he had done, answered other questions, and was examined. (Tr. p. 145, line 17 – p. 148, line 17.) Between the time she left Investigator Stuke, and she went to the hospital, she showered twice, urinated three or four times, had fluids to drink, and brushed her teeth. (Tr. p. 146, line 22 – p. 147, line 5.) She did not wear the same clothes when she went to the hospital as she was wearing when assaulted by Appellant the day before. (Tr. p. 147, lines 10-16.)

The victim then told Investigator Stuke about the sexual assault, and the fact that she had had consensual sex with Mr. Brown earlier on the same day. (Tr. p. 149, line 9 – p. 150, line 4.) She did not change her first statement but talked about the sexual assault. She told him that she had not been trying to be serious with Appellant because she was already "talking" with Mr. Brown. (Tr. p. 150, line 25 – p. 151, line 6; p. 294, line 15 – p. 295, line 6.)

Investigator Stuke photographed the broken windshield of the victim's car, but it was never processed because the victim's family had recovered it rather than law enforcement. (Tr. p. 299, line 22 – p. 300, line 13.) Appellant was either excluded from the DNA samples submitted (including the vaginal swab) or a comparison could not be completed. (Tr. p. 276, line 17 – p. 286, line 12.)

The victim was afraid of Appellant, but between September 23, 2018, and the date of Appellant's arrest, she reconciled with him for about a three-month period, told his mother she would straighten "this" out, visited Appellant once in the jail, and gave his mother money to put on his jail account. (Tr. p. 154, line 18 – p. 156, line 1; p. 157, lines 6-11; p. 158, lines 8-17.) At Appellant's bond hearing, she said she wanted to drop the charges, but not because it did not happen. She testified she said that because she was embarrassed. Blackville and Springfield are small towns, and she did not want everyone to know she was talking to two men at the same time.[2] (Tr. p. 155, lines 9-12; p. 157, line 12 – p. 158, line 5.)

[2] At trial, Appellant's defense was alibi. Evidence was presented that, on September 23, 2018, the defendant lived in his mother's home with his then 16- or 17-year-old cousin, his nephew, and his mother. (Tr. tr. p. 320, line 7 – p. 321, line 16; p. 327, line 22 – p. 328, line 2; p. 328, lines 9-21.) On that morning, Ms. Corbitt left for the grocery store sometime between 7:00 a.m. and noon and did not return until around 2:00 p.m. (Tr. p. 320, lines 5-12; p. 324, line 20 – p. 325, line 3; p. 334, lines 14-22.) Appellant, his cousin, and his nephew watched "Criminal Minds" on television; Appellant did not leave home while his mother was gone and said he could not leave them when his mother was out "because they're kids." (Tr. p. 320, line 7 – p. 321, line 4; p. 334, line 23 – p. 335, line 5.) Appellant testified he did not have a problem with the victim seeing someone else, but she had a problem with him seeing someone else. (Tr. p. 332, lines 11-18.) He denied kidnapping, raping, and beating the victim and stealing her car. (Tr. p. 332, line 19 – p. 333, line 8.)

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. *State v. Robinson*, 410 S.C. 519, 526, 765 S.E.2d 564, 568 (2014). When reviewing an evidentiary ruling, the appellate court affords great deference to the trial court because the admission or exclusion of evidence is left to the sound discretion of the trial court, and the trial court's exercise of such will not be disturbed on appeal absent a manifest abuse of discretion. *State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013); *State v. Williams*, 386 S.C. 503, 509, 690 S.E.2d 62, 65 (2010). "An abuse of discretion occurs when conclusions of the trial court either lacked evidentiary support or are controlled by an error of law." *State v. Simmons*, 423 S.C. 552, 816 S.E.2d 566 (2018). "The improper admission of hearsay is harmless when it could not have reasonably affected the result of the trial." *State v. Young*, 420 S.C. 608, 625, 803 S.E.2d 888, 897 (Ct. App. 2018).

ARGUMENT

Appellant has failed to preserve any issue for appeal because his objection at trial was based on only one ground, the judge admitted the challenged evidence based on two grounds, and Appellant argues a different ground on appeal than at trial. The trial court properly exercised its discretion in admitting the sexual assault nurse examiner's testimony as to what the sexual assault victim told her happened as the victim's statements were either not hearsay under Rule 801(d)(1)(D), SCRE, or fell under the "Statements for Purposes of Medical Diagnosis or Treatment" exception to the hearsay rule in Rule 803(4), SCRE. Assuming *arguendo* some of the statements were improperly admitted, any error in their admission was harmless beyond a reasonable doubt since it could not have reasonably affected the result of the trial. Further assuming *arguendo* some of the challenged statements were improperly admitted and the error was not harmless, only Appellant's criminal sexual conduct in the first degree conviction need be reversed and remanded for a new trial. (Issue I)

Background

During the presentation of the State's case, after the victim had testified, Cadey Keigans was called to the stand. Ms. Keigans testified she had bachelor's degrees in both nursing and exercise science. (Tr. p. 201, lines 6-9.) She also received special training to be a SANE, consisting of 40 hours of classroom training at MUSC and clinical hours worked at MUSC, followed by 10 supervised sexual assault cases, for which she was supervised by her director. (Tr. p. 202, lines 7-20; p. 204, line 1 – p. 205, line 22.) At Aiken Regional, she worked in the emergency department from February 2017 to October 2019. (Tr. p. 201, lines 13-23.) Ms. Keigans testified that she was a registered nurse employed by Aiken Regional. (Tr. p. 201, lines 10-18.) At the time of the trial, she worked as a nurse in labor and delivery, but in September 2018, she worked in the emergency department of the hospital. (Tr. p. 201, lines 14-23.) When she worked in the emergency department, she was also the sexual assault nurse examiner (SANE). Ms. Keigans explained that SANEs provide trauma-informed care to patients and collect evidence after a sexual assault. (Tr.

p. 202, lines 21-25.) She did approximately 50 exams as the SANE nurse. (Tr. p. 202, lines 1-6; p. 203, lines 1-3.)

After being qualified as an expert in sexual assault examinations, Ms. Keigans explained that a SANE exam includes pertinent medical history, which could include things like the timing of a woman's last period, current medications being taken, hygiene since the sexual assault, and recent consensual intercourse. The SANE then asks the patient to recall what happened, while she documents the details about the sexual assault. (Tr. p. 215, lines 11-21; p. 216, lines 1-11.) The patient is asked to undress, and the patient's clothes are collected. Next is a visual head-to-toe examination, with any findings, such as injuries, documented on the SLED form. After that, another head-to-toe examination is conducted using UV light. Finally, there is the collection of swabs for evidence, a speculum examination of the genitals, and prophylactic treatment for sexually transmitted diseases and pregnancy are provided. (Tr. p. 216, lines 13-22.)

Ms. Keigans said that she performed an exam on the victim on September 24, 2018, in the emergency department of Aiken Regional. (Tr. p. 217, lines 1-9.) The victim was by herself. (Tr. p. 217, lines 10-12.) Ms. Keigans testified the victim told her how she was assaulted. (Tr. p. 217, lines 13-18). The prosecutor then asked Ms. Keigans to explain how the victim was assaulted and how that was relevant to her examination. (Tr. p. 216, lines 13-15.)

At that point, defense counsel objected to Ms. Keigans testifying about what the victim told her on hearsay grounds. (Tr. p. 218, lines 16-17.) The trial court read out Rule 803(4), SCRE, the "Statements for Purposes of Medical Diagnosis or Treatment" exception to the hearsay rule and asked the defense to respond. (Tr. p. 218, line 25 – p. 219, line 10.) Defense counsel stated that, under Rule 801(d)(1), SCRE, Ms. Keigans' testimony should be limited to only the time and place of the assault. (Tr. p. 219, line 11 – 21; p. 220, lines 19-25.) The prosecutor countered that,

under Rule 801, the statements would not be hearsay, and, under Rule 803, they would fall under an exception to the hearsay rule. (Tr. p. 221, lines 2-5.) The trial court overruled the objection. (Tr. p. 221, line 6.)

Ms. Keigans thereafter testified that the victim said she was in a vehicle when she was initially physically assaulted by being punched in the face and having her hair pulled. (Tr. p. 221, lines 15-18.) Then, after being driven to a wooded area, the victim told her she was pulled out of the vehicle and sexually assaulted, with the "alleged assailant" penetrating her vagina first with his fingers and then with his penis. (Tr. p. 221, lines 18-22.) The victim said she was then pulled back into the vehicle by her hair and arm, and the physical assault upon her continued until they arrived at a gas station. (Tr. p. 221, line 23 – p. 222, line 1.) The victim told her she was able at that point to get into the driver's seat in an attempt to drive away. (Tr. p. 222, lines 1-2.)

The trial court then interrupted to say, "[t]he only testimony in relation to what is necessary involving medical treatment." (Tr. p. 222, lines 11-13.)

When asked by the prosecutor if she had asked the victim about vaginal penetration to know where to swab, Ms. Keigans answered affirmatively. She repeated that Ms. Keigans had said her assailant had inserted his fingers and his penis in her vagina. (Tr. p. 222, line 19 – p. 223, line 3.) She also asked the victim if he had ejaculated inside her, and the victim said he had not. (Tr. p. 223, lines 4-8.)

Ms. Keigans testified she questioned the victim about her post-assault hygiene. The victim told her that, since the assault, she had urinated about four times, had brushed her teeth that morning, had some fluids to drink, and had showered a couple of times. (Tr. p. 223, lines 9-22.) Ms. Keigans explained to the jury that post-assault hygiene matters because each time any of the activities the victim mentioned occurs, evidence gets washed away from the body. (Tr. p. 223,

lines 23-25.)

She testified she then performed her physical examination of the victim. A head-to-toe physical examination of the victim was done twice, first with the naked eye. Ms. Keigans observed and documented numerous injuries to the victim:

- an abrasion on her right buttocks,
- an abrasion on her left wrist,
- three missing acrylic fingernails on both hands (six total),
- a bruise on back of her left arm,
- a partial bite mark on her right hand,
- a scabbed-over abrasion on the middle of her forehead,
- a bruise underneath her left cheek,
- two black eyes,
- a full bite mark on her right thigh, with bruising around it, and
- a circular bruise on her left thigh.

(Tr. p. 224, line 6 – p. 225, line 9.) The subsequent UV examination was positive on the victim's left hand. (Tr. p. 224, lines 9-10.) Ms. Keigans swabbed the victim's mouth and her thighs where the bite marks were located, did a pubic hair combing, and collected fingernail scrapings. (Tr. p. 226, line 2 – p. 227, line 23.) She also collected the victim's leggings and any debris that fell onto a sheet from the victim's clothing when she undressed. (Tr. p. 228, lines 1-9.) A genital examination was done by a doctor, with Ms. Keigans present. The victim's genitalia were within normal limits. (Tr. p. 230, lines 9-12.) A vaginal swab was collected. (Tr. p. 225, line 11 – p. 226, line 1.)

Argument

At trial, the only objection and argument made by Appellant, as to Ms. Keigans' testimony about what the victim told her, was any testimony that went beyond the time and place of the

assault violated Rule 801(d)(1)(D). In support of the admission of the challenged testimony, the State argued the statements were either non-hearsay under Rule 801(d)(1)(D) or admissible under Rule 803(4) as a statement for purposes of medical diagnosis or treatment. The trial court agreed with the State. (Tr. p. 218, line 18 – p. 222, line 18.) On appeal, Appellant frames the issue as an 801(d)(1)(D) issue as follows:

> Whether the trial judge erred in allowing an expert witness to testify beyond the scope of Rule 801 (d)(l(d)), SCRE, in a criminal sexual conduct case, where the witness exceeded the lawful bounds of the rule and told the jury in Appellant's case about much more than time and place of the incident?

(Initial Brief of Appellant at 1.) He then uses the last three paragraphs of his brief to argue, for the first time, that Rule 803(4) does not apply to the challenged testimony of Ms. Keigans.

It is well-settled that an issue cannot be raised for the first time on appeal. It must have been timely and specifically raised at trial by the appellant and ruled upon by the trial court to be preserved for appellate review. *State v. Freiburger*, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005); *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). Moreover, an appellant is limited to the arguments made at trial – he or she may not argue one ground at trial and then another on appeal. *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). Here the only testimony of Ms. Keigans that Appellant is challenging on appeal is that which was admitted under Rule 803(4). His failure at trial to object to the admission of that evidence under Rule 803(4) results in his failure to properly preserve any challenge to such and leaves nothing for this Court to review.[3] *State v. Freiburger, supra; State v. Bailey, supra; State v. Rogers, supra.*

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[3] In addition, *even if* this Court were to find that Appellant preserved the Rule 803(4) challenge to Ms. Keigans' testimony at trial, Appellant failed to include it as a ground when framing his issue on appeal. *See* Rule 208(b)(1)(B), SCACR ("The statement shall be concise and direct as to each issue.... Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."). *See also State v. Hopkins*, 431 S.C. 560, 848 S.E.2d 368 (Ct. App. 2020) (when ruling

Assuming *arguendo* this Court finds this issue to be properly before it, Appellant argues the trial court erred in allowing Ms. Keigans to testify as to what the victim told her about the sexual assault beyond the time and place of the assault in violation of Rule 801(d)(1)(D) and beyond the scope of the "Statements for Purposes of Medical Diagnosis or Treatment" exception in Rule 803(4).

Respondent strongly disagrees. The trial court properly allowed Ms. Keigans' testimony that related to the time and place of the assault because it was not hearsay under Rule 801(d)(1)(D), and the remainder fell under the "Statements for Purposes of Medical Diagnosis or Treatment" exception in Rule 803(4).

Hearsay is inadmissible unless an exception applies. Rule 802, SCRE. Hearsay is defined as an out-of-court statement offered at trial to prove the truth of the matter asserted. Rule 801(c), SCRE. Rule 801 sets out some types of out-of-court statements that are specifically excluded from this definition of hearsay. Under Rule 801(d)(1)(D), if the declarant testifies at trial and is subject to cross-examination concerning the statement, statements "consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the victim, and the statement is limited to the time and place of the incident" are not hearsay.

Rule 801(d)(1)(D) thus limits "corroborating testimony" to the time and place of the assault and considers it to be nonhearsay, but any other particulars are generally considered hearsay and inadmissible unless they fall within an exception to the hearsay rule. *State v. Simmons*, 423 S.C. 552, 816 S.E.2d 566 (2018); *Thompson v. State*, 423 S.C. 235, 814 S.E.2d 487 (2018). One of the

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of a trial court is based on multiple grounds, ruling will be affirmed on appeal unless appellant appeals all the grounds).

exceptions to the hearsay rule is the "Statements for Purposes of Medical Diagnosis or Treatment" exception set out in Rule 803(4), which states:

> The following are not excluded by the hearsay rule...:
>
> * * *
>
> (4) **Statements for Purposes of Medical Diagnosis or Treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment; provided, however, that the admissibility of statements made after commencement of the litigation is left to the court's discretion.

(Emphasis in original.) This hearsay exception may apply in a criminal sexual conduct case, but it requires a nexus between the information provided by the patient and the examination, diagnosis, or treatment of the patient. *Simmons*, 423 S.C. at 563-564, 816 S.E.2d at 572. "For example, after recent trauma, these types of statements can provide the doctor with specific areas to focus on or specific conditions to search for when performing the diagnostic physical exam and are reasonably pertinent to diagnosis or treatment." *Id.*, 423 S.C. at 564, 816 S.E.2d at 572. If an objection is raised to the admission of hearsay testimony, the proponent of such bears the burden of showing it falls within a hearsay exception. *Id.*, 423 S.C. at 563, 816 S.E.2d at 572.

To the extent Ms. Keigans testified as to what the victim told her of the time and place of the sexual assault, Appellant appears to agree that that was not hearsay under Rule 801(d)(1)(D) and was thus properly admitted. The other portion of her challenged testimony, set forth above, in which she repeated what the victim told her happened during the sexual assault was hearsay, but fell under the "Statements for Purposes of Medical Diagnosis or Treatment" exception in Rule 803(4) because it was information necessary for the medical examination and treatment of the victim. Ms. Keigans' job as the SANE required her to obtain this type of information – what was done to the victim and how – so that she would know where to look on her patient's body and what

to look for, for purposes of documentation of injuries, collection of evidence, and medical treatment. That is what Ms. Keigans did in this case and that was what she testified to. Knowing what was done to the victim (the sexual assault and the physical assault used to accomplish such), how it was done, and where (not just geographic location of the assault, but also the location on the body of any potential injury or evidence), allowed her to focus her examination and ensure the collection of all necessary written and photographic documentation. Unlike in *State v. Burroughs,* 328 S.C. 489, 492 S.E.2d 408 (Ct. App. 1997), and *State v. Simmons, supra*, relied upon by Appellant, the challenged testimony of Ms. Keigans in this case did not include statements that went well beyond what is contemplated by Rule 803(4). Here, there was a direct nexus between the information provided and the examination and treatment of the victim such that the statements were all reasonably pertinent. The challenged testimony clearly falls under the exception.

This case is also further factually distinguishable from the cases cited by Appellant. In *State v. Simmons*, *supra*, *State v. Burroughs, supra*, and *State v. Brown*, 286 S.C. 445, 334 S.E.2d 816 (1985), the challenged hearsay testimony included the identification of the defendant as the perpetrator.[4] Here, Ms. Keigans did not identify Appellant; she never testified that the victim identified her assailant, and did not refer to Appellant by name, but rather used the term "assailant." Also, in *Simmons*, the prosecution emphasized the testimony of the doctor about what the victim in that case told him and how it was consistent with what the victim told his interviewer and the jury. *Id.*, 423 S.C. at 566, 816 S.E.2d at 573. In this case, the prosecution, in its closing, mentioned

[4] In its opinion in *Simmons*, 423 S.C. at 559, 816 S.E.2d at 569, the Court cited trial testimony in which a witness said the victims told them their father (Simmons) had them perform sexual acts. In *Burroughs*, 328 S.C. at 496, 492 S.E.2d at 411, the Court of Appeals said that "[a]mong the details of the assault recounted by the witnesses was that the victim told them that, before he raped her, Burroughs asked the victim if he could have a hug." In *Brown*, 286 S.C. at 446, 334 S.E.2d at 817, the witness repeated the victim's statement that "Mr. Carl" (Brown) performed the sexual acts on her.

Ms. Keigan's testimony only in the context of the examination she performed and the injuries to the victim she observed during that examination.[5] (Tr. p. 365, lines 5-23.)

However, assuming *arguendo* the trial court erred in allowing Ms. Keigans to testify as to what the victim told her happened to her, the error was harmless. "The improper admission of hearsay is harmless when it could not have reasonably affected the result of the trial."[6] *Young*, *supra*.

> "A harmless error analysis is contextual and specific to the circumstances of the case." *State v. Byers*, 392 S.C. 438, 447, 447–48, 710 S.E.2d 55, 60 (2011). "No definite rule of law governs [a finding of harmless error]; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial." *Id.* at 447–48, 710 S.E.2d at 60 (*quoting State v. Reeves*, 301 S.C. 191, 193–94, 391 S.E.2d 241, 243 (1990)). If a review of the entire record does not establish that the error was harmless beyond a reasonable doubt, then the conviction shall be reversed. *See State v. Price*, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006) (*citing State v. Pickens*, 320 S.C. 528, 531, 466 S.E.2d 364, 366 (1996)).

Simmons, 423 S.C. at 565-566, 816 S.E.2d at 573-574. Here, there was no vouching for or improper bolstering of the victim's testimony by Ms. Keigans and the prosecutor did not highlight the hearsay testimony given by Ms. Keigans in closing argument. And, while there was no eyewitness to the actual sexual assault and Appellant's DNA was not found on or in the victim, there was abundant and overwhelming evidence of Appellant's guilt, notwithstanding this hearsay testimony. Any error in the admission of the challenged testimony would, therefore, be harmless

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[5] While the prosecutor did not, in closing, repeat, discuss or emphasize any testimony by Ms. Keigans as to what the victim told her, she did remind the jury that the victim testified she told Ms. Keigans that it was Appellant who assaulted her. (Tr. p. 366, lines 3-5.)

[6] "In a direct appeal, a harmless error analysis should be employed when reviewing the admission of hearsay testimony that improperly corroborates the victim's testimony in a sexual assault case." *Thompson*, 423 S.C. at 246, 814 S.E.2d at 492.

beyond a reasonable doubt. *See Huggler v. State*, 360 S.C. 627, 602 S.E.2d 753 (2004), *abrogated on other grds., Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018); *State v. Mitchell*, 287 S.C. 572, 336 S.E.2d 150 (1985).

Further assuming *arguendo* this Court finds both error in the admission of the challenged testimony of Ms. Keigans and that its admission was not harmless, only the conviction for criminal sexual conduct in the first degree need be reversed and remanded for a new trial. The challenged testimony could not have impacted the jury's verdict on the other charges, which are supported by abundant and overwhelming evidence, including photographic and eyewitness. *See State v. Brewer*, 411 S.C. 401, 409-410, 768 S.E.2d 656, 660 (2015).

CONCLUSION

For the foregoing reasons and any other appearing in the Record on Appeal (as provided for in Rule 220, SCACR), the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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