STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY
Debra R. McCaslin, Circuit Court Judge

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Appellate Case No. 2023-001259

The State, .....Respondent,

v.

Robert B. Neeley,.....Appellant.

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# FINAL BRIEF OF RESPONDENT

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## RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court abused its discretion in admitting, pursuant to Rule 803(4), SCRE, hearsay testimony from SANE nurse Vincent conveying statements made by Victim about the sexual assault, where those statements were made to Vincent for purposes of medical diagnosis or treatment. Furthermore, whether any possible error was harmless in this case where, beyond a reasonable doubt, it did not contribute to the jury's verdict?

2. Whether Appellant's argument that the trial court erroneously held Victim's statements to the SANE nurse, about the sexual assault, admissible pursuant to Rule 106, SCRE, fails to present a justiciable controversy where, despite prevailing on the trial court's evidentiary ruling, the State did not elicit any additional sexual assault related testimony from the SANE nurse beyond what was already deemed admissible pursuant to Rule 803(4), SCRE? In addition, whether Appellant's argument is preserved for appellate review where he failed to make a contemporaneous objection on this basis when the allegedly objectionable testimony was elicited at trial? Furthermore, whether the trial court properly ruled the testimony was admissible under the rule of completeness? Finally, whether any possible error in the ruling was harmless in this case where, beyond a reasonable doubt, it could not have contributed to the jury's verdict?

## STATEMENT OF THE CASE

Robert B. Neeley (Appellant) was indicted at the May, 2023 term of the grand jury for Lexington County for armed robbery (2023-GS-32-2228); kidnapping (2023-GS-32-2229); criminal sexual conduct (CSC) – first degree (2023-GS-32-2230); burglary – first degree (2023-GS-32-2231); and possession of a weapon during commission of a violent crime (2023-GS-32-2234). On July 24-28, 2023, Appellant proceeded to a trial by jury before the Honorable Debra R. McCaslin. He was represented by Assistant Public Defenders David M. Mauldin and Jean M. Popowski of the Eleventh Circuit Public Defender's Office. Respondent (the State) was represented by Deputy Solicitor L. Suzanne Mayes and Assistant Solicitor Ashley E. Wellman of the Eleventh Circuit Solicitor's Office. At the conclusion of trial, the jury found Appellant guilty as indicted. He was sentenced by Judge McCaslin to thirty (30) years' imprisonment for first-degree CSC; twenty-four (24) years' consecutive imprisonment for armed robbery; twenty (20) years' consecutive imprisonment for first-degree burglary; twenty (20) years' concurrent imprisonment for kidnapping; and five (5) years' concurrent imprisonment for possession of a weapon during commission of a violent crime, for an aggregate sentence of seventy-four (74) years' imprisonment. (R.p.744-p.765; p.1; p.712-p.723).

Appellant timely filed a notice of intent to appeal his convictions and sentence, and a brief was submitted in support of his appeal by Appellate Defender Breen Richard Stevens of the South Carolina Commission on Indigent Defense. This Brief of Respondent follows.

## STATEMENT OF FACTS

As briefly summarized by the solicitor during her opening statement, the charges against Appellant stemmed from an incident that began shortly after eight o'clock on the night of October 12, 2021, at the home of the seventy-four (74) year old victim (Victim). The solicitor first explained that in the weeks prior to the incident, Appellant had been hired by Victim to do yardwork and other odd jobs around her home and that as a result, she thought she had gotten to know him and trusted him. The solicitor then described the crimes that were committed after Appellant parked in Victim's driveway on October 12, 2021, and walked up to her door carrying a dark duffle bag. The solicitor said that after Victim opened the door and let Appellant in:

> He grabbed her, he ripped off her clothes, he sexually assaulted her by digital penetration, demanded money from her, stole her gun and two bullets, forced her into her car to go to an ATM to get cash. He used that cash to buy drugs, which he consumed himself in the car. He then took her to an abandoned house on Rabon Road in the northeast part of Richland County and he forced her to perform oral sex on him.
>
> He finally took her home, but he didn't leave until he had threatened her, made her promise not to call the cops, and left her with her gun and those two bullets.

(R.p.140-p.144).

### Pretrial Motions – Victim's Statements – Rule 803(4), SCRE

On July 24, 2023, when the case was called for trial, the trial court heard and ruled on several pretrial motions, including the State's motion for admission, under Rule 803(4), SCRE, of several statements Victim made to Shannon Vincent, the Sexual Assault Nurse Examiner

(SANE) nurse who conducted Victim's sexual assault examination following the incident. The State sought to introduce twenty specific statements Victim made to the SANE nurse, arguing each was admissible under Rule 803(4), SCRE, as a statement made for purposes of medical diagnosis or treatment. (R.p.57, line 13-p.58, line 5; p.59, line 22-p.62, line 6). Appellant disagreed and argued that because Victim had been "medically cleared" by the emergency room staff prior to her examination by the SANE nurse, the SANE nurse "was no longer trying to diagnose or treat anything" and was merely "there as a forensic examiner to collect evidence for the prosecution." (R.p.58, line 7-p.59, line 10; p.62, line 8-p.63, line 7).

After hearing general arguments for and against admission, the trial court asked the parties to address the twenty statements individually. The court then reviewed each statement, heard arguments from each side, and made a series of rulings on admissibility, ultimately admitting eleven of the twenty statements made by Victim to the SANE nurse, and excluding the rest. Statements 1, 3, 5, 7, 8, 9, 10, 13, 14, 17, & 19 were admitted by the trial court and statements 2, 4, 6, 11, 12, 15, 16, 18, and 20 were excluded. The trial court summed-up its ruling on the eleven admitted statements as follows:

> And just for my ruling, I find that all the statements the State intends to introduce provide the doctor or the SANE nurse with specific areas to focus on or specific conditions to search for when performing her SANE examination and they are pertinent to the diagnosis and treatment of the victim.

(R.p.81, lines 12-17).

## Trial

The following day, the jury was sworn and the trial court gave preliminary instructions to the jurors. (R.p.133-p.140). The parties then gave brief opening statements before the State began presenting its case-in-chief. (R.p.140-p.148). First the State called Melissa Patrick, the training coordinator for the Lexington County 911 Communications Center to authenticate the business records they kept, including an audio recording of Victim's 911 call and the computer aided dispatch [CAD] report which documented that call and the emergency response. (R.p.148-p.153). The State then called Brenda McMillan, Victim's best friend, to the stand. McMillan went to Victim's house the Wednesday morning after the assault so she and Victim could make their routine Meals-on-Wheels delivery in their community. When she arrived, McMillan found Victim "bruised and bleeding" and looking awful, at which point Victim reported she had been sexually assaulted. McMillan called 911 on Victim's behalf and authenticated the recording of her call, which was then played for the jury. (R.p.154-p.169; p.173-p.174).

Next, the State called SLED forensic scientist Rachel Nguyen from the DNA casework Department in SLED's forensic laboratory to testify. She described her training and education, the general scope of her work in forensic serology, or "body fluid identification," as well as the parts of "directed DNA analysis" she typically performs—extraction and quantification. Nguyen was admitted as an expert in the field of serology and DNA quantification and proceeded to describe the detailed process SLED followed in receiving, handling, and testing the evidence collected and analyzed in Appellant's case. This included swabs taken by the SANE nurse

during Victim's sexual assault examination, a "known standard" buccal swab taken from Victim, and a paper napkin collected from Victim's house which tested presumptively positive for semen. Nguyen forwarded the evidence to a SLED DNA analyst for further testing. (R.p.177-p.203; p.207-p.208).

**Victim's Cell Phone - Rule 106, SCRE**

On the third day of trial, the State then called Victim to the stand. She provided detailed testimony describing the attack and sexual assaults she endured beginning on October 12, 2021, including a description of the multiple injuries she suffered. Victim knew Appellant prior to the assault and she positively identified him in the courtroom. (R.p.211-p.311; p.349-p.359). During her testimony on direct, Victim noted that in addition to taking possession of her gun Appellant also took possession of her cell phone before they left the house. (R.p.284, line 10-p.285, line 8). She explained that after the ordeal, when Appellant finally returned her to her home for the last time, she did not go back to her car until the next morning, at which point she found her phone in the door of the driver's seat. (R.p.289, lines 7-19). Victim explained that after Appellant left she was afraid because she did not know where he had gone, and she testified she did not have possession of her firearm or her phone. (R.p.292, lines 3-25).

On cross-examination, the defense focused in part on Victim's testimony about the cell phone, presumably attempting to prove Victim *did* have possession of her phone but failed to immediately call the police to report an assault. Counsel asked Victim whether, contrary to her testimony, she had told both SLED Agent Sykes during her law enforcement interview and the

SANE nurse during her examination at the hospital, that Appellant told her the phone was in the car before he left. Victim did not deny making the statements; however, said she did not remember making that comment about the phone. Counsel asked if watching a videotape of her interview with the police would help refresh her memory and when Victim agreed it could, counsel moved to allow Victim to view the video outside the presence of the jury to refresh her recollection. The State argued the proper approach would be for the defense to offer that portion of the video into evidence. (R.p.333, line 3-p.338, line 5). All of this occurred in the presence of the jury.

Following a bench conference, the jury was excused and the trial court ruled it would allow the defense to play two short clips from the police interview outside the presence of the jury. Before the video clips were played, however, the State made a motion pursuant to Rule 106, SCRE, to introduce other parts of the police interview into evidence, arguing the defense had effectively opened the door to Victim's statements. The solicitor argued this should permit the State to elicit testimony about the remainder of that portion of the statements to provide context as to why Victim might have considered her phone inaccessible as she testified, even though it was in her car. The State suggested this "rule of completeness" would apply both to the statements Victim made to Agent Sykes and to the SANE nurse about her phone, statements she had already been questioned about on cross-examination. Appellant responded and argued he was not opening the door and that since Appellant was not trying to introduce extrinsic evidence of Victim's prior inconsistent statement under Rule 613(b), SCRE, the rule of

completeness should not override the other rules of evidence prohibiting admission of the prior statements. Ultimately, the trial court agreed with the State and ruled that the defense could use Victim's statement to Agent Sykes to refresh her memory as to her comment about the phone; however, the State would also be allowed to later question Sykes about the entire portion of that statement during the State's case-in-chief. No further argument was made in regard to Victim's statement about the phone to the SANE nurse and no ruling was made by the trial court about that statement, although where both statements (to Agent Sykes and the SANE nurse) were used by Appellant on cross-examination, the trial court's ruling arguably extended to the State's ability to elicit contextual testimony about those statements when questioning both Agent Sykes and the SANE nurse later during trial. Counsel then played the clips of the law enforcement interview for Victim outside the presence of the jury and followed-up in the jury's presence by successfully getting Victim to acknowledge what she had said to Agent Sykes. The defense did not question Victim any further about the similar statement she made to the SANE nurse. (R.p.338, line 6-p.347, line 19).

Despite the trial courts earlier ruling, when the State subsequently called SLED Agent April Sykes to the stand, it never asked her *any* questions about specific statements Victim made during her interview. (R.p.458-p.510; p.523-p.532). Similarly, the defense did not ask any substantive questions about Victim's statement to Agent Sykes. (R.p.510-p.523). Later, when SANE nurse Shannon Vincent took the stand, she testified as to the various parts of Victim's statements the trial court had already ruled admissible under Rule 803(4). (R.p.541-p.587).

Additionally, in response to a question about whether Victim said anything during the exam in regard to her phone, Vincent testified Victim told her that after the assault, the assailant told Victim her phone was in the car but not to call the cops. No objection was raised to either the question or the answer about Victim's phone. (R.p.559, lines 5-9). It does not appear Victim was asked any other questions about her statements during the sexual assault examination that were not previously ruled admissible under Rule 803(4), SCRE. (R.p.541-p.587). The defense also did not probe the SANE nurse about other portions of Victim's statement, including anything she said about her cell phone. (R.p.587-p.598). During the State's closing argument, the solicitor referenced Victim's testimony that Appellant told her not to call the police, but the solicitor did *not* make any comments about Victim's phone or her statements about that phone to Agent Sykes or the SANE nurse. (R.p.657, line 23-p.658, line 5; p.670, lines 14-16; p.676, lines 3-7). During Appellant's closing argument, counsel challenged Victim's veracity, arguing her story did not make sense and she was likely making up the ordeal to cover for a consensual relationship she wanted to hide from her friends and neighbors. As evidence of this theory, Counsel claimed Appellant "gives her the phone back" after their encounter. (R.p.677-p.680, line 19). Counsel further argued:

> And he tells her not to call the police, but leaves her phone. Why wouldn't he take her phone if he didn't want her to call the police? Because she asks him to? She had the phone all night. She knew she had the phone. He gave her her phone back, gave her the car keys back, gave her ATM card back, gave her that receipt. She doesn't go to her neighbors, her concerned neighbors though. She doesn't call her friend on that phone.

(R.p.682, lines 4-13).

**Trial – Continued**

After Victim testified, the State called a series of additional witnesses to the stand. John Waters, Victim's across-the-street neighbor, described driving past Victim's car at an intersection in their neighborhood at approximately 11:55 p.m. on the night of the assault and seeing her in the passenger seat, which he described as unusual unless her brother was driving. Waters said a young white male—not her brother—was driving the car, and that Victim looked terrified. He identified a dash-camera video recording of his interaction as well as video recordings of that night from his driveway camera and doorbell camera, all of which were introduced into evidence. (R.p.359-p.368). Sergeant Larry Walker of the South Congaree Police Department was dispatched to Victim's residence after the 911 call. When he arrived, Victim described the sexual assault, showed him the clothes she had been wearing, and told him about the paper napkin where she had spit the assailant's ejaculate after he forced her to perform oral sex, which Walker retrieved from the trash can in her garage. Walker observed bruising and other signs of injury on Victim and found blood in her car. (R.p.371-p.378).

On the fourth day of trial, Lieutenant Todd Schenk from SLED's crime scene investigation unit was admitted as an expert in crime scene investigation. He was dispatched to Victim's house the day after the incident to conduct the crime scene investigation and was debriefed by other officers already at the scene when he arrived, including Sergeant Walker and SLED's lead investigator, Agent April Sykes. Schenk described all aspects of his investigation,

including collecting and securing the paper napkin with ejaculate that had been retrieved by Walker; processing the crime scene and vehicle for fingerprints, bodily fluids, and other evidence; executing a search warrant at Appellant's house and on his red Toyota Tundra truck; and photographing both the crime scene and Appellant's house. (R.p.381-p.423; p.431-p.434). Next, Agent Thomas Darnell, a fingerprint examiner for SLED, was admitted as an expert in latent print comparison analysis. Darnell testified that, within a reasonable degree of forensic science certainty, he was able to identify Appellant's right palm print and left middle fingerprint on Victim's vehicle. (R.p.438-p.456; p.457-p.458).

The State then called SLED Agent April Sykes to the stand. A Lieutenant in SLED's Special Victim Unit and a forensic interviewer, Sykes was dispatched to the crime scene where she conducted a detailed interview of Victim during which she was given details of the crimes. She later presented Victim with a six-person photo lineup and Victim identified a photo of Appellant as her assailant. Sykes described details about the overall investigation, including identifying photographs, video recordings, and items of evidence that were presented to the jury; describing visits to other locations relevant to the crime; executing search warrants; and having a victim advocate accompany Victim to the hospital for diagnosis and treatment, which included a sexual assault examination by a SANE nurse. (R.p.458-p.510; p.523-p.532). Next, Lexington County Sheriff's Department Detective Scott Purdy of the Violent Crime and Guns Unit described entering Victim's stolen gun into NCIC after the incident and how that gun was recovered over a year later during the arrest of a wanted felon. (R.p.533-p.538).

**Trial – Victim's Statements – Rule 803(4), SCRE**

After hearing from Detective Purdy, the State called SANE nurse Shannon Vincent to the stand. Vincent worked for Prisma Health as a forensic nurse examiner and was admitted as an expert in sexual assault forensic examination. She gave a detailed description of what typically takes place during a sexual assault exam, including evaluating injuries, both external and internal. Vincent talked about the need to conduct palpitations to discover hidden injuries, noting that special care is needed in cases involving strangulation. (R.p.541-p.551). Vincent then described her examination of Victim on October 13, 2021. She explained Victim had already been seen by an Emergency Room physician who, because of some chest pain, ordered a chest x-ray which was negative. Vincent said the ER had "medically cleared" Victim at that point, which meant it was okay for Vincent to come conduct a full forensic exam. She testified she followed the SLED sexual assault exam protocol, which includes getting medical history and detailed information about the cause of an injury or event from a patient. Vincent explained in great detail why such information was necessary for purposes of medical diagnosis or treatment. She then testified about her examination of Victim and statements Victim made during that examination, first describing the reported time and place of the assault. In the context of describing the injuries she documented, Vincent recounted each of the admitted statements Victim made about the assault. She repeatedly explained why those statements were important for the purpose of medical diagnosis or treatment, particularly in regard to the age of the visible injuries, possible hidden injuries, possible long-term complications, exposure to sexually

transmitted diseases, and other information that could impact the future course of treatment. (R.p.551-p.587). On cross-examination, when Vincent was questioned as to whether her purpose was to evaluate the wounds or to collect evidence, Vincent testified: "We evaluate the wounds to see if there's any additional medical treatment that may be required and then we collect evidence as well." (R.p.589, lines 1-9).

**Trial – Continued**

After the SANE nurse completed her testimony, forensic scientist Donna Money from SLED's Forensic Services Lab in the DNA Casework Department took the stand. She was admitted as an expert in DNA analysis and statistical calculations. Money testified the DNA profile of the blood found in Victim's car was sixteen septillion[1] times more likely to have come from Victim than from an unidentified unrelated individual, and the DNA profile of the semen discovered on the napkin from Victim's garage was 200 octillion[2] times more likely to have come from Appellant than an unidentified unrelated individual. (R.p.612, line 23-p.615, line 13). (R.p.601-p.615; p.618-p.622). Finally, the State called Melanie Martin of Lexington Monitoring Services (LMS) to describe Appellant's act of removing his GPS ankle monitor on June 27, 2022, during the time he was out on pretrial bond (R.p.624-p.633), and Lexington County Sheriff's Department fugitive investigator Shannon Dykes to describe her role as a member of the United States Marshall's Service Fugitive Task Force and the efforts which led to

[1] Sixteen septillion is represented numerically as 16,000,000,000,000,000,000,000,000.

[2] Two hundred octillion is represented numerically as 200,000,000,000,000,000,000,000,000,000.

Appellant's subsequent arrest in a casino in Billings, Montana, on August 29, 2022. (R.p.634-p.637).

**Directed Verdict and Right to Testify**

Appellant moved for a directed verdict, and after hearing his argument and the State's response, the trial court denied the motion. (R.p.639-p.643). The trial judge then advised Appellant, outside the presence of the jury, regarding his right to testify or not testify, stating that if he decided not to testify, the court would instruct the jurors that they cannot give that fact any consideration whatsoever. (R.p.644-p.650). The following morning, Appellant advised the court he would not testify in his own defense, and he rested without offering any evidence. (R.p.650-p.651). Appellant renewed his motion for a directed verdict and the trial court again denied that motion. (R.p.652).

**Closing Arguments, Jury Charge, Verdict & Sentencing**

After the trial court denied Appellant's directed verdict motion, the parties made closing arguments. During the State's closing argument, the solicitor argued the extent of Victim's physical injuries supported her testimony about the sexual assault. The State referenced the injuries themselves as well as the statements Victim made to the SANE nurse about those injuries during her sexual assault exam. (R.p.658-p.661). Also, during its close, the State referenced Victim's testimony that Appellant told her not to call the police; however, the solicitor did not make any comments about Victim's cell phone or her statements about that phone to Agent Sykes or the SANE nurse. (R.p.657, line 23-p.658, line 5; p.670, lines 14-16;

p.676, lines 3-7). During Appellant's closing argument, counsel challenged Victim's veracity, arguing her story did not make sense and she was likely making up the ordeal to cover for a consensual relationship she wanted to hide from her friends and neighbors. (R.p.677-p.691). As evidence of this theory, Counsel questioned why Appellant would have given Victim her phone back after telling her not to call the police. (R.p.677, line 16-p.680, line 19; p.682, lines 4-13).

The trial judge then charged the jury on the indictments, the presumption of innocence, the State's burden of proof, reasonable doubt, the roles of the judge and jury, direct and circumstantial evidence, criminal intent, credibility of witnesses, expert witnesses, the elements of each offense, the defendant's right to not testify, and the verdict forms. (R.p.693-p.712).

At the end of trial, the jury found Appellant guilty as indicted. He was sentenced by Judge McCaslin to thirty (30) years' imprisonment for first-degree CSC; twenty-four (24) years' consecutive imprisonment for armed robbery; twenty (20) years' consecutive imprisonment for first-degree burglary; twenty (20) years' concurrent imprisonment for kidnapping; and five (5) years' concurrent imprisonment for possession of a weapon during commission of a violent crime. (R.p.744-p.765; p.712-p.723).

## STANDARD OF REVIEW

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Brown*, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012), *cert. denied*, 569 U.S. 1023 (2013); *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). Our appellate courts give great deference when reviewing the evidentiary ruling of the trial court. The admission or exclusion of evidence is left to the sound discretion of the trial judge. *State v. Edwards*, 373 S.C. 230, 234, 644 S.E.2d 66, 68 (Ct. App. 2007). The trial court's ruling on the admissibility of evidence will not be reversed on appeal absent abuse of discretion or the commission of legal error which results in prejudice to the defendant. *Id.*; *State v. Adams,* 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003). An abuse of discretion occurs when the ruling lacks evidentiary support or is controlled by an error of law. *Brown*, 401 S.C. at 87, 736 S.E.2d at 265; *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011); *State v. Morris*, 376 S.C. 189, 205-06, 656 S.E.2d 359, 368 (2008); *State v. McDonald*, 343 S.C. 319, 540 S.E.2d 464 (2000).

## ARGUMENT

### I.

**The trial court did not abuse its discretion in admitting, pursuant to Rule 803(4), SCRE, hearsay testimony from SANE nurse Vincent conveying statements made by Victim about the sexual assault, because those statements were made to Vincent for purposes of medical diagnosis or treatment. Furthermore, any possible error was harmless in this case because, beyond a reasonable doubt, it did not contribute to the jury's verdict.**

Appellant argues the trial judge abused her discretion by allowing the State to present hearsay testimony from SANE nurse Shannon Vincent that went beyond the scope of time and place exception in Rule 801(d)(1)(D), SCRE. Specifically, Appellant argues the testimony from the SANE nurse describing details of the sexual assault and injuries sustained by Victim constituted hearsay outside the scope of the medical exception recognized in Rule 804(3). (Brief of Appellant, p.7-p.11). The State disagrees.

The trial court properly admitted the hearsay testimony from SANE nurse Vincent conveying statements made by Victim about the sexual assault under Rule 803(4), SCRE, because those statements were clearly made to Vincent for purposes of medical diagnosis or treatment. In any event, any possible error in admitting the statements was harmless in this case because, beyond a reasonable doubt, it did not contribute to the jury's verdict. Appellant's convictions should be affirmed.

**Law / Analysis**

Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted. *State v. Price*, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006); *Turner v. Thomas*, 431 S.C. 527, 544, 848 S.E.2d 353, 362 (Ct. App. 2020). The rule against hearsay prohibits the admission of evidence of an out of court statement to prove the truth of the matter asserted unless an exception to the rule applies. *Price*, 368 S.C. at 499, 629 S.E.2d 363 at 366 (citing Rule 802, SCRE); *State v. Weaver*, 361 S.C. 73, 602 S.E.2d 786 (Ct. App. 2004). Pursuant to Rule 801(d)(1)(D), SCRE, "[i]n South Carolina, a sexual assault victim's prior statements limited to time and place of the alleged incident are not hearsay if the victim testifies at trial and is subject to cross-examination." *State v. Jeffcoat*, 350 S.C. 392, 395, 565 S.E.2d 321, 323 (Ct. App. 2002). The rule "allows other witnesses to testify the victim complained of the assault, but only as to 'time and place,' it specifically circumscribes such testimony by 'excluding details and particulars,' including the identity of the alleged perpetrator." *Id.* at 395, 565 S.E.2d at 323. However, under Rule 803(4), SCRE, statements made for the purposes of medical diagnosis or treatment are admissible as a hearsay exception, regardless of the availability of the declarant. To be admissible the statement must: (1) be made for the purpose of and be reasonably pertinent to medical diagnosis or treatment; (2) describe the patient's medical history, past or present symptoms, pain or sensation, or the inception or general character of their cause or external source; and (3) be reasonably relied upon by the medical professional. *Glinyanay v. Tobias*, 436 S.C. 137, 145, 871 S.E.2d 193, 198 (Ct. App. 2022). These statements are exempt due to their

inherent trustworthiness. *Id.* To be admissible, the declarant's motive in making the statement must be consistent with the purpose of promoting diagnosis or treatment and the content of the statement must be such as is reasonably relied upon by a medical care provider in making a diagnosis or providing treatment. *Willingham v. Crooke*, 412 F.3d 553 (4th Cir. 2005).

The State submits that the statements in question were "reasonably pertinent" to diagnosis or treatment, fall under the exception to the hearsay rule, and were properly admitted as evidence at trial. In *State v. Burroughs*, this Court stated that "certainly, a statement that the victim had been raped or that the assailant had hurt the victim in a particular area would be pertinent to the diagnosis and treatment of the victim." *State v. Burroughs,* 328 S.C. 489, 501, 492 S.E.2d 408, 414 (Ct. App. 1997). As acknowledged by Appellant, this principle was cited with approval by our supreme court in *State v. Simmons* , 423 S.C. 552, 816 S.E.2d 566 (2018). Indeed, statements of how and when abuse occurs provide the medical care examiner with specific areas and conditions to focus on for diagnosis and treatment.

The statements in question were made by Victim to the SANE nurse, at the hospital, for the purpose of obtaining medical treatment for extensive physical injuries and on-going symptoms experienced by Victim within twenty-four hours of the assault. These injuries included significant bruising to Victim's left temple, her right breast, her vagina, her upper and lower back, both of her arms, her upper thigh, both of her kneecaps, and her buttocks; abrasions on her chest; skin tears on her left elbow, left forearm, and left wrist; and a broken fingernail. Victim reported tenderness associated with most of these injuries—tenderness that was explored

by the SANE nurse with palpitations. (R.p.271-p.277; p.286-p.288; p.561-p.584). Victim also required testing for certain sexually transmitted diseases but not others due to the specific nature of the sexual assault—oral rather than vaginal—and her exposure to semen. (R.p.555-p.556; p.582). The statements describing the assault itself were critical to medical diagnosis and treatment because they enabled the SANE nurse to know all areas of the Victim's body to explore.

Appellant quotes from *Simmons* in support of his argument (Brief of Appellant, p.7-p.9); however, the analysis from *Simmons* supports admission of the testimony here rather than weigh against it, particularly because the circumstances between the cases are strikingly different. In *Simmons*, the minor victims' pediatrician was qualified as an expert in pediatric medicine and was permitted to relay statements made by the victims during an interview with them two years after the alleged sexual abuse from their father. He testified that one victim said his father had been watching porn, told Victim not to tell anybody because of their secret pact, and that Dad made them suck his penis. *Simmons*, 423 S.C. at 559, 816 S.E.2d at 570. The supreme court found there was no arguable basis to uphold the hearsay testimony under Rule 803(4), SCRE, and that it would not "sanction the State's use of [the pediatrician] as a conduit for this glaringly inadmissible hearsay to be brought before the jury." *Id.* at 563-65, 816 S.E.2d at 572-73. Yet, the most troubling aspects of the admitted testimony were that the relevant examination occurred more than two years after the alleged abuse and that it revealed no signs of physical or sexual acts. *Id.* The court found that if the evidence was admissible under Rule 803(4) the legitimate use

of the exception would be undermined, and the general approach of Rule 801(d)(1)(D) would be thwarted. *Id.* The *Simmons* court explained that a doctor's testimony should never be used as a tool to prove facts properly proved by other witnesses. *Id.*

Here, the SANE nurse's testimony was clearly not being used to prove facts that should have been proven by other witnesses. Instead, the facts of the assault were proven through Victim's detailed and extensive testimony about the assault and her physical injuries. Her testimony was then corroborated by the documented injuries themselves, DNA evidence, and copious circumstantial evidence supporting Victim's version of events. Appellant argues that even if some of Victim's statement indicated where she had pain or bruising, the details of *how* she received them was not reasonably pertinent for the SANE nurse to diagnose or treat whether Victim actually had such injuries. (Brief of Appellant, p.10). But the State submits such a strict application would flip *Simmons* on its head and would result in the general approach of Rule 801(d)(1)(D) thwarting the recognized approach of Rule 803(4) and undermining the legitimate use of the exception. Indeed, *how* pain and bruising was received, when explained to a medical professional conducing an examination, is always related to medical treatment for that pain and bruising. This is precisely what was recognized in both *Burroughs* and *Simmons*.

Appellant next argues the SANE nurse's only role after Victim was "cleared" by the ER staff "was to fulfill the function of a forensic crime scene specialist whose 'crime scene' was a human being's body—her role was to attempt to locate evidence of a purported crime, collect it, and preserve it for future prosecution." (Brief of Appellant, p.11). But that concept was directly

refuted by the testimony of the SANE nurse herself, who explained: "*We evaluate the wounds to see if there's any additional medical treatment that may be required* and then we collect evidence as well." (R.p.589, lines 1-9) (emphasis added). As stated above, the information here was clearly given by Victim, to the SANE nurse within twenty-four hours of the assault while her injuries were fresh, was clearly made for the purpose of medical diagnosis and future treatment. The SANE nurse's testimony was reasonably pertinent to the diagnosis of physical and emotional damage and the treatments necessary to address these issues. Therefore, the testimony was admitted as a proper exception to the hearsay rule under Rule 803(4), SCRE.

The trial court did not abuse its discretion. Instead, the trial judge's careful adherence to the limitations of the medical exception is evidenced by her requiring the exclusion of nearly half of the statements the State sought to introduce. There was no error in the trial judge's admission of the SANE nurse's testimony.

**Harmless Error**

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. *State v. Sherard*, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Only errors so substantial that they result in a verdict which would not otherwise have been rendered require reversal. *State v. Jolly,* 304 S.C. 34, 39, 402 S.E.2d 895, 898 (Ct. App. 1991). "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) ). A defendant seeking reversal based on error in admission of evidence has the burden of showing that evidence was prejudicial. *State v. McElveen,* 280 S.C. 325, 327, 313 S.E.2d 298, 299 (1984). "Improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice." *State v. Jennings*, 394 S.C. 473, 478, 716 S.E.2d 91, 93 (2011) (quoting *State v. Garner*, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct. App. 2010) ). Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless. *State v. Blackburn,* 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978).

The State submits any error in the admission of the testimony was harmless, first, because it was cumulative to other evidence properly admitted at trial and, second, because the testimony was insubstantial in view of the evidence presented of Appellant's guilt such that it could not reasonably have affected the result of the trial. *See State v. Watts*, 321 S.C. 158, 467 S.E.2d 272 (Ct. App. 1996) (stating that error is harmless beyond a reasonable doubt if it does not contribute to the verdict). A comparison with the error our supreme court deemed was not harmless in *Simmons* is illustrative. In *Simmons*, even though the court noted a harmless error argument may appear plausible, it was not able to find the error harmless beyond a reasonable doubt given the critical importance the State assigned to the offending testimony.

The court noted that the State highlighted the hearsay testimony, calling the pediatrician as the first witness and emphasizing the importance of his testimony in determining credibility for a case that lacked any physical evidence. In particular, the State's closing argument focused on the hearsay testimony and asked the jury to consider how it was consistent with the victims' stories. The court held that where there was no physical evidence in the case and the only evidence was the children's accounts of what occurred and other hearsay evidence of those accounts, it was "simply a bridge too far to conclude that [the doctor's] improper testimony was harmless beyond a reasonable doubt." *Simmons*, 423 S.C. at 567, 816 S.E.2d at 574.

In the instant case, the State did not highlight the hearsay testimony from the SANE nurse, and primarily used her to describe the extent of the injuries and how certain evidence was collected. She was not called as the first witness and was only called after Victim had given an extensive description of the assault. The State also did not focus on the SANE nurse's testimony about Victim's statements in its closing argument. The solicitor argued Victim's injuries were consistent with her testimony, but did not argue her statements to the SANE nurse were consistent with her testimony. In addition, the testimony of the SANE nurse never revealed the identity of the perpetrator, and instead was limited to describing how Victim's injuries were received. Thus, any error in admitting the pediatrician's testimony was harmless because it was merely cumulative.

Indeed, even if improperly admitted, Appellant has not shown the requisite prejudice to support reversal of the convictions. *State v. Price*, 368 S.C. at 499, 629 S.E.2d at 366. The

evidence in question was not sufficiently significant to have had an impact on the verdict. The identity of the perpetrator was never in question. Appellant defended the claims, not by pointing to another possible perpetrator, but by suggesting during cross-examination of the SANE nurse that the sexual encounter was consensual and the injuries were a result of "rough sex." (R.p.594, lines 4-14). Again, the overwhelming evidence of guilt rendered the testimony from the SANE nurse merely cumulative to Victim's detailed description of the assault – a description supported by extensive physical injuries, surveillance video from the neighbor's house and car, and DNA evidence concluding the DNA profile of the semen discovered on the napkin was 200 octillion times more likely to have come from Appellant than an unidentified unrelated individual. (R.p.612, line 23-p.615, line 13). In view of the very specific, detailed account of the sexual assaults and additional evidence adduced at trial, any possible errors arising from the admission of this testimony was harmless and did not have an impact on the verdict. For all of these reasons, Appellants' convictions should be affirmed.

## II.

**Appellant's argument that the trial court erroneously held Victim's statements to the SANE nurse, about the sexual assault, admissible pursuant to Rule 106, SCRE, fails to present a justiciable controversy because, despite prevailing on the trial court's evidentiary ruling, the State did not elicit any additional sexual assault related testimony from the SANE nurse beyond what was already deemed admissible pursuant to Rule 803(4), SCRE. In addition, Appellant's argument is not preserved for appellate review because he failed to make a contemporaneous objection on this basis when the allegedly objectionable testimony was elicited at trial. Furthermore, the trial court properly ruled the testimony was admissible under the rule of completeness. Finally, any possible error in the ruling was harmless in this case because, beyond a reasonable doubt, it did not contribute to the jury's verdict.**

Appellant argues the trial court erroneously held Victim's statement to the SANE nurse was admissible through the SANE nurse's testimony pursuant to Rule 106, SCRE. He complains that Victim's prior inconsistent statement was neither admitted nor used for impeachment pursuant to Rule 613(b), SCRE, but rather was simply used by Appellant during cross-examination of the Victim to refresh her recollection, and therefore Rule 106 did not apply. Appellant argues the trial court's ruling improperly allowed the State to elicit Victim's statement to the SANE nurse regarding "details of the purported sexual assault to the jury that had nothing to do with her cell phone." (Brief of Appellant, p.12-p.15). The State disagrees and respectfully submits Appellant's argument is misplaced, is not supported by the trial court record, and should be dismissed for a number of reasons.

First, the argument fails to present a justiciable controversy where Appellant suffered no possible prejudice from the trial court's Rule 106, SCRE ruling. Despite prevailing on the trial

court's evidentiary ruling, the State *never* elicited testimony from the SANE nurse about Victim's statement describing the details of the assault beyond what had already properly been deemed admissible pursuant to Rule 803(4), SCRE. Consequently, Appellant's rights were not injuriously affected. Second, the argument is not preserved for appellate review because Appellant failed to make a contemporaneous objection on the basis of the Rule 106 ruling when the allegedly objectionable testimony was elicited from the SANE nurse at trial. Third, the trial court properly ruled that any contextual testimony concerning Victim's entire statement *about her cell phone* was admissible under the rule of completeness. Finally, any possible error in the trial court's Rule 106 ruling was harmless beyond a reasonable doubt because it could not have reasonably contributed to the jury's verdict.

## Law / Analysis

### Justiciable Controversy

Before an action or appeal can be maintained, there must exist a justiciable controversy. *James v. Anne's Inc.*, 390 S.C. 188, 701 S.E.2d 730 (2010); *Sloan v. Friends of the Hunley, Inc.*, 390 S.C. 188, 630 S.E.2d 474 (2006) ("Generally, this Court only considers cases presenting a justiciable controversy."); *Byrd v. Irmo High School*, 321 S.C. 426, 468 S.E.2d 861 (1996) ("This Court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy."); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003) ("The function of appellate courts is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of

some party to the litigation."). "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." *Pee Dee Elec. Coop., Inc., v. Carolina Power & Light, Co.*, 279 S.C. 64, 301 S.E.2d 761 (1983).

Appellant's Rule 106, SCRE argument fails to present a justiciable controversy because Appellant suffered no possible prejudice from the trial court's Rule 106 ruling. Despite prevailing on the trial court's evidentiary ruling, the State *never* elicited testimony from the SANE nurse about Victim's statement describing the details of the assault beyond what had already properly been deemed admissible pursuant to Rule 803(4), SCRE. Here, not only did Appellant fail to raise a contemporaneous objection to the SANE nurse's testimony during trial on the Rule 106 grounds he argued in response to the motion raised by the State during Victim's testimony, but the allegedly objectionable testimony itself was not elicited under the auspices of the Rule 106 ruling. It was instead properly admitted under a separate rule of evidence—Rule 803(4), SCRE. Consequently, there is no justiciable controversy for appeal because Appellant suffered no prejudice from the Rule 106 ruling.

**Issue Preservation**

To preserve a trial error for appellate review, the appellant's objection at trial must be contemporaneous to the introduction of the objectionable evidence. *State v. Byers*, 392 S.C. 438, 710 S.E.2d 55 (2011); *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999). The granting or denying of a motion *in limine* does not remove the need to make a contemporaneous objection at

trial. *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993). The trial court's Rule 106 ruling—to permit the State to question Agent Sykes about the entire portion of Victim's statement about her cell phone during the State's case-in-chief—was made during Victim's testimony. The SANE nurse was not called to the stand until the following day, after six intervening witnesses had testified for the State. Because Appellant failed to make a contemporaneous objection to the Rule 106 ruling when the State elicited the allegedly improper testimony from the SANE nurse, this issue, as articulated by Appellant, is unpreserved for appellate review. *Byers*; *Aldret*.

**Rule of Completeness**

Rule 106, SCRE, is based on the rule of completeness and seeks to avoid the unfairness inherent in the misleading impression created by taking matters out of context. *State v. Cabrera-Pena*, 361 S.C. 372, 379, 605 S.E.2d 522, 525 (2004). When one party elects to use a witness to elicit portions of a conversation, the rule of completeness requires the opposing party be permitted to inquire into the full substance of that conversation. *Id.* at 380, 605 S.E.2d at 526. Simply because the statement was not introduced by the first party into evidence does not alter the rule. Indeed: "Given the purpose behind Rule 106, fairness and completeness, it is also applied where a party's use of a writing or recorded statement is 'tantamount to the introduction of the [document] into evidence.'" *State v. Taylor*, 333 S.C. 159, 171, 508 S.E.2d 870, 876 (1998) (quoting *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523 (11th Cir. 1986)).

In the instant case, the defense challenged Victim's testimony that she did not have possession of her cell phone following the assault. Counsel focused on this claim, presumably attempting to prove Victim *did* have possession of her phone but failed to immediately call the police. Counsel asked Victim whether, contrary to her testimony, she had told both SLED Agent Sykes during her law enforcement interview and the SANE nurse during her examination at the hospital, that Appellant told her the phone was in the car before he left. Victim did not deny making the statements; however, said she did not remember making that comment about the phone. Although counsel did not introduce the statement into evidence, and instead pivoted to using the videotaped interview with Agent Sykes to refresh Victim's memory, the defense had already, in front of the jury, "used" the recorded statement to make its point on cross-examination. (R.p.333, line 3-p.338, line 5). The State submits this "use" was tantamount to the introduction of the portion of the recorded statement concerning the cell phone. Utilizing an appropriate application of the rule of completeness under Rule 106, SCRE, the trial court properly held the State would, as a consequence, be able to question Agent Sykes about "that portion of the remainder of a statement which explains or clarifies the previously admitted portion." *Taylor*, 333 S.C. at 171, 508 S.E.2d at 876. This ruling did not constitute an abuse of discretion under the circumstances of this case.

**Harmless Error**

To the extent this Court disagrees and finds the trial court's Rule 106 ruling was in error, it was harmless beyond a beyond a reasonable doubt because it could not possibly have

contributed to the jury's verdict. As argued above, the exact same objectionable testimony—recounting Victim's statement giving details about the sexual assault—was properly admitted under Rule 803(4), SCRE. Thus, the Rule 106 ruling had no impact on the admission of the complained-of testimony. Indeed, as argued above, the overwhelming evidence of guilt rendered the testimony from the SANE nurse merely cumulative to Victim's detailed description of the assault – a description supported by extensive physical injuries, surveillance video from the neighbor's house and car, and DNA evidence concluding the DNA profile of the semen discovered on the napkin concluding it was 200 octillion times more likely to have come from Appellant than an unidentified unrelated individual. (R.p.612, line 23-p.615, line 13). Appellant has failed to show how the Rule 106 ruling had an impact on the verdict given the overwhelming evidence of guilt; therefore, any error in the Rule 106 ruling was harmless.

## CONCLUSION

For all of the foregoing reasons, the State respectfully requests that Appellant's convictions and sentence be affirmed.

Respectfully submitted,

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Columbia, South Carolina
January 9, 2025

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STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY
Debra R. McCaslin, Circuit Court Judge

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Appellate Case No. 2023-001259

The State, .....Respondent,

v.

Robert B. Neeley,.....Appellant.

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**PROOF OF SERVICE**

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I, Susan Spencer, Legal Assistant, hereby certify that I have served the *Final Brief of Respondent,* dated January 9, 2025, on Appellant by sending an electronic copy via email to Sarah E. Shipe, counsel of record for Appellant, at the address listed for counsel in AIS.

I further certified that all parties required by Rule to be served have been served. This 9th day of January, 2025.

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## Susan Spencer

**From:** Susan Spencer
**Sent:** Thursday, January 9, 2025 10:04 AM
**To:** sshipe@sccid.sc.gov
**Cc:** Ben Aplin; Warren, Kaylynn
**Subject:** The State v. Robert B. Neeley (2023-001259)
**Attachments:** NEELEY Robert - Final Brief of Respondent.pdf

Good Morning Ms. Shipe,

Please find attached the Final Brief of Respondent in The State v. Robert B. Neeley (2023-001259). This document will be filed today with the Court of Appeals via the AIS OneDrive system. If you will, please confirm receipt.

Thank you.

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