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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Berkeley County

Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES EDWARD BOLEY, II,

APPELLANT

APPELLATE CASE NO. 2025-000228

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court abused its discretion by refusing to exclude testimony from a Sexual Assault Nurse Examiner (SANE) nurse concerning whether a SANE exam was performed and the procedure surrounding SANE exams because the testimony was irrelevant, had little probative value, and was not substantially outweighed by the danger of unfair prejudice?

STATEMENT OF THE CASE

Appellant was indicted at the November 2024 term of the Berkeley County grand jury for three counts of criminal sexual conduct (CSC) with a minor, second degree, and one count of CSC with a minor, third degree. R. 642-643; 645-646; 648-649; 651-652. Appellant's case was called for trial on January 27, 2025, before the Honorable Deadra L. Jefferson, and a jury. R. 1. Grover Cleavland Seaton, IV, represented appellant, and Kamila Szymczynska-Sas and Marie Lerch represented the state. R. 1.

On January 30, 2025, the jury returned a guilty verdict as to each count. R. 624, l. 21 – 625, l. 21. Judge Jefferson sentenced appellant to a 16-year total sentence comprised of 16 years for each CSC with a minor, second degree and 13 years as to the CSC with a minor, third degree, all set to run concurrently. R. 638, ll. 4-13.

This appeal follows.

STANDARD OF REVIEW

"In criminal cases, appellate courts sit to review errors of law only." *State v. Robinson*, 426 S.C. 579, 591, 828 S.E.2d 203, 209 (2019) (citing *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*; *see also State v. Brockmeyer*, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

ARGUMENT

The trial court abused its discretion by refusing to exclude testimony from a SANE nurse concerning whether a SANE exam was performed and the procedure surrounding SANE exams because the testimony was irrelevant, had little probative value, and was not substantially outweighed by the danger of unfair prejudice.

Relevant facts

During appellant's trial, the state presented evidence that J.A. "bounced" between appellant's residence in Berkeley County and her mother's. R. 130, ll. 15-18. Several witnesses testified that J.A. was like family to appellant. R. 288, ll. 10-15; 310, ll. 14-17. The state called J.A. as a witness, and she testified that she told her mother about the sexual abuse she experienced. R. 128, l. 15 – 130, l. 4. She described the abuse. R. 163, l. 5 – 175, l. 8. She identified appellant as the individual who sexually abused her. Kimberly Perez, J.A.'s mother, testified that her daughter told her about the abuse and after speaking to the police, she took J.A. to the hospital. R. 335, l. 12 – 336, l. 22.

Dr. Ian Kane, an expert in pediatric emergency medicine, testified that he was involved in J.A.'s care on February 14, 2020. R. 392, ll. 10-13. J.A. was seen in the emergency room concerning sexual assault allegations. R. 393, ll. 3-5. Dr. Kane testified that a SANE nurse also saw J.A. and that a SANE kit was not performed on J.A. R. 394, l. 1. – 395, l. 10.

Objection to SANE nurse testimony

The state then offered Katherine Fabrizio as an expert in the area of sexual abuse nurse examinations and procedure. R. 409, ll. 23-25. Trial counsel objected to the relevance of her testimony but had no objection as to her qualifications. R. 410, ll. 2-3, 9-17. Trial counsel argued that testimony had already been heard that a SANE examination was not conducted. R.

411, ll. 1-4. He argued that there was a 49-page report that did not have her name on it. R. 411, ll. 9-14. The court determined that the testimony was relevant and probative because the jury was left to wonder why a SANE exam was not done and the state was entitled to call a witness to explain why the exam was not done. R. 411, l. 15 – 412, l. 4. Trial counsel contended Fabrizio could only add that there were no SANE protocols done and no SANE report created. R. 412, ll. 5-7. He argued that "[a]ll we're trying to do is bolster her in the eyes of the jury as having something important to say when she doesn't." R. 412, ll. 8-10. The state noted that it had no report that Fabrizio examined J.A. or that she was the SANE nurse consulted. R. 412, l. 16 – 413, l. 4. The state continued that it would have a detective testify that he spoke with Fabrizio, that she was the SANE nurse that night, and that they had a conversation that night. R. 413, ll. 6-11. The court overruled the objection because it found the evidence probative and relevant. R. 413, ll. 16-17. The court continued that the evidence was not prejudicial and, even if it was, the probative value outweighed any potential prejudice. R. 413, ll. 21-24. Further, the court determined that the state was entitled to present a complete picture as to why no physical evidence or no physical exam was done. R. 414, ll. 1-8.

SANE nurse trial testimony

Fabrizio testified that she was a P-SANE nurse, or someone who dealt with patients between 0 and 17. R. 416, ll. 1-2. She reviewed the Medical University of South Carolina (MUSC) records for J.A. and was the SANE nurse working on February 14, 2020, at MUSC. R. 416, ll. 15-25. She described the procedure for performing a SANE kit. R. 418, l. 9 – 419, l. 6. She then explained that an acute exam was an exam that fell within the time frame of 96 hours for a pubertal child and 36 hours for a pre-pubertal child. R. 419, ll. 7-12. She testified that if a child had not had contact with the offender within that time frame, the child would be referred

out for an outpatient forensic exam. R. 419, ll. 15-19. She continued that after 96 hours it was unlikely any DNA evidence could be collected. R. 420, ll. 1-9. She explained that an acute exam was done within 96 hours, and a non-acute exam was done at an outside facility. R. 420, ll. 10-12. She also explained that pre-pubertal was before the start of a period and children under 11, while children 12 and older were considered pubertal. R. 420, ll. 17-22.

Based on her review of the MUSC records, Fabrizio testified that J.A. did not have an acute exam on February 14, 2020. R. 421, ll. 1-4. She opined that an acute exam was not completed because the patient "most likely fell out of the time frame," and that there was no other reason why the exam would not have been done. R. 421, ll. 6-9. She explained that the information concerning the time frame predominately came from the patient, but information may also come from law enforcement or the hospital. R. 421, ll. 11-12. The state inquired whether it was unusual for a patient to come to the ER to get an acute exam and not receive one, and Fabrizio replied that it was possible because a parent may believe a kit needs to be done but are not aware of the time frame that would render it unlikely that DNA evidence could be collected. R. 421, l. 19 – 422, l. 4. She testified that labs were ordered for sexually transmitted infections, which was typical. R. 422, ll. 5-17. It was also standard to treat prophylactically with medication to keep the patient from getting an infection. R. 423, ll. 1-8.

Fabrizio testified that for children that fell outside of the time frame, she would refer them to an outside facility for an exam, which was done for J.A. R. 423, ll. 9-22. The exam for J.A. occurred on June 29, 2020. R. 424, ll. 1-2. She reviewed those records and testified that J.A.'s exam was normal. R. 424, ll. 11-15. She opined that there was "overwhelming" research that showed it was normal to have a normal exam. R. 424, ll. 19-21. She explained that it was

rare for that area of the body to be injured, and if it did, it heals quickly. R. 424, ll. 21-23. She stated it was "very rare that you have a positive exam." R. 425, l. 1.

On cross-examination, Fabrizio agreed that her name was not in the 49-page report. R. 428, ll. 3-5. She stated that she was on-call that night, so the SANE nurse referenced in the report was most likely her. R. 428, ll. 19-24. She did not create her own report or document. R. 429, ll. 10-19. She had no personal knowledge of having met J.A. R. 429, ll. 20-22.

Trial testimony continued

Scott Bell, an officer with Berkeley County Sheriff's Office, testified that he responded to the incident on February 14, 2020. R. 442, ll. 9-15. He confirmed that he responded to MUSC and spoke with the SANE nurse, Kathy Fabrizio. R. 449, ll. 13-17. He also testified that he learned that a SANE exam was not performed. R. 450, ll. 2-4.

Closing and sentencing

Thereafter, both parties rested their cases. R. 544, ll. 6-7; 549, l. 23. During closing arguments, the state emphasized that the SANE nurse testified about how the SANE exams were done and that it was "normal to be normal." R. 575, ll. 8-11. It continued that the SANE nurse's testimony about the exams was evidence. R. 575, ll. 12-15. The state argued that the testimony of the SANE nurse was "really important," concerning female anatomy. R. 577, ll. 10-12.

The jury returned a guilty verdict as to each count. R. 624, l. 21 – 625, l. 21. Judge Jefferson sentenced appellant to a 16-year total sentence comprised of 16 years for each CSC with a minor, second degree and 13 years as to the CSC with a minor, third degree, all set to run concurrently. R. 638, ll. 4-13.

Discussion

The trial court abused its discretion by overruling trial counsel's objection to the relevance of the testimony from the state's SANE nurse because the testimony was irrelevant, had little probative value, and was not substantially outweighed by the danger of unfair prejudice.

All relevant evidence is generally admissible. Rule 402, SCRE. To be relevant, the evidence must have a "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.

The SANE nurse's testimony concerning whether a SANE exam was completed did not tend to establish any fact of consequence, namely, whether appellant committed the offenses he was charged with. *See State v. Passio*, 433 S.C. 666, 678, 861 S.E.2d 785, 791 (Ct. App. 2021) ("Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved") (citing *State v. Sweat*, 362 S.C. 117, 126-27, 606 S.E.2d 508, 513 (Ct. App. 2004)). Any relevance the testimony may have had was diminished by the same testimony from several witnesses that a SANE exam was not completed. R. 394, l. 1. – 395, l. 10; 450, ll. 2-4; *see also* Rule 401, SCRE. Nor was her testimony concerning the general procedure for completing a SANE exam relevant as it did not make it more or less likely that appellant committed the charged offenses. R. 418, l. 9 – 420, l. 22. Thus, the trial court abused its discretion by determining that the evidence was relevant given that it had no bearing on proving appellant's guilt. R. 413, ll. 16-17.

The trial court further abused its discretion by finding that, even if the evidence were prejudicial, the probative value outweighed any potential prejudice. R. 413, ll. 21-24. Even if evidence is relevant, it should otherwise be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "Cumulative evidence has repeatedly been defined to be additional evidence of the same kind to the same point." *State v. Funderburke*, 251 S.C. 536, 540, 164 S.E.2d 309, 311 (1968). In addition, "[t]he determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case." *State v. Henley*, 428 S.C. 649, 662, 837 S.E.2d 639, 646 (Ct. App. 2019) (quoting *State v. Gillian*, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007)).

As discussed, Fabrizio's testimony was irrelevant because it did not make any fact of consequence more or less probable. Rule 401, SCRE; R. 412, ll. 5-10. Relatedly, the probative value of the SANE nurse's testimony concerning whether a SANE exam was performed and the procedure for performing the exam was minimal. *See State v. Gray*, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App. 2014) (explaining that "probative value is the measure of the importance of the evidence to the outcome of a case or the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues.") (internal quotations and alterations omitted). The probative value of the testimony was low considering that, on this record, the testimony was redundant of the testimony from Dr. Kane and Scott Bell that a SANE exam was not performed. *Henley*, 428 S.C. at 662, 837 S.E.2d at 646; R. 394, l. 1. – 395, l. 10; 450, ll. 2-4. The result is that Fabrizio's testimony presented only "additional evidence of the same kind to the same point," and thus, was not probative to any issue in dispute. *Funderburke*,

251 S.C. at 540, 164 S.E.2d at 311. Further, the probative value was substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. By admitting the testimony, Fabrizio was allowed to opine that it was not unusual to go to the hospital for a SANE exam and not receive one. R. 421, l. 19 – 422, l. 4. The prejudicial effect of Fabrizio's testimony was amplified during the state's closing argument which emphasized to the jury that her testimony was evidence and was "really important." R. 575, ll. 8-15; R. 577, ll. 10-12.

Accordingly, the trial court abused its discretion by determining that Fabrizo's was relevant, despite the fact that it did not aid the jury in determining appellant's guilt, and by concluding that the probative value of the evidence was substantially outweighed by any prejudicial effect. *See Hatcher*, 392 S.C. at 91, 708 S.E.2d at 753.

CONCLUSION

Based on the foregoing argument, appellant respectfully requests this Court to reverse his convictions and sentence and remand to the Court of General Sessions of Berkeley County for a new trial.

Molly M. Keegan
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of February, 2026.

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JAMES EDWARD BOLEY, II,

APPELLANT

APPELLATE CASE NO. 2025-000228

PETITION TO BE RELIEVED AS COUNSEL

Counsel for James Boley states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Deadra L. Jefferson, which was held on Jan. 27-30, 2025, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

Wherefore, she asks the Court to relieve her as counsel for James Boley.

Respectfully Submitted,

Molly M. Keegan
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of February, 2026.

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S.C. SUPREME COURT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Molly M. Keegan
Appellate Defender

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ATTORNEY FOR APPELLANT

This 25th day of February, 2026.