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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2023-001884

The State, ... Respondent,

v.

Emeric T. Hamilton, ... Appellant.

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Whether Appellant's argument that the trial court erred in "admitting hearsay testimony from an unknown male" is unpreserved for appellate review where Appellant waived the objection by: (1) asking about the man's statement on cross-examination of a State's witness and then (2) failing to specifically object when the statement was later admitted as part of Victim's forensic interview. In any event, whether the trial court properly admitted the evidence where the statement: (1) was not offered to prove the truth of the matter asserted and therefore was not hearsay and (2) alternatively constituted an excited utterance. Finally, whether any possible error in admitting the statement was harmless in this case where, beyond a reasonable doubt, it did not contribute to the jury's verdict given the overwhelming evidence of guilt.

2. Whether the trial court properly admitted Appellant's statements that he had been released from jail shortly before the sexual assault where: (1) they were properly offered as either part of the *res gestae* of the crime or under Rule 404(b), SCRE, to prove identity and motive; and (2) they were not subject to exclusion because the probative value was not substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE. In any event, whether any possible error in admitting the statements was harmless where, beyond a reasonable doubt, they did not contribute to the jury's verdict given the overwhelming evidence of guilt.

3. Whether argument that the trial court erred in admitting testimony regarding the checks and balances in place to bolster the competency of minor witnesses during a forensic interview is unpreserved for review where: (1) no such testimony was presented following his objection and (2) Appellant did not move to strike the single word of testimony given in response to the question prior to the objection being raised. In any event, whether the trial court properly admitted the testimony where it was neither a direct nor indirect comment on Victim's credibility. Finally, whether any possible error in admitting the statement was harmless where, beyond a reasonable doubt, it did not contribute to the jury's verdict given the overwhelming evidence of guilt.

STATEMENT OF THE CASE

Emeric Tyrone Hamilton (Appellant) was indicted at the September 2023 term of the grand jury for Charleston County for criminal sexual conduct (CSC) with a minor, second degree. (2023-GS-10-04605). He was represented by Assistant Public Defender Mary Ford of the Ninth Circuit Public Defender's Office. Respondent (the State) was represented by Assistant Solicitors Lauren Frierson and Nick Harris of the Ninth Circuit Solicitor's Office. On November 27-29, 2023, the case proceeded to trial before the Honorable Jennifer B. McCoy and a jury. At the conclusion of trial, the jury found Appellant guilty as indicted, and he was sentenced to twenty (20) years' imprisonment. (R.p.1; p.525-p.539; p.606-p.609).

Appellant filed a notice of intent to appeal; however, due to deficiencies in the trial transcript, this Court remanded the case to the trial judge to reconstruct the record. (R.p.570). On January 30, 2025, the trial court issued an order finding as follows: "In light of the discovery of the missing portions of the audio files, the revisions to the transcript made following a hearing on December 17, 2024, and the testimony provided by trial counsel concerning the timing surrounding the jury's deliberations, this Court determines that no further action is required to reconstruct the record of Defendant's trial." (R.p.602-p.605). Appellant subsequently filed a second notice of appeal, and a brief in support of his appeal was filed by Appellate Defender Gary H. Johnson of the South Carolina Commission on Indigent Defense. This Brief of Respondent now follows.

STATEMENT OF FACTS

As summarized by the State in its opening statement, this case stemmed from the then eleven-year-old victim's allegation that she was sexually assaulted by Appellant on April 19, 2018, in North Charleston. That day, she (Victim) ran away from home because she did not want to follow the rules of the house. As she was walking down the street in a North Charleston neighborhood, she was approached by an older adult man who smelled of alcohol and invited her into his house. The house was dark and messy and once inside, the man led Victim to his bedroom, took off her clothes, and raped her. After the incident, she escaped the house where she was met by her mother (Mother) and the police, who had been looking for her after she ran away. Victim did not immediately disclose the sexual assault to the police, but did tell her mother shortly after the police left, which prompted their return. Victim was taken to the Medical University of South Carolina (MUSC) where she was given a sexual assault nurse examination (SANE) which included collection and preservation of possible DNA evidence. Mother directed the police to the house identified by Victim as the location of the assault, where officers spoke briefly with Appellant. He denied knowing Victim or anything about any assault. SLED later analyzed evidence collected from Victim during the SANE exam and found Appellant's DNA inside Victim. (R.p.144-p.147).

Pretrial Motions

On November 27, 2023, prior to the jury being sworn, the trial court convened a hearing to address the pretrial motions submitted by Appellant and the State. These included motions on: (1) the rape shield statute and whether to exclude evidence that Victim had made a subsequent and similar allegation of a sexual assault; (2) the admissibility of Appellant's statements about his prior incarceration (See Argument II below); (3) the chain of custody for the DNA evidence; (4) a possible *Jackson v. Denno* hearing on Appellant's statement to law enforcement shortly

after the incident; (5) a possible *Neil v. Biggers* hearing on Mother's identification of Appellant; (6) the admissibility of a recorded jail telephone call made by Appellant; (7) Victim's competency as a witness under Rule 601, SCRE; (8) a possible suppression hearing on the search warrant for Appellant's buccal swab; (9) the admissibility of Victim's forensic interview under Section 17-23-175 of the Code; (10) possible redaction of two portions of that forensic interview if admitted, consisting of: (a) Victim's claim that an unidentified man told Mother that something nasty happened to Victim immediately prior to her disclosure of the sexual assault (See Argument I below) and (b) Victim's claim that Appellant told her, during or immediately after the sexual assault, that he had just gotten out of jail (See Argument II below); (11) a possible *Brady* or Rule 5 challenge to the State's inadvertent loss of all body-camera recordings from the officers who responded to the incident; (12) the admissibility of testimony about a CODIS "hit" which served as part of the basis for obtaining the search warrant for Appellant's buccal swab; and (13) the admissibility of unofficial transcripts of both the forensic interview and the jail call. (R.p.1-p.12; p.37-p.121). Most of the motions were addressed as they were raised, but the trial court deferred ruling on several until the following morning. (R.p.124-p.132).

Trial

The jury was then sworn, and the case proceeded to trial. (R.p.133-p.144). The State and Appellant each gave an opening statement before the State called Victim to the stand as its first witness. (R.p.144-p.152). Victim identified Appellant in the courtroom as the man who approached her on the day of the incident and then authenticated a photograph of the house where he lived. She described being invited into Appellant's house, how he smelled like alcohol, and how the house was dark, junky, and littered with beer cans. Victim testified Appellant took off her clothes and had sex with her by putting his private part inside hers. She said he stopped

when one of his homeboys started banging on the window, and then the door, and eventually came in the house and told him to "get that young girl out of this house." Victim said she put her clothes back on, except for a pair of pink panties she left inside, and walked out of Appellant's house. Once outside, she encountered Mother and an unidentified man who told Mother: "your daughter has something to tell you." Victim did not immediately disclose the incident to Mother, but did disclose later that day, which prompted Mother to knock on Appellant's door to ask if he had touched her daughter. Victim next described being interviewed by Mattie Dodds at "Dee Norton" a couple of weeks after the incident. She testified she told Dodds that during the assault Appellant disclosed he had just gotten out of jail. Victim noted Appellant was a stranger to her at that time. (R.p.152-p.164). Victim was then thoroughly cross-examined by Appellant in regard to: (1) her history of behavior/anger issues, (2) her history of hearing voices, (3) her stint in a group home, (4) inconsistencies in details she provided to different people about the incident, (5) her admission she had lied to the police about parts of the incident and (6) her admission that she sometimes lies to avoid getting in trouble. (R.p.152-p.182).

The State proceeded to call various law enforcement officers who either responded to the incident scene or conducted some aspect of the investigation. Former North Charleston Police Department (NCPD) Deputy Patrick Norwood was working as a patrol officer the day of the incident. He first responded to the call from Mother about Victim running away and later returned to the same location after the sexual assault was reported. Norwood identified the residence of the reported assault but did not conduct a formal interview with Victim. (R.p.182-p.189). NCPD Officer Joseph Magrane was patrolling the area the day of the incident when Mother flagged him down and reported the assault. He called EMS and his supervisor but had no recollection of speaking to Victim prior to their arrival. (R.p.202-p.208).

Former NCPD Officer Michael Cardaronella was the patrol sergeant the evening of the incident. He was called in to serve as the supervising officer on the scene—giving guidance, answering questions, making phone calls, and giving directives. Cardaronella testified the police talked to two individuals, including Appellant and another gentleman, but he did not interview Victim or Mother. (R.p.208-p.211). Former NCPD Officer Sarah Fortier was working patrol the evening of the incident and responded to the scene to talk to Victim. She testified it was not an in-depth interview and instead she simply got basic information about Victim's disclosure of a sexual assault, including when and where it happened. Fortier also met with Appellant to ask about the reported incident. Appellant denied knowing anything about it, or of any crime occurring at his residence. (R.p.213-p.217).

Next, the State called Christie Harley to the stand. Harley was the SANE nurse who examined Victim a few hours after the sexual assault. She described her education, training, and experience as well as the SANE exam she performed on Victim based on a reported history of a penis penetrating Victim's vagina. Harley described all parts of the exam, including a genital exam to look for any injuries or abnormalities and swabbing relevant areas, including outside and inside the rectum, for possible DNA evidence. She described what swabs were taken and how they were sealed and stored for further testing. (R.p.224-p.234). The State then called Pediatric Sexual Assault Nurse Examiner (PSANE) Catherine Fabrizio, a Nurse Practitioner from MUSC, to the stand. Fabrizio was admitted as an expert in child sexual abuse examinations and testified about the follow-up exam she performed on Victim in May of 2018, two weeks after Harley's exam. Fabrizio noted a normal genital exam with no acute injuries and explained it was not unusual for an 11-year-old to have a normal exam after a sexual assault due to the elastic nature of the genitals and anus and their ability to heal quickly. (R.p.239-p.252).

The State then called chain-of-custody witnesses Lauren Santos from MUSC's public safety department (R.p.260-p.263); Jeremy Michael Ledford from the NCPD Property and Evidence Unit (R.p.263-p.270); and former SLED Agent Verona Herrera, all to explain the process for securing and testing the biological evidence collected in the case. (R.p.276-p.290). Herrera was also admitted as an expert in forensic serology without objection. She generally described how swabs are tested for the presence of semen, sperm, saliva, or other bodily fluids that can then be forwarded for DNA analysis. Herrera identified the oral, vaginal, and rectal swabs taken from Victim as well as her buccal swab and a swab taken from her buttocks. She noted the oral and vaginal swabs were negative, but the rectal swab was positive for semen and spermatozoa, and the swab of the buttocks was positive for saliva. (R.p.277-p.297).

Next, the State called NCPD Detective Tiffany Crider to the stand. Crider had specialized training for cases involving child victims but did not get involved with the investigation until October of 2019 while investigating old cases that had been closed by NCPD due to a suspect not being known. She reviewed the original incident report and interviewed Victim and her mother to renew the investigation, particularly noting the claim by Victim that Appellant said he had recently been released from jail. Crider testified Appellant became a suspect in her investigation based on two things. First, she noted he had been mentioned in the original report and his registered address was the incident site. Second, she said she was notified of a hit in the database for Appellant's DNA. Based on this information, she got a search warrant for his buccal swab, which was collected in May of 2020 and submitted to SLED for testing, and which ultimately led to Appellant's arrest. (R.p.297-p.308).

The next morning, the trial court ruled it would admit an unofficial transcript of Victim's forensic interview into evidence as Court's Exhibit #4. Following a brief discussion of jury

charges, Mother was called to the stand. (R.p.313-p.322). Mother described Victim's history of behavioral issues, her learning disability, her prior hospitalizations in the MUSC psychiatric ward, her medications, and her diagnosis of ADHD before explaining the events of April 29, 2018. She testified about calling the NCPD when Victim ran away from Victim's grandmother's house and how, during their search of the area, Mother saw a man who asked if she was looking for her daughter. When Mother responded "yes," Victim walked up. Victim subsequently told Mother she had been sexually assaulted and where it happened. Mother testified she knocked on the door to confront the man her daughter identified, and he said he did not touch Victim, did not know Victim, and had never seen Victim. (R.p.322-p.328). On cross-examination, Mother was asked if Victim was found with an adult when she walked up and Mother testified: "Well, the guy said, well, you tell your mama what happened." (R.p.332, line 11-p.333, line 13).

The State then called Dodds to the stand to introduce the recording of the Victim's forensic interview into evidence. (R.p.340). Dodds noted her employment at the Dee Norton Child Advocacy Center as a therapist and forensic interviewer, as well as her training and her use of the "Child First" protocol. She briefly explained what a forensic interview was and without objection explained how they are conducted in a developmentally sensitive and appropriate way by a neutral party, using open-ended, non-leading, non-suggestive questions, all of which allows the child to use his or her own language and to correct any misunderstandings. (R.p.340, line 6-p.343, line 21). Dodds was then asked if her interview protocol involved any "checks and balances" to ensure competency in an interview. She started her answer with "sure," but before she could offer further explanation, Appellant objected on grounds of "vouching." The trial court overruled the objection and said the testimony would be allowed; however, the question

was never repeated by the solicitor nor answered by Dodds, and Appellant did not move to strike the previous, partial response of "sure." (R.p.344, line 16-p.345, line 13).

After the State completed laying a foundation, the partially redacted recording of the forensic interview (State's Exhibit #7) and an unofficial transcript of that redacted recording (Court's Exhibit #4) were offered into evidence. Appellant objected "based on bolstering in [his] prior objection, both for the recording and the several statements -- that were discussed;" however, the trial court admitted both. (R.p.347-p.348). The video was started for the jury, however, due to a delay between the video and audio, the trial court determined only the audio portion of the interview would actually be played. (R.p.350-p.351).

That audio included Dodds' questions and answers about the unidentified man encountered by Mother who told mother that "something nasty happened to your daughter." (R.p.361, lines 4-23; p.560, line 4-p.561, line 7).[1] Victim then described encountering people outside and seeing a cab when she exited the house after the sexual assault. She called them Appellant's "homeboys," said the unidentified man who talked to Mother was one of these homeboys, and said he drives a cab. (R.p.361-p.363; p.561, line 8-p.563, line 24). The audio also included Dodds' questions and answers about Appellant's statement to Victim that: "he just got out of jail." (R.p.362, line 23-p.363, line 12; p.562, line 20-p.563, line 17). No objections were made as the audio recording was played.

At the conclusion of Dodds' testimony, the State called its final chain of custody witness, NCPD crime scene officer Tiffany Wilcome. (R.p.371-p.374). As its final overall witness, the State called SLED senior DNA analyst Maryanne Elizabeth Boehm to the stand. She was

[1] The court reporter attempted to transcribe the audio in real time as it was played for the jury and that transcription is included in the trial transcript itself (R.p.351-p.368); however, because the jury independently heard the audio recording with the aid of the unofficial transcript that was prepared prior to trial, the quotations both above and below reflect the more detailed account provided in those exhibits rather than what is in the trial transcript.

admitted as an expert in forensic DNA analysis and serology, without objection, and provided the DNA results from her analysis. Boehm explained what DNA is, how DNA analysis works, and how she arrives at statistical likelihood ratios. In regard to the rectal swab taken from Victim she testified as to the presence of semen and that there was a DNA mixture from two people, concluding "the DNA profile is approximately 2.6 octillion times more likely if [Victim] and [Appellant] contributed to the mixture than if [Victim] and an unidentified unrelated individual contributed to the mixture, which is "very strong support" the semen belonged to Appellant. In regard to the saliva swabs taken from Victim's buttocks, Boehm testified there was a mixture of three individuals and concluded: "a profile is approximately 1.2 octillion times more likely if [Victim], [Appellant], and an unidentified unrelated individual contributed to the mixture than if [Victim] and two unidentified unrelated individual[s] contributed to the mixture," which again, is "very strong support" the saliva belonged to Appellant. Boehm concluded her direct testimony by explaining that when a person is lying down, liquid bodily fluids such as semen can travel from one part of the body to another because of gravity. (R.p.375-p.397).

At the conclusion of Boehm's testimony, the State rested. Appellant renewed all previous motions and moved for a directed verdict and all motions were denied. Following a charge conference, the trial court questioned Appellant regarding his right to testify. (R.p.408-p.427). Appellant elected not to testify, rested, and renewed his prior motions. The motions were again denied, and the parties proceeded to closing arguments. (R.p.427-p.429).

During the State's close, the solicitor argued, among other things, that it was implausible that an eleven-year old with a learning disability would: (1) decide to frame a random stranger for a crime; (2) manage to coordinate getting into his house, transferring fresh, wet ejaculate and saliva to her body, putting them in a place the SANE nurse would find them; and (3) somehow

learn this stranger had just gotten out of jail—a fact she would not have otherwise known. (R.p.435, lines 3-11). The solicitor did not mention the statement during the State's closing argument. (R.p.429-p.437).

After hearing the trial court's charge on the law (R.p.448-p.458), the jurors asked to rehear testimony from SANE nurse Harley, SLED serologist Herrera, and SLED DNA analyst Boehm, before reporting, after further deliberations, that they could not reach a unanimous verdict and were stuck at 10-2 in favor of guilt. (R.p.459-p.522). The trial court gave an *Allen* charge and after further deliberation, the jury found Appellant guilty as indicted. (R.p.523-p.528). Appellant was sentenced by Judge McCoy to twenty (20) years' imprisonment. (R.p.1; p.529-p.539; p.606-p.609).

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012); *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence but, instead, simply determines whether the trial judge's ruling is supported by *any evidence*. *Wilson*, 345 S.C. at 6, 545 S.E.2d at 829 (emphasis added); *see also State v. Gracely*, 399 S.C. 363, 371, 731 S.E.2d 880, 885 (2012) ("The trial court will only be reversed when there is no evidence to support the ruling below."). Our appellate courts give great deference when reviewing the evidentiary ruling of the trial court. *State v. Cross*, 427 S.C. 465, 473, 832 S.E.2d 281, 285 (2019); *State v. Davis*, 437 S.C. 93, 96, 876 S.E.2d 321, 322 (Ct. App. 2022). Indeed, the admission or exclusion of evidence is left to the sound discretion of the trial judge. *State v. Commander*, 396 S.C. 254, 262-63, 721 S.E.2d 413, 417 (2011); *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. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); *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. *State v. Brown*, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012); *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011); *McDonald*, 343 S.C. at 325, 540 S.E.2d at 467.

ARGUMENT

I.

Appellant's argument that the trial court erred in "admitting hearsay testimony from an unknown male" is not preserved for appellate review because Appellant waived the objection by: (1) asking about the man's statement on cross-examination of a State's witness and then (2) failing to specifically object when the statement was later admitted as part of Victim's forensic interview. In any event, the trial court properly admitted the evidence because the statement: (1) was not offered to prove the truth of the matter asserted and therefore was not hearsay and (2) alternatively constituted an excited utterance. Finally, any possible error in admitting the statement was harmless in this case because, beyond a reasonable doubt, it did not contribute to the jury's verdict given the overwhelming evidence of guilt.

Appellant argues the trial court erred in admitting hearsay testimony from an unknown male that bolstered Victim's claim that Appellant sexually assaulted her. He complains the State "had no logical justification for admitting the hearsay statement" and "there was no purpose to the admission . . . other than to bolster the claims of [Victim] regarding the sexual abuse." (Brief of Appellant, p.6-p.10). The State disagrees and submits this argument should be denied and dismissed for several reasons.

First, the argument is not preserved for review because Appellant waived any objection to the statement by: (1) asking Mother about it on cross-examination and (2) subsequently failing to object when the purportedly objectionable portion of the Victim's forensic interview was played for the jury. Second, even if preserved, the trial court properly allowed the evidence because the statement: (1) was not offered to prove the truth of the matter asserted and therefore was not hearsay; (2) would have been properly admitted under the excited utterance exception to the rule against hearsay. Finally, any possible error in admitting the statements was harmless in this case becauase, beyond a reasonable doubt, it did not contribute to the jury's verdict given the overwhelming evidence of guilt. For all of these reasons, this argument should be rejected and Appellant's conviction and sentence should be affirmed.

Facts

During the pretrial motion hearing on November 27, 2023, the trial court took testimony, outside the presence of the jury, on the issue of Victim's competency to testify under Rule 601, SCRE. Victim testified she knew she was in court because of sexual conduct that happened to her when she was eleven years old. When asked to explain what she remembered about the incident, Victim stated in part:

> And he – and then after that – that's when the home – when the homeboy knock on the window, somebody went in the house and knock on the door and on the room door. And that's when he like get that young girl out of house. And that's when he was finished and all. And I put back on my clothes and I left my pink panties there. *And the man told me to – when I walked down, the man told me to tell my mama – I want to tell my mom. But he all – I just finally told my mom what happened.*

(R.p.46, line 20-p.47, line3) (emphasis added). Later, in response to a question about if she remembered anyone else being in the house, Victim said: "All I know when I went in the yard, I

didn't see a yellow. I saw a yellow cab, like, it was like a yellow cab parked in the front of the yard. And I see him and then two other guys." (R.p.48, lines 1-5).

An additional matter addressed at the pretrial hearing was the State's motion to admit Victim's April 27, 2018 forensic interview pursuant to Section 17-23-175 of the South Carolina Code. (R.p.69, line 25-p.73, line 19). In arguing Victim's statement provided a detailed account of the offense, the solicitor noted Victim gave "very specific statements" about the incident including that when "her mama found her, that somebody said something nasty happened to her." (R.p.72, line 25-p.73, line 7). After the trial court ruled to admit the forensic interview, with agreed-upon redaction of the "truth promise" made by Victim, Appellant moved to also redact/suppress Victim's comment that her mama was told by a man that someone did something nasty to her. He argued it should be removed as hearsay. (R.p.84-p.86). After hearing arguments on another portion of the interview Appellant sought to exclude (See Argument II below), the trial court deferred ruling to further consider the matter. (R.p.87-p.91).

Later in the pretrial hearing, while the parties were discussing Appellant's recorded phone call from the jail, the solicitor reminded the trial judge they would need her "ruling on the comments about jail and he did something nasty for the forensic interview." (R.p.117, line 23-p. 118, line 3). After further discussion about the jail call, the trial judge said she would look into the issue that afternoon and rule at a later time. (R.p.117-p.119).

The following morning, after the trial court announced its ruling on Appellant's two "jail" statements (See Argument II), the solicitor reminded the judge they were also waiting for a ruling on the portion of the forensic interview where Victim said that after she was found by her mother but prior to her initial disclosure, an unidentified man came up and stated: "Hey, somebody was doing something nasty to your daughter, but I'll let her tell you." (R.p.126, line

24-p.130, line 12). After hearing further arguments and reviewing the unofficial transcript of the forensic interview (which was later admitted as Court's #4), the trial court ruled as follows:

> Okay. Well, you know, *I think it's not offered for the truth.* I think it can come in, but obviously, you know, in terms of [Victim] having any recollection as to who he is, where he was, I mean, it seems like she didn't at the time of the interview, days after. I'm not sure it's going to be much better now. So I, you know, I think that's a fact to the State's going to have to live with. So I'm going to let it in over your objection.

(R.p.130, lines 13-20) (emphasis added).

Victim was called as the State's first trial witness. After describing the details of the sexual assault itself and the circumstances of how it ended, the following exchange took place:

> Q. After he stopped, did you put your clothes on?
>
> A. Yes, ma'am. I left my – I put my clothes back on. I left my panties.
>
> Q. How come?
>
> A. Because I was scared.
>
> Q. And then what happened?
>
> A. And that's when I saw my mama. And that's when the man told – told me to tell my mama. *He told my mama, your daughter got something to tell you.* And I was scared. And then I ended up telling my mama.

(R.p.160, line 21-p.161, line 6) (emphasis added).

Later during trial, Mother testified on behalf of the State. She provided background information to explain why, with the assistance of NCPD, she was out in the neighborhood on the day of the incident searching for Victim. She then testified:

> A. . . . . I saw a guy, he asked me if I was looking for someone. I told him, yeah, I was looking for my daughter. As I was talking to him, [Victim] came up and *he told me either you could tell –*

Ms. Ford: Objection. Hearsay.

The Witness: -- my mama.

The Court: Sustained. Just try not to say what people told you. Okay. Directly about direct quotes or anything. Okay.

Mr. Harris, I'll give you some latitude and questioning her since she doesn't do that. All right?

Mr. Harris: Yes, ma'am.

(R.p.326, lines 11-22) (emphasis added). Mother did not repeat the man's entire statement. On cross-examination, Appellant questioned Victim's mother as to whether Victim was with a man when she found Victim, or if the man was talking to her when Victim approached. (R.p.332-p.333). Ultimately, Appellant asked: "Okay. When you found [Victim], you asked her about anything that may have happened, correct?" Victim's mom answered: "Well, the guy said, well, you tell your mama what happened." (R.p.333, lines 10-13). Appellant did not object or move to strike.

The State subsequently called forensic interviewer Mattie Dodds to the stand. (R.p.340-p.368). The recording of the redacted forensic interview (State's Exhibit #7) and an unofficial transcript of that redacted recording (Court's Exhibit #4) were offered into evidence. Appellant objected "based on bolstering in [his] prior objection, both for the recording and the several statements -- that were discussed." The trial court admitted the recording "subject to our previous discussions on the record" and the unofficial transcript noting "your objection is also renewed timely on those. We have had discussions about those as well." (R.p.347-p.348).

The audio portion of the interview was then played for the jury and included the following questions and answers:

Q. Okay. So, you said you got up, you almost fell in the house, and you went through the front door?

A. Uh-huh.

Q. Okay, then what happened?

A. That's it. My mom, they're trying to get in touch with my mom. But my mom ran back on the street, and she found me with the other man.

Q. Tell me about the other man.

A. *He tell my mom something nasty happened to your daughter, I gotta tell you.*

Q. How come he told her that?

A. Because he's been outside.

Q. Hm?

A. He been, the man been outside.

Q. The man been outside? Okay.

A. That's all-that's when my mom called the police.

Q. So tell me more about, you said the man told your mom something nasty happened to your daughter?

A. Uh huh.

Q. How did the man know that?

A. [shrugs]

Q. How did the man know something nasty happened?

A. [shrugs]

Q. Okay. Where did the man come from?

A. Outside.

Q. Outside where?

A. He was outside.

(R.p.361, lines 4-23; p.560, line 4-p.561, line 7) (emphasis added).[2] Victim then described encountering people outside and seeing a cab when she exited the house after the sexual assault. She called them Appellant's "homeboys." (R.p.361-p.363; p.561, line 8-p.563, line 7). Ms. Dodds asked: "Okay. So, you said his homeboys were outside. And you said something about a man telling your mom something nasty happened? Was that man one of his homeboys or something else?" Victim replied: "Homeboy" and said "He drive cab." (R.p.363, lines 13-17; p.563, lines 16-24). No objections were made during the playing of the audio and at the end of trial, during the State's closing argument, there was no mention of any statement made by the unidentified man. (R.p.429-p.437).

Issue Not Preserved

As an initial matter, the State submits this argument is not preserved for review because Appellant waived any objection to the statement by: (1) asking Mother about it on cross-examination and (2) subsequently failing to object when the purportedly objectionable portion of the Victim's forensic interview was played for the jury. In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the Petitioner; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004). In regard to timeliness, to preserve a trial error for appellate review, the appellant's objection at trial must be contemporaneous to the introduction of the objectionable evidence.

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[2] The court reporter attempted to transcribe the audio in real time as it was played for the jury and that transcription is included in the trial transcript itself (R.p.351-p.368); however, because the jury independently heard the audio recording with the aid of the unofficial transcript that was prepared prior to trial, the quotations both above and below reflect the more detailed account provided in those exhibits rather than what is in the trial transcript.

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). If no evidence is offered between a preliminary ruling and the admission of the evidence ruled upon, then "the decision is final" and there is no need for an additional objection. *State v. Morales*, 439 S.C. 600, 606–07, 889 S.E.2d 551, 555 (2023) (quoting *State v. Jones*, 435 S.C. 138, 144, 866 S.E.2d 558, 561 (2021)). When additional evidence is offered in the meantime, however, an additional, contemporaneous objection is usually required because the evidence developed during [the interim] may warrant a change in the ruling. *Morales*, 439 S.C. at 607, 889 S.E.2d at 555.

Here, the trial court's ruling—to permit the State to play the portion of the forensic interview where Victim recounted the man's statement—was made at the end of the pretrial hearing. Even though Victim was called as the first witness by the State, her trial testimony was limited to the man saying: "your daughter got something to tell you," and not that something "nasty" had happened. Contrary to the claim in Appellant's brief, this was not a definite statement that the man witnessed anything—instead it only indicated he learned of the sexual assault somehow and implored Victim to disclose it to Mother. Mother was prevented from testifying about the full statement on direct and only completed her description on cross. Although Appellant arguably objected to the admission of the forensic interview "based on bolstering in [his] prior objection . . . for . . . the several statements - - that were discussed," because Appellant: (1) elicited testimony about the statement on cross-examination of Mother; (2) failed to specifically articulate his objection before the forensic interview was played; and (3) failed to contemporaneously object when the objectionable portion of the forensic interview was actually played, the argument was waived and this issue is unpreserved for appellate review. *Morales*; *Byers*; *Aldret*.

Not Hearsay – Not Offered for the Truth of the Matter Asserted

Hearsay is a statement, which may be written, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. *State v. King*, 422 S.C. 47, 66, 810 S.E.2d 18, 28 (2017); *State v. Brockmeyer*, 406 S.C. 324, 351, 751 S.E.2d 645, 659 (2013); Rule 801(c), SCRE. "Hearsay is not admissible unless there is an applicable exception." *King*, 422 S.C. at 66, 810 S.E.2d at 28; *Brockmeyer*, 406 S.C. at 351, 751 S.E.2d at 659; Rule 802, SCRE. If a statement is relevant and probative *only* to prove the truth of the matter asserted by the out-of-court declarant, then the statement is hearsay, and its admission into evidence is governed by the traditional hearsay rule. *King*, 422 S.C. at 67, 810 S.E.2d at 28 (relying on *Ruiz v. Commonwealth*, 471 S.W.3d 675 (Ky. 2015)). But, as with any other statement, if the out-of-court statement has relevance and probative value that is *not* dependent upon its truthfulness, and it is *not* offered into evidence as proof of the matter asserted, then by definition the evidence is *not* hearsay. *Id.*

In the instant case, evidence regarding the statement made by the unidentified man was not entered for its truth but rather to explain the Victim's decision to disclose the sexual abuse to Mother *after* she initially failed to disclose when the police were first on the scene. Thus, as determined by the trial court, the evidence was not hearsay, was relevant and probative, and was properly admitted. *See State v. Thompson*, 352 S.C. 552, 559–60, 575 S.E.2d 77, 81–82 (Ct. App. 2003) (finding an officer's testimony regarding statements made by a bystander were not entered for their truth but rather to explain and outline the officers' investigation and their reasons for going to defendant's home); *Caprood v. State,* 338 S.C. 103, 111, 525 S.E.2d 514, 518 (2000) (finding statements made regarding unrelated crimes not hearsay where "officers were explaining their actions in pursuing the defendants and the statements were not offered for

their truth"); *State v. Kirby,* 325 S.C. 390, 396, 481 S.E.2d 150, 153 (Ct. App. 1996) (concluding testimony by police officer about dispatcher's call was not hearsay where offered to explain "the reason for the initiation of police surveillance of the vehicle in question"); *State v. Johnson,* 318 S.C. 194, 197, 456 S.E.2d 442, 444 (Ct. App. 1995) (ruling testimony that defendant was in a "high drug traffic area" was not hearsay because it was introduced as "background information" about the investigation).

Admissible Hearsay - Excited Utterance

Even if this Court concludes the statement was hearsay, it was still properly admitted under the *res gestae* or excited utterance exception to the hearsay rule. As explained by our supreme court, where a statement was made immediately after an upsetting event, it is part of the *res gestae*, and therefore admissible. *State v. Sims*, 304 S.C. 409, 420, 405 S.E.2d 377, 383 (1991). In a similar analysis under our rules of evidence, the statement at issue here was admissible as an excited utterance under Rule 803(2), SCRE. An excited utterance is a statement relating to a startling event or condition made while the declarant is under the stress of excitement caused by the event or condition. Rule 803(2), SCRE. The excited utterance exception is based on the rationale that "the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication." *State v. McHoney,* 344 S.C. 85, 94, 544 S.E.2d 30, 34 (2001); *State v. Dennis,* 337 S.C. 275, 284, 523 S.E.2d 173, 177 (1999). Three elements must be met for a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition. *State v. Stahlnecker*, 386 S.C. 609, 623, 690 S.E.2d 565, 573 (2010); *State v Sims*, 348 S.C. 16, 21, 558 S.E.2d 518, 521 (2002). A court must consider the totality of

the circumstances in determining whether a statement falls within the excited utterance exception. *State v. Stahlnecker*, 386 S.C. at 623, 690 S.E.2d at 573 (2010); *McHoney,* 344 S.C. at 94, 544 S.E.2d at 34; *Dennis*, 337 S.C. at 284, 523 S.E.2d at 177.

In the present case, the man's statement related to the startling event of either witnessing Victim being sexually assaulted by Appellant, or simply learning of that sexual assault, either of which would have happened before or immediately after Victim escaped Appellant's house and was found by Mother. The man told Mother something nasty happened to her daughter as soon as he spoke; thus, he made the statement while under the stress of excitement. Finally, this stress was obviously caused by witnessing or learning about the sexual assault. The requirements of Rule 803(2), SCRE were satisfied in this case. The unidentified male's statement was an excited utterance and the trial judge did not err in allowing evidence about that statement, even if it is deemed hearsay. *See Stahlnecker*, 386 S.C. at 623-24, 690 S.E.2d at 573 (holding a trial court did not abuse its discretion in admitting a hearsay statement under the excited utterance exception when the statement was made to the victim's mother related to the startling event of being sexually assaulted immediately before her mother returned home); *see also State v. Ladner,* 373 S.C. 103, 116-17, 644 S.E.2d 684, 691 (2007) (holding a trial judge did not abuse his discretion by admitting a hearsay statement under the excited utterance exception when the statement was made by a two-and-a-half year old girl to her caretakers after they discovered blood coming from her vaginal area and the statement related to the startling event of a sexual assault).

Harmless Error

Improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice. *State v. Jennings*, 394 S.C. 473, 478–79, 716 S.E.2d 91, 93–94 (2011); *State v. Garner,* 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct.App.2010). Such error is deemed harmless when it could not have reasonably affected the result of trial, and an appellate court will not set aside a conviction for such insubstantial errors. *Jennings*, 394 S.C. at 479, 716 S.E.2d at 94; *Garner*, 389 S.C. at 67, 697 S.E.2d at 618. "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). 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).

Here, any error in the admission of evidence regarding the man's statement was harmless because the comment was insubstantial and merely cumulative in view of the evidence presented, 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). With the exception of the added word "nasty," the forensic interview evidence was cumulative to that given by Victim during her direct testimony, to which Appellant made no objection. (R.p.161, lines 3-6). Similarly, it was cumulative to Mother describing the man imploring Victim to tell Mother what happened, which was elicited by Appellant on cross-examination. (R.p.333, lines 7-13). Finally, the incredibly strong DNA evidence corroborated Victim's claim that she had been sexually assaulted by Appellant. Thus, even if the statement from the forensic interview was hearsay and did not constitute an excited utterance, any error in its admission was harmless and non-prejudicial

because it could not have reasonably affected the result at trial. *See State v. Haselden,* 353 S.C. 190, 197, 577 S.E.2d 445, 448–49 (2003) (stating the admission of improper evidence is harmless where the evidence is merely cumulative to other unobjected-to evidence); *State v. Kirby,* 325 S.C. 390, 396–97, 481 S.E.2d 150, 153 (Ct.App.1996) (finding even if officer's testimony regarding information radioed by the police dispatcher constituted hearsay, its admission was harmless given it was cumulative to similar testimony that was admitted without objection); *Jennings*, *supra*; *McElveen*, *supra*. For all of these reasons, the State submits this argument should be denied and dismissed, and Appellant's conviction and sentence should be affirmed.

II.

The trial court properly admitted Appellant's statements that he had been released from jail shortly before the sexual assault because: (1) they were properly offered as either part of the *res gestae* of the crime or under Rule 404(b), SCRE, to prove identity and motive; and (2) they were not subject to exclusion because the probative value was not substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE. In any event, any possible error in admitting the statements was harmless because, beyond a reasonable doubt, they did not contribute to the jury's verdict given the overwhelming evidence of guilt.

Appellant argues the trial court erred in admitting his statements that he had been released from jail shortly before the sexual assault because "such evidence was highly prejudicial character evidence that had no relation to the criminal charges before the jury." He contends admission of this evidence was unfairly prejudicial for the same general reasons he outlined in Argument I—because the impact of admitting prejudicial evidence in a case that relied in large part on an assessment of Victim's credibility was particularly damaging. While acknowledging the strength of the DNA evidence against him, Appellant argues the verdict nevertheless hinged

on Victim's credibility and consequently, the improper admission of character evidence requires reversal. (Brief of Appellant, p.11-p.13). The State disagrees and submits Appellant's argument should be denied and dismissed for a number of reasons.[3]

Appellant's repeated admissions that he had recently been released from jail before the alleged assault were: (1) properly admitted as either part of the *res gestae* of the crime or under Rule 404(b), SCRE, to prove identity and motive; and (2) were not subject to exclusion because the probative value was not substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE. Furthermore, any possible error in admitting the evidence was harmless in this case because, beyond a reasonable doubt, it did not contribute to the jury's verdict given the overwhelming evidence of guilt. This argument should be rejected and Appellant's conviction and sentence should be affirmed.

Facts

At the start of the pretrial motion hearing on November 27, 2023, the solicitor noted there was a motion regarding Appellant's prior incarceration and two statements the State sought to admit wherein Appellant acknowledged being in jail—once in a comment he made to Victim at the time of the incident (incident statement), and another comment in a telephone call he made from the jail following his arrest (jail call statement). The State explained it would seek to admit Appellant's two statements about his prior incarceration as part of the *res gestae* and under Rule 404(b), SCRE. (R.p.9, lines 10-18). Later, when the trial court was taking testimony on the issue

[3] As acknowledged by Appellant, his challenge to his admission that he had been in jail may not be preserved for appellate review because Appellant made no objection when the State introduced that specific evidence at trial. *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004). Here, the trial court's ruling—to admit Appellant's two "jail statements"—was made at the end of the pretrial hearing. Although Appellant arguably renewed his objection to the admission of the forensic interview "based on bolstering in [his] prior objection . . . for . . . the several statements - - that were discussed," because Appellant failed to: (1) specifically articulate the nature of his objection and (2) failed to contemporaneously object when the objectionable portion of the forensic interview was actually played, the argument seems to have been waived and this issue may be unpreserved for appellate review. *Morales*; *Byers*; *Aldret*.

of Victim's competency to testify under Rule 601, SCRE, the solicitor asked if, on the night of the incident, Appellant told her anything about being in jail. Victim testified she did not remember. (R.p.60, line 23-p.61, line 7).

An additional matter addressed at the pretrial hearing was the State's motion to admit Victim's April 27, 2018 forensic interview pursuant to Section 17-23-175 of the South Carolina Code. (R.p.69, line 25-p.73, line 19). In arguing Victim's statement provided a detailed account of the offense, the solicitor noted Victim gave "very specific statements" about the incident including that "he [Appellant] told her [Victim] he just got out of prison." (R.p.72, line 25-p.73, line 7). After the trial court ruled to admit the forensic interview, with agreed-upon redaction of the "truth promise" made by Victim, Appellant moved to also redact/suppress Victim's comment that Appellant said he just got out of prison. He argued both that it was not accurate because he had been released from jail rather than prison, and that it was highly prejudicial because "the jury's mind would go wild" with speculation. (R.p.85-p.87).[4]

The trial court agreed the comment would be prejudicial and asked the State why it wanted it admitted. The solicitor argued it should be admitted for two reasons—as part of the *res gestae*, and to prove identity under Rule 404(b), SCRE. In regard to *res gestae*, she argued it was so intimately connected with and explanatory of the crime and setting where it occurred it was contextual and necessary for a full presentation of the case. In regard to identity, the solicitor explained the comment supported Victim's credibility because Appellant *did* get out of jail shortly before the crime and Victim would have had no way to know that except for his statement, so it was corroborative evidence. She noted this helped identify Appellant as the

[4] Although the solicitor used the term "prison," the recording of the forensic interview revealed Victim used the term "jail."

perpetrator rather than any of the other people at or around the house because the police would confirm Appellant's admission about his prior incarceration. The solicitor further argued the probative value of the evidence would outweigh the prejudicial effect. Appellant complained this would leave him unable to cross-examine Victim on this matter because she now was saying she does not remember any incident statement.[5] The trial court deferred ruling to consider the matter. (R.p.88-p.91).

Later in the pretrial hearing, while the parties were discussing Appellant's recorded phone call from the jail, the solicitor noted Appellant's specific statement: "Why would I want to rape somebody when I just got out of jail?" Appellant explained he had not raised this jail call statement as a separate matter because he considered it part of the same objection to the incident statement from the forensic interview. The trial judge said she would look into the issue that afternoon and rule at a later time. (R.p.116-p.119).

The following morning, the trial court announced its ruling on Appellant's two "jail" statements. The judge noted the statements were really a matter of "geography" and only morphed into being a prior bad act because that geographic location happened to be jail. She found the statements went to identification under Rule 404(b) and as part of the *res gestae* of the crime such that redaction would unnecessarily fragment the State's case. They were ruled admissible over Appellant's objections. (R.p.125-p.126).

Victim was called as the State's first witness. After describing the details of the sexual assault, the following exchange took place.

> Q. Was – was your interview at Dee Norton the first time that you had like a formal interview that was recorded?

[5] As explained in more detail below, when Victim testified at trial she *did* recall Appellant making the incident statement. Thus, contrary to this assertion, Appellant did get the opportunity to cross-examine Victim about the statement when she took the stand.

A. Yes, ma'am.

Q. Do you think your memory of what happened was better then or is better now?

A. It was better now.

Q. And do you – did you tell Ms. Dodds anything the Defendant said to you?

A. Yeah, *he told me he just got out of jail.*

Q. And you said (inaudible) a stranger?

A. He was a stranger –

Ms. Ford: Objection, Your Honor, based on the prior.

The Court: All right. Overruled. Go ahead.

By Ms. Frierson:

Q. He was a stranger to you?

A. Yes, ma'am.

Q. Would you have had any other way to know that information?

A. No, ma'am.

(R.p.163, line 11-p.164, line 4) (emphasis added).

After several other witnesses testified, the State called Detective Crider to the stand. (R.p.297-p.308). She testified as follows:

Q. So did you speak with the victim and her mother once you got the case?

A. I did.

Q. And were they able to provide any information that was helpful to you?

A. Yes, sir. One of the things that the victim had stated –

Mr. Ford: Objection. Hearsay.

The Court: I don't know that it's a question called for hearsay, but you can't say what other people told you.

The Witness: Okay. Well –

The Court: Refrain from doing that.

The Witness: Okay.

The Court: He needs to rephrase the question somehow he can.

The Witness: What was noted in the initial incident report and in notes was that one of the things the victim had, I guess told officers was that he had – the Defendant had recently been released from jail.

Ms. Ford: Objection. Based on my prior objection, Your Honor.

The Court: Okay. Overruled. Based on the prior ruling from me go ahead she can answer. Continue.

The Witness: All right. So that was one of the things that I used to begin looking into things.

By Mr. Harris:

Q. Just so ensure the jury was able to understand what you're saying. You were able to confirm that the Defendant was released from jail?

A. Yes.

Mr. Ford: Objection. Your Honor, calls for hearsay and information outside of her personal knowledge.

The Court: Okay. Overruled. For the same basis we made earlier. Go ahead. Just try not to lead. Okay?

Mr. Harris: Yes, ma'am.

(R.p.302, line 1-p.303, line 10).

The State subsequently called forensic interviewer Mattie Dodds to the stand. (R.p.340-p.368). After the State sufficiently laid a foundation, the recording of the redacted forensic interview (State's Exhibit #7) and an unofficial transcript of that redacted recording (Court's Exhibit #4) were offered into evidence. Appellant objected "based on bolstering in [his] prior objection, both for the recording and the several statements -- that were discussed." The trial court admitted the recording "subject to our previous discussions on the record" and the unofficial transcript noting "your objection is also renewed timely on those. We have had discussions about those as well." (R.p.347-p.348).

The audio portion of the interview was then played for the jury and included the following questions and answers:

> Q. Okay. Tell me everything he said.
>
> A. That's it.
>
> Q. Okay. Okay. So, you said, I'll give you money, I'll pay for the cab, and you said no, then you walked out the door. What's the next thing that happened?
>
> A. Then my mom found me.
>
> Q. Your mom found you? And you said something about a man. Or people outside?
>
> A. Uh huh.
>
> Q. Who were the people?
>
> A. His homeboys.
>
> Q. His homeboys?
>
> A. He just got out of jail.
>
> Q. Okay, tell me about that.
>
> A. I don't know that man.

Q. Okay. But you said he just got out of jail?

A. That's what he tell me.

Q. Who told you that?

A. The man who raped me.

Q. He told you he just got out of jail?

A. Uh-huh.

(R.p.362, line 23-p.363, line 12; p.562, line 20-p.563, line 17). Appellant did not specifically object to this portion of the audio while it was played. At the end of trial, during the State's closing argument, the solicitor argued it was implausible that an eleven-year old with a learning disability would: (1) decide to frame a random stranger for a crime; (2) manage to coordinate getting into his house, transferring fresh, wet ejaculate and saliva to her body, putting them in a place the SANE nurse would find them; and (3) somehow learn this stranger had just gotten out of jail—a fact she would not have otherwise known. (R.p.435, lines 3-11).

Law / Discussion

Generally, all relevant evidence is admissible. Rule 402, SCRE; *State v. Saltz*, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001). Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401, SCRE; *State v. King,* 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002). Relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; *Saltz* 346 S.C. at 127, 551 S.E.2d at 247; *State v. Cooley,* 342 S.C. 63, 536 S.E.2d 666 (2000). "To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence." *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App.

2012). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest a decision on an improper basis." *Id.* at 529, 732 S.E.2d at 229.

A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003). The appellate courts review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment. *State v. Aleksey,* 343 S.C. 20, 35, 538 S.E.2d 248, 256 (2000); *State v. Hamilton*, 344 S.C. 344, 358, 543 S.E.2d 586, 598 (Ct. App. 2001) *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). In an appeal from a decision regarding the admission of prior bad act evidence, the appellate court is limited to determining whether the trial judge abused his discretion. *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). "If there is any evidence to support the admission of bad act evidence, the trial judge's ruling cannot be disturbed on appeal." *State v. Martucci*, 380 S.C. 232, 253, 669 S.E.2d 598, 609 (Ct. App. 2008). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." *Hamilton*, 344 S.C. at 358, 543 S.E.2d at 598.

Res Gestae

"The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred." *State v. Johnson*, 439 S.C. 331, 341, 887 S.E.2d 127, 132 (2023) (quoting *State v. King,* 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999); *State v. McGee*, 408 S.C. 278, 287, 758 S.E.2d 730, 735 (Ct. App. 2014). "The evidence

admitted must logically relate to the crime with which the defendant has been charged." *McGee*, 408 S.C. at 287, 758 S.E.2d at 735 (quoting *State v. Wiles,* 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009)). "When evidence is admissible to provide this full presentation of the offense, there is no reason to fragmentize the event under inquiry by suppressing parts of the *res gestae*." *McGee*, 408 S.C. at 288, 758 S.E.2d at 735-36 (quoting *State v. Preslar,* 364 S.C. 466, 474, 613 S.E.2d 381, 385 (Ct.App.2005)). Under this theory, the temporal proximity of the prior bad act should be closely related to the charged crime. *Johnson*, 439 S.C. at 342, 887 S.E.2d 132; *McGee*, 408 S.C. at 288, 758 S.E.2d at 736. As with any other evidence, evidence considered for admission under the *res gestae* theory must satisfy the requirements of Rule 403. *Id.*; *State v. Dennis,* 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013).

Here, it is clear the incident statement was part of the *res gestae* of the sexual assault, since this "evidence ... is so much a part of the setting of the case and its 'environment' that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context." *State v. Adams*, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996), *overruled on other grounds by State v. Giles*, 407 S.C. 14, 754 S.E.2d 261 (2014). This rendered the jail call statement merely cumulative. The requirement for temporal proximity was also met, as the incident statement was made within minutes of the incident. *See Johnson*, 439 S.C. at 342, 887 S.E.2d at 132 (finding temporal proximity requirement was met where the evidence at trial established an unbroken thirteen-hour timeline of violence). Thus, the trial court did not abuse its discretion in finding the statement qualified as part of the *res gestae*.

Additionally, it is clear the trial court did not err by finding that this evidence should not be excluded under a Rule 403 analysis. Our supreme court has explained that when balancing the danger of unfair prejudice against the probative value of evidence, the determination must be

based on the entire record and will turn on the facts of each case. *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 27-28 (2014). Considering the record in this case, the probative value of this evidence was not substantially outweighed by its prejudicial effect. As noted, the incident statement was extraordinarily probative of Appellant's identity. It also was arguably probative of his motive because a person recently released from incarceration might be more likely to seek immediate sexual gratification than a person who had not had his or her freedom restricted. Undoubtedly, the challenged evidence was prejudicial, as most evidence introduced by the prosecution in a sexual assault case rightfully would be. "Unfair prejudice, however, does not include damage that occurs to a defendant's case because of the 'legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.'" *United States v. Guerrero-Cortez*, 110 F.3d 647, 652 (8th Cir. 1997); see also *Lee*, 399 S.C. at 527, 732 S.E.2d at 228.

Whatever prejudicial effect the evidence may have had was outweighed by its probative value, since it helped to prove identity and motive. This is particularly true where it was corroborated by Detective Crider's investigation of the information provided and where Appellant was able to fully cross-examine Victim and Crider about the reported incident statement. Notably, both of Appellant's statements were also admissible as an admission of a party-opponent under Rule 801(d)(2)(A), SCRE; *State v. Beck*, 342 S.C. 129, 134, 536 S.E.2d 679, 682 (2000) ("'As a general rule, statements or declarations made by one accused of a crime are admissible against him'"). Under all of these circumstances, the trial judge properly admitted the incident statement as part of the *res gestae*.

Rule 404(b), SCRE

Although evidence of other criminal acts by a defendant is generally not admissible to prove the defendant's propensity to commit the crime with which he has been charged, such evidence may be admitted to prove motive, intent, identity of the perpetrator, lack of accident or mistake, or common scheme or plan. Rule 404(b), SCRE; *State v. Perry*, 430 S.C. 24, 30-31, 842 S.E.2d 654, 657 (2020); *State v. Ford*, 334 S.C. 444, 451, 513 S.E.2d 385, 388 (Ct. App. 1999). There must be a logical relevancy or connection between the crime charged and the other bad acts for evidence of the prior bad acts to be admissible under the *Lyle* exceptions. *Perry*, 430 S.C. at 31, 842 S.E.2d at 658; *Ford*, 334 S.C. at 451, 513 S.E.2d at 388.

It is clear the incident statement was offered not to show that appellant had committed another crime, but to identify him as the assailant, because it corroborated Victim's description of the crime with a fact she could only have learned from Appellant. As explained above, the evidence was a necessary element in both identifying Appellant and possibly understanding his motive for sexually assaulting Victim. Evidence logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime. *State v. Green,* 261 S.C. 366, 200 S.E.2d 74 (1973). Here, the testimony did not even reveal Appellant's guilt of another crime. Indeed, people in jail on pending charges are presumed innocent (as the jury was instructed in this case) and often have charges dropped or dismissed. Thus, any connection to a crime was so vague that the probative value of Appellant being identified outweighed any possible prejudice. *State v. Tillman*, 304 S.C. 512, 520, 405 S.E.2d 607, 612 (Ct. App. 1991). Because the incident statement was admissible, the jail call statement also could not have been prejudicial because it was merely cumulative to the incident statement.

Moreover, the trial court did not err in determining the probative value was not substantially outweighed by the prejudicial effect of admitting the statements. "Evidence of other crimes, even if logically relevant to prove intent, is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." *State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001) (citing Rule 403, SCRE). "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." *Id.* Evidence of prior bad acts to show a defendant's motive and intent to commit the crime charged becomes significantly more probative when the defendant directly disputes his or her motive or intent. *See Ford*, 334 S.C. at 452, 513 S.E.2d at 389; *id.* (finding evidence that the defendants twice previously robbed the victim was highly probative of the defendants' guilt because the defendants directly disputed the State's allegations about their motive and intent in accosting the victim a third time). Similar to *Ford*, Appellant here directly disputed his identity as the perpetrator by denying any knowledge of the crime when he was questioned by the police. He also directly disputed he had a motive for sexually assaulting Victim by saying in the jail call: "Why would I want to rape somebody when I just got out of jail?" The trial court aptly recognized that identification was central in the case. Consequently, the trial court did not err in finding the probative value was not substantially outweighed by the danger of unfair prejudice.

Harmless Error

For the same reasons discussed in Argument I above, any possible error in the admission of Appellant's statements about being in jail was harmless because the evidence was insubstantial in view of the DNA evidence presented, 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).

For all of these reasons, this argument should be denied and dismissed and Appellant's conviction and sentence should be affirmed.

III.

Appellant's argument that the trial court erred in admitting testimony regarding the checks and balances in place to bolster the competency of minor witnesses during a forensic interview is not preserved for review because: (1) no such testimony was presented following his objection and (2) Appellant did not move to strike the single word of testimony given in response to the question prior to the objection being raised. In any event, the trial court properly admitted the testimony because it was neither a direct nor indirect comment on Victim's credibility. Finally, any possible error in admitting the statement was harmless because, beyond a reasonable doubt, it did not contribute to the jury's verdict given the overwhelming evidence of guilt.

Appellant argues the trial court erred in "admitting testimonial evidence regarding the checks and balances in place to bolster the competency of [Victim] during a forensic interview" because "it improperly vouched for the veracity of [Victim] . . . in direct contravention of the warnings outlined in *Anderson*[6] and *Clark*."[7] (Brief of Appellant, p.14-p.16). The State disagrees and submits Appellant's argument should be denied and dismissed for several reasons.

First, the argument is not preserved for review because: (1) no such testimony was presented following Appellant's objection and (2) Appellant did not move to strike the single word of testimony given in response to the question prior to the objection being raised. In any event, the trial court properly admitted Dodds' testimony because it was neither a direct nor indirect comment on Victim's credibility and instead would reasonably have been interpreted as a statement *other than* as an expression of the witness' belief Victim told the truth. Finally, any possible error in admitting the testimony about the checks and balances in place during a forensic

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[6] *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015).

[7] *State v. Clark*, 444 S.C. 606, 910 S.E.2d 481 (2024).

interview was harmless in this case because, beyond a reasonable doubt, it did not contribute to the jury's verdict given the overwhelming evidence of guilt.

Facts

One of the motions addressed at the pretrial hearing conducted on November 27, 2023, was Appellant's challenge to Victim's competency, where Appellant noted she had previously been diagnosed with intellectual disabilities. (R.p.38, line 1-13). After the trial court heard background information and an introductory argument from Appellant, the State called Victim to the stand and questioned her about her current living arrangements, her understanding of the difference between the truth and a lie, her understanding of why she was in court, her memory of the incident for which Appellant was now on trial, and her memory of various parts of the ensuing police investigation. (R.p.38-p.50). Appellant further explored these issues on cross-examination. (R.p.50-p.60). Following re-direct examination, independent examination by the trial judge, and arguments from the parties, the trial court ruled, over Appellant's objection, that Victim would be allowed to testify. The trial court found Victim was lucid and able to respond appropriately to questions in a timely manner, seemed to know the difference between right and wrong, and understood there could be a punishment associated with lying under oath, and therefore was competent to be a witness under Rule 601, SCRE. (R.p.60-p.67).

Another matter addressed at the pretrial hearing was the State's motion to admit Victim's April 27, 2018 forensic interview pursuant to Section 17-23-175 of the South Carolina Code. The State provided a brief description of the contents of the interview and an argument in favor of admission, offering to have the trial court take sworn testimony from forensic interviewer Mattie Dodds to determine if the totality of the circumstances provided particularized guarantees of trustworthiness. (R.p.69, line 25-p.73, line 19). In arguing Victim's statement provided "a

detailed account of the alleged offense,"[8] the solicitor noted Victim gave "very specific statements." (R.p.72, line 25-p.73, line 7).

Dodds was subsequently called to the stand and questioned by counsel for Appellant about the relevant statutory factors regarding trustworthiness. She testified about the Child First interview protocol, which she described as a developmentally sensitive appropriate method for gathering information about alleged child abuse. Dodds explained how it was designed to provide the child the opportunity to give a narrative of the abuse without suggestive or leading questions. She went on to explain that the protocol could be applied differently based on both the biological and the developmental age of the child. Dodds noted she was aware Victim had an intellectual disability at the time of the interview and that she tried to be sensitive to that fact by using language to ensure Victim comprehended her questions and could provide her own narrative. She acknowledged repeated questioning by law enforcement prior to a forensic interview could be considered suggestive. (R.p.74, line 24-p.81, line 3).

At the conclusion of the testimony, Appellant argued the number of individuals who spoke to Victim about the incident prior to the forensic interview tainted the statement despite the absence of leading questions and therefore the interview should be suppressed. The trial court disagreed, concluding under the totality of the circumstances that Victim's statements to Dodds provided trustworthiness that would itself be helpful to the jury and therefore the forensic interview would be admitted. (R.p.81, line 16-p.85, line 4). The State noted it would redact the portion of the interview which included "the truth promise" in an effort to avoid bolstering the Victim's testimony during trial. The parties then engaged in a discussion of two particular

[8] S.C. Code Ann. § 17-23-175(B)(3).

comments Victim made during the interview which Appellant wanted to redact/suppress, for other reasons. (See Issues I and II above). (R.p.85, line 6-p.91, line 20).

At trial, Victim testified about the sexual assault and was thoroughly cross-examined by Appellant in regard to: (1) her history of behavior/anger issues, (2) her history of hearing voices, (3) her stint in a group home, (4) inconsistencies in details she provided to different people about the incident, (5) her admission she had lied to the police about parts of the incident and (6) her admission that she sometimes lies to avoid getting in trouble. (R.p.151-p.182). Later during trial, Dodds was called to the stand as the State sought to introduce Victim's forensic interview into evidence. (R.p.340). Dodds noted her employment at the Dee Norton Child Advocacy Center as a therapist and forensic interviewer, as well as her training and her use of the Child First protocol for interviewing children in accordance with the National Children's Alliance for forensic interviews. She briefly explained what a forensic interview was, then, without objection, she explained how they are conducted in a developmentally sensitive and appropriate way by a neutral party, using open-ended, non-leading non-suggestive questions, all of which allows the child to use his or her own language and to correct any misunderstandings. (R.p.340, line 6-p.343, line 21). Shortly thereafter, the following exchange took place:

> Q. All right. *Do you have some checks and balances without going into them and in place to ensure competency in an interview*?
>
> A. *Sure*. So I mentioned earlier letting --
>
> Ms. Ford: Objection. That goes into something that's been redacted.
>
> The Court: Okay.
>
> Ms. Frierson: I wasn't going into that, just whether or not there are checks and bounds to ensure.

The Court: Okay.

Ms. Ford: Vouching.

The Court: I'll allow it as long as we stay within the bounds of our previous discussion on the record.

Ms. Ford: Your Honor, I also believe it's vouching.

The Court: Okay. What was the question saying again?

Ms. Frierson: Are there -- without going into them.

The Court: Uh-huh.

Ms. Frierson: *Are there checks and balances in place to ensure competency*?

The Court: I'll allow. Overruled. Okay.

By Ms. Frierson:

Q. And do you obtain a family or social history when you -- prior to doing this interview?

(R.p.344, line 16-p.345, line 13) (emphasis added).

Law / Discussion

Initially, the State submits this issue is not preserved for review because: (1) no such testimony was presented following Appellant's objection and (2) Appellant did not move to strike the single word of testimony given in response to the question prior to the objection being raised. *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004). Even if preserved, the testimony about checks and balances was properly admitted because it was not a direct or indirect comment on Victim's credibility. It is well settled "that it is improper for a witness to give testimony as to his or her opinion about the credibility of a child victim in a sexual abuse matter." *State v. Hill*, 394 S.C. 280, 294, 715 S.E.2d 368, 376 (Ct. App. 2011). Because assessing witness credibility is "the exclusive province of the jury," one witness may

not improperly bolster the testimony of another. *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). If "there is no way to interpret [the witness]'s testimony other than as her opinion that the victim was telling the truth," the testimony is inadmissible. *Id.* at 465, 725 S.E.2d at 142. In *State v. Kromah*, our supreme court directed forensic interviewers to avoid five kinds of statements:

> (1) that the child was told to be truthful; (2) a direct opinion as to a child's veracity or tendency to tell the truth; (3) any statement that indirectly vouches for the child's believability, such as stating the interviewer has made a "compelling finding" of abuse; (4) any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter; or (5) an opinion that the child's behavior indicated the child was telling the truth.

State v. Kromah, , 401 S.C. 340, 360, 737 S.E.2d 490, 500 (2013). *Kromah*, however, specifically approved the following subjects: "the time, date, and circumstances of the interview; any personal observations regarding the child's behavior or demeanor; or a statement as to events that occurred within the personal knowledge of the interviewer." *Id.*

Here, by merely mentioning she had checks and balances in place to ensure competency, Dodd's testimony falls within a subject approved by *Kromah*—helping to explain the circumstances of the interview. Even if this Court disagrees and concludes Dodd's comment exceeded the non-exhaustive parameters of *Kromah*, the relevant inquiry is whether there is a way to interpret the statement *other than* as an expression of the witness' belief Victim told the truth. *See McKerley*, 397 S.C. at 465, 725 S.E.2d at 142 (finding that even though the forensic interviewer "never testified directly that she believed what the victim stated in her interviews or in her testimony .... there [wa]s no way to interpret [the interviewer]'s testimony other than as her opinion that the victim was telling the truth"); *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) ("There is no other way to interpret the language used in the reports other than to

mean the forensic interviewer believed the children were being truthful."). The most rational way to interpret Dodds' testimony was as she described—a comment that she had checks and balances in place to ensure the competency of a victim to participate in an interview, not as any kind of opinion Victim told the truth. Indeed, a competent witness could just as easily lie as tell the truth. Thus, Dodds' statement did not indirectly vouch for Victim's believability and never suggested to the jury that Dodds believed Victim's allegations—two things *Kromah does* prohibit. *See* 401 S.C. at 360, 737 S.E.2d at 500.

To suggest Dodds' simple comment could singularly constitute improper bolstering is a bridge too far. In this specific context, Dodds' comment alone, without more, did not convey to the jury that Dodds believed Victim. Instead, Dodds' testimony served a valid evidentiary purpose. Her one word affirmation that she had procedures in place to ensure competency went to support the necessary establishment that Victim was competent to answer her questions and explain what happened during the forensic interview. This was relevant to the jury's assessment of her testimony, regardless of whether they believed her allegations or not. Also, it was similar to the competency determination the trial court itself was required to establish to allow Victim to testify at trial. Here, the trial court's limitations on Dodds' overall testimony achieved their purpose—by ensuring her testimony contained no direct or indirect bolstering. The trial court deftly navigated the issue and protected the proceeding from improper bolstering. Therefore, there was no abuse of discretion in the trial court's decisions to admit Dodds' limited testimony. *State v. Makins*, 433 S.C. 494, 502–05, 860 S.E.2d 666, 671–72 (2021) (finding no abuse of discretion in the trial court's decision to deny defendant's motion for mistrial or to admit the therapist's limited testimony).

Additionally, and for the same reasons discussed in Argument I above, any possible error in the admission of Dodds' testimony about checks and balances was harmless because the evidence was insubstantial in view of the DNA evidence presented, 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).

CONCLUSION

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

Respectfully submitted,

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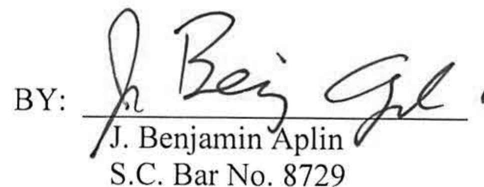
BY: 
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