STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Honorable DeAndrea G. Benjamin, Circuit Court Judge
Appellate Case No. 2012-212105

THE STATE,

Respondent,

vs.

DARIUS DOMINIC MACK,

Appellant.

INITIAL BRIEF OF RESPONDENT

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II.

Any issue with the trial judge's qualification of a sexual assault nurse examiner as an expert and admission of her testimony regarding the victim's injuries and the significance of those injuries was not properly preserved for appellate review because defense counsel elicited cumulative testimony to the objected-to testimony during her own examination of the witness without reserving an objection to that testimony. However, regardless of any issue preservation concerns, the expert's testimony was properly admitted and did not improperly invade the province of the jury or bolster the credibility of the victim. Furthermore, even assuming the testimony had somehow been improper, any error was entirely harmless and resulted in no prejudice to Appellant.

STATEMENT OF THE CASE

In October of 2010, Appellant Darius Dominic Mack was arrested following an investigation into a sexual assault that took place at Spring Valley High School. In March of 2011, the Richland County grand jury indicted Appellant for one count of first-degree criminal sexual conduct. On May 14, 2012, a jury trial was commenced in the Richland County court of general sessions with the Honorable DeAndrea G. Benjamin, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to a term of imprisonment of twenty years. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

Around 8:40 a.m. to 9:00 a.m., Doris Pleasants, an employee of Spring Valley High School, arrived at the high school and entered an older building where art and music classes were taught. (Tr. pp. 150-153). Pleasants then walked through the older building towards the school's newer building, which was connected to the older building by a secluded patio area. (Tr. pp. 153-154). As she approached the secluded patio area, Pleasants heard someone screaming and telling another person to get off of her. (Tr. pp. 154-155). Pleasants then looked into the confined space from which she heard the screaming and observed what appeared to be a male student standing in front of a crying female student, who was fighting to get away from the man while he held her up against a wall with his hand around her throat. (Tr. pp. 155-158; p. 166; p. 174). As she looked on, Pleasants noticed the pants of the man she believed to be a student were down below his buttocks, the female student's belt was broken, and the female student's pants were half-unzipped. (Tr. p. 160). Concerned, Pleasants asked them what they were doing, and the man informed her he had the situation under control, was the female student's brother, and was there to see why people were messing with her. (Tr. p. 159; pp. 175-176). However, the female student quickly screamed the man was not her brother and had raped her, and the man, Appellant Darius Dominic Mack, responded by immediately running out of the school.[1] (Tr. p. 159; p. 161; p. 213).

Following Appellant's flight from the school, Pleasants attempted to comfort the female student ("Victim"), who was crying, sobbing, and repeatedly stating she had been raped. (Tr. p. 160; p. 163). Pleasants then escorted Victim to an administrator for help, and the administrator notified Deputy Ben Fields, a school resource officer at the high

[1] Appellant was not a student at Spring Valley High School. (Tr. p. 287; p. 488).

school and a deputy with the Richland County Sheriff's Office, of the incident. (Tr. p. 162; pp. 317-318; pp. 324-325). Deputy Fields then met with Victim, asked her what happened, and was informed she had been raped by Appellant. (Tr. pp. 325-326). In response, Deputy Fields locked the school down while they searched for Appellant and advised Victim to go to the hospital for a sexual assault examination.[2] (Tr. pp. 326-328).

Thereafter, Victim's mother picked Victim up from the school and took her to the hospital for a sexual assault examination. (Tr. pp. 264-265). At the hospital, Victim met with Donna DeBrew, a registered nurse and a forensic sexual assault nurse examiner ("SANE nurse"). (Tr. pp. 349-350). DeBrew then spoke with Victim about what had occurred, examined her, and documented the injuries she discovered. (Tr. pp. 369-370; pp. 387-389; p. 391). During her examination, she found red scratches on Victim's chest and an abrasion in the posterior fourchette area of Victim's vagina. (Tr. p. 392; p. 400; p. 402; p. 414). Additionally, DeBrew took swabs from Victim's vagina and located male semen on the swabs. (Tr. pp. 396-397; p. 406). She then secured the evidence for subsequent analysis.[3] (Tr. p. 406).

Later that day, Investigator Richard Carter, an investigator in the special victims unit of the Richland County Sheriff's Office, began an investigation into the incident.

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[2] Subsequently, Deputy Fields secured and reviewed the school's surveillance footage from the morning of the incident. (Tr. p. 330). The surveillance footage depicted both Appellant and Victim entering the school, walking towards an area containing lockers, and then walking towards the secluded area where the incident occurred. (Tr. p. 333; pp. 336-339). Additionally, the surveillance footage showed Appellant rapidly fleeing from the school's campus. (Tr. p. 339). However, the surveillance footage did not depict the incident because there were no surveillance cameras in the secluded area where it occurred. (Tr. pp. 338-339).

[3] During trial, John Barron, a DNA analyst for the Richland County Sheriff's Office and an expert in DNA analysis, testified about the results of his analysis of the evidence collected from Victim's vagina. (Tr. pp. 453-454; p. 456; p. 459). Specifically, Barron testified he compared the DNA profile developed from the semen discovered in Victim's vagina to Appellant's DNA profile. (Tr. p. 461; p. 463). Based on that comparison, Barron concluded the DNA profiles were identical and confirmed Appellant's DNA was present in Victim's vagina shortly after the incident. (Tr. pp. 464-465; p. 467).

(Tr. pp. 437-438). Based on his investigation, he obtained an arrest warrant for Appellant, and he met with him at the Richland County Sheriff's Office on October 20, 2010, after Appellant was taken into custody. (Tr. pp. 440-441). During their meeting, Investigator Carter informed Appellant of his rights, Appellant waived those rights, and then Appellant provided a statement to the officer. (Tr. pp. 441-443; p. 445). In his statement, Appellant claimed he went to school with Victim on the day of the incident even though he knew he was not supposed to be on the bus or at the school because he alleged Victim told him to do so since they could no longer have sex at her mother's home. (Tr. p. 445). Furthermore, Appellant admitted he "stuck it in [Victim]" at the school and acknowledged lying to Pleasants after he was discovered, but he denied raping Victim and claimed Victim's family was responsible for the accusations against him because they did not like him. (Tr. pp. 445-447).

Subsequently, Appellant was indicted for first-degree criminal sexual conduct, and he proceeded to trial. (Tr. p. 16). During trial, Pleasants recounted her experiences on the day of the incident and confirmed she heard Victim screaming from the secluded area, investigated the sounds, and observed the man who turned out to be Appellant holding Victim against the wall as Victim fought and tried to get away from him. (Tr. pp. 154-159; p. 166; p. 174). Additionally, she testified Victim was crying, Victim's belt was broken, and Victim accused Appellant of raping her. (Tr. p. 159; p. 163). Furthermore, Pleasants indicated Appellant claimed to be Victim's brother before fleeing from the school when Victim rebutted his claims. (Tr. p. 159; p. 161).

Following Pleasants' testimony, Victim testified about the incident and the events leading up to it. (Tr. pp. 194-195; pp. 205-210; pp. 213-221). Specifically, Victim, who was seventeen years old at the time of trial, stated she knew Appellant prior to the

incident, had been in a relationship with him in the past, had become pregnant with Appellant's child when she was fourteen years old, and had separated from Appellant during the pregnancy. (Tr. pp. 188-191; p. 193). Regarding the day of the incident, Victim stated she went to the bus stop to wait for the bus to school, saw Appellant there, did not speak with him, got on the bus when it arrived, and watched as Appellant got on as well. (Tr. pp. 194-195; pp. 205-206). Victim recounted Appellant then sat next to her on the bus and attempted to prevent her from moving away from him but she was eventually able to do so. (Tr. p. 206). Thereafter, Victim stated they arrived at school, Appellant followed her inside, Appellant told her he wanted to be a part of his son's life, she told him no, and then she headed to her first class in the older building at the school. (Tr. pp. 206-210). When she did so, she stated Appellant followed her, pulled her arm and pulled her into a corner, threw her belongings down, "had [her] in the corner" up against a wall, and ripped her belt while trying to get her pants off. (Tr. pp. 213-214). As Appellant had her against the wall, Victim testified she asked Appellant to leave her alone but he did not and they ended up on the floor. (Tr. p. 214). Once they were on the floor, Victim stated she fought with Appellant as he tried to get her pants off, Appellant lifted her leg and covered her mouth, and Appellant inserted his penis into her vagina in a painful manner despite the fact she did not want to have sex with him.[4] (Tr. pp. 214-217; pp. 223-224). After that, Victim indicated Appellant attempted to help her up, apologized for what he had done, and asked her not to tell on him. (Tr. pp. 218-219). As a result of the incident, Victim stated she had scratches on her arm and neck, her leg was

[4] Victim indicated she was fourteen years old at the time of the sexual assault while Appellant was seventeen years old at the time. (Tr. p. 214). She also stated Appellant was much larger than her. (Tr. p. 214).

injured, and her vagina hurt "real bad."[5] (Tr. p. 219). Thereafter, Victim indicated Pleasants entered the secluded area and asked what happened, Appellant attempted to mislead her, she told Pleasants she had been raped, and Pleasants then took her for help while Appellant fled from the school. (Tr. pp. 219-221). Victim testified she then revealed the details of the incident and went to the hospital for a sexual assault examination. (Tr. pp. 222-223).

Subsequently, as the trial progressed, the solicitor called DeBrew, the SANE nurse who examined Victim after the incident, to the witness stand. (Tr. p. 349). After taking the stand, DeBrew testified she was a SANE nurse and also a labor and delivery nurse at the hospital. (Tr. p. 349). In carrying out her role as a SANE nurse, DeBrew indicated she took care of sexual assault victims, collected evidence, provided medical treatment, and took a history from each patient. (Tr. p. 349). Regarding her background, she noted she had a nursing degree, was a registered nurse, had twenty-three years of experience as a nurse, had been a SANE nurse for approximately two and half years, had worked on approximately 180 to 190 cases as a SANE nurse, had received specialized training as a SANE nurse, and was certified as an adult SANE nurse. (Tr. pp. 350-352). Following that testimony, the solicitor moved for DeBrew to be qualified as an expert in the field of "adult sexual assault nurse examiner examination," and defense counsel asked for permission to question DeBrew about her qualifications. (Tr. pp. 352-353). During her subsequent testimony, DeBrew stated her work as a SANE nurse was peer-reviewed, her role as a SANE nurse involved collecting evidence and providing care to patients

[5] In addition to Victim's physical injuries, Victim's mother testified during trial about the changes to Victim's behavior that occurred after the incident. (Tr. p. 261; pp. 265-266). In particular, Victim's mother stated Victim became easily upset after the incident, could not handle things well, and no longer wanted to be around other people. (Tr. pp. 265-266).

with the help of hospital physicians, and her role as a SANE nurse did not involve diagnosing patients because she was not permitted to do so as a nurse. (Tr. pp. 353-355).

Following that testimony, defense counsel indicated she did not object to DeBrew being qualified as an expert in the collection of evidence and the administering of the examination but did object to any testimony beyond those areas. (Tr. p. 356). The solicitor responded DeBrew was being offered as an expert adult sexual assault nurse examiner, and the trial judge excused the jury from the courtroom for an in camera hearing on the matter. (Tr. p. 356). During the hearing, defense counsel indicated she did not object to DeBrew being qualified "as a sexual assault examiner within the narrow scope of collecting evidence" and had no objections to DeBrew testifying about what she did, whether she did it correctly, and what "observation she found." (Tr. p. 357). However, defense counsel indicated she did object to DeBrew testifying about any conclusions she drew or anything regarding causation or diagnosis. (Tr. p. 357). In response, the solicitor argued DeBrew was permitted as an expert to offer her opinion as to what she observed on Victim and what Victim's injuries represented. (Tr. pp. 357-358). The solicitor further indicated DeBrew intended to testify the victim's injuries could be caused by both consensual and non-consensual sexual intercourse. (Tr. p. 358).

After listening to counsel's remarks, the trial judge asked defense counsel how DeBrew's proposed testimony would fall outside of the scope of typical expert opinion testimony. (Tr. p. 358). Defense counsel responded DeBrew could be qualified as an expert while explicitly confirming she was "not objecting to her being qualified." (Tr. p. 359). However, defense counsel asserted DeBrew's testimony would improperly constitute a legal conclusion if she testified as to causation. (Tr. p. 359). For that reason,

defense counsel opined DeBrew was only permitted to testify as to what she saw and what she did in the collection of evidence. (Tr. p. 359).

Thereafter, the trial judge asked the solicitor if she intended to ask DeBrew to come to a conclusion as to whether Victim was sexually assaulted, and the solicitor confirmed she did not intend to do so. (Tr. p. 361). The trial judge then indicated such questioning was what she believed defense counsel's objection went to, and defense counsel acknowledged it was. (Tr. pp. 361-362). However, defense counsel indicated she was also objecting to DeBrew being permitted to testify as to whether something was consistent with sexual assault. (Tr. p. 362). The trial judge then stated DeBrew was permitted to testify whether or not something she observed was consistent with a particular thing based on her experience and simply was not permitted to draw a conclusion as to whether Victim was sexually assaulted. (Tr. pp. 362-363).

After the trial judge ruled on the scope of DeBrew's testimony, defense counsel indicated she objected to DeBrew testifying to the details of the sexual assault as reported by Victim on the grounds it would violate Rule 801, SCRE, and constitute improper bolstering. (Tr. pp. 363-364). Following defense counsel's contentions, the parties discussed the issue with the trial judge, and the trial judge had the solicitor proffer DeBrew's testimony in regard to Victim's statements to her. (Tr. pp. 364-374). After the solicitor finished proffering DeBrew's testimony, the parties discussed the issue further, and the trial judge ruled DeBrew would be permitted to testify she spoke with Victim and observed injuries consistent with sexual assault but would not be permitted to testify as to the details of Victim's statement to her. (Tr. pp. 374-383). Defense counsel then sought the exclusion of the photographs of Victim's injuries as irrelevant and unduly prejudicial, and the trial judge overruled the objection but limited the number of photographs that

could be introduced. (Tr. pp. 384-385). After ruling on the photographs, the trial judge ruled DeBrew could be qualified as an expert in the field of adult sexual assault nurse examination. (Tr. pp. 385-386).

Following the trial judge's ruling, the jury returned to the courtroom, DeBrew was qualified as an expert, and the trial judge gave a limiting instruction to the jurors indicating they were not required to accept DeBrew's opinion and could give it whatever weight and credibility they believed was appropriate. (Tr. pp. 385-386). Subsequently, the solicitor resumed her direct examination of DeBrew, and DeBrew testified about her examination of Victim. (Tr. pp. 386-389). During his testimony, DeBrew recounted she took a statement from Victim, photographed any injuries consistent with what Victim told her along with red scratches to Victim's chest, and secured Victim's clothing as potential evidence. (Tr. pp. 390-393). DeBrew stated she then took swabs from Victim's vagina, determined Victim was on her menstrual cycle, and located an abrasion to the posterior fourchette area of Victim's vagina. (Tr. pp. 396-400). Regarding the injury, she noted it was a very common injury to see from sexual assault while acknowledging similar injuries could result from childbirth.[6] (Tr. pp. 401-402). The solicitor then asked DeBrew why – to a reasonable degree of medical certainty – the posterior fourchette area of a vagina is commonly injured in a sexual assault, defense counsel objected on the basis it was outside the scope of DeBrew's expertise, and the trial judge overruled the objection. (Tr. pp. 402-403). DeBrew then responded the injury was common because it was an area of the vagina that would be hit when an object enters the vagina, noting it

[6] During her testimony, DeBrew informed the jury Victim had previously given birth to a child. (Tr. p. 401).

was referred to as a mounting injury due to the way people engage in sexual intercourse with one another. (Tr. pp. 403-404).

Thereafter, defense counsel questioned DeBrew on cross-examination and elicited testimony from DeBrew confirming she found scratches to Victim's neck and an abrasion to the posterior fourchette area of Victim's vagina, which DeBrew described as the first point of contact for any object entering a vagina. (Tr. pp. 413-414). As the questioning continued, DeBrew stated different things could cause an abrasion to the posterior fourchette area of a vagina, noted abrasions are caused by friction, and acknowledged friction was consistent with sexual intercourse. (Tr. p. 415). DeBrew further testified many sexual assaults have not resulted in any injuries and noted Victim's single injury to her vagina did not automatically mean a sexual assault had occurred. (Tr. pp. 416-417). Thereafter, on re-direct examination, DeBrew testified it was less common to find injuries when consensual intercourse had occurred. (Tr. p. 418). Then, on re-cross-examination, DeBrew indicated sexual assault injuries were usually to the posterior fourchette area of the vagina while acknowledging such injuries could also result from consensual sex, from the position of the parties, from the duration of sexual intercourse, and from the size of the male. (Tr. p. 420).

Subsequently, the State rested, and defense counsel moved for a directed verdict on the first-degree criminal sexual conduct charge. (Tr. p. 468; p. 471). In support of that motion, defense counsel argued no evidence had been presented establishing Victim submitted to a sexual assault while being the victim of "any higher level of forcible confinement" while asserting an elevated level of forcible confinement was allegedly necessary to support a conviction for the offense. (Tr. pp. 472-474). In response, the solicitor noted the trial testimony established each element of the indicted offense

because it showed Appellant pinned Victim up against the wall, held her, pushed her to the ground, and got on top of her before raping her. (Tr. p. 473). After considering the arguments of counsel, the trial judge denied defense counsel's motion. (Tr. pp. 475-476).

Following the trial judge's ruling, Appellant testified in his own defense and acknowledged going to Spring Valley High School on the date of the incident. (Tr. pp. 490-493). However, Appellant claimed he only went to the school because Victim asked him to do so. (Tr. pp. 490-493). Furthermore, Appellant acknowledged going to the secluded patio area of the school with Victim but claimed he engaged in consensual sex with Victim there after she removed her own pants. (Tr. pp. 498-499). He then stated they were caught having sex, Victim accused him of raping her, and he fled because he knew he was not supposed to be at the school. (Tr. p. 500). However, he insisted he did not rape Victim. (Tr. p. 511; p. 518).

Subsequently, the defense rested, and the trial judge instructed the jurors on the applicable law, including on how they should consider expert testimony in the same manner they considered any other testimony and were not to give it greater weight simply because it came from an expert. (Tr. p. 518; pp. 582-597). Thereafter, at the conclusion of trial, the jury convicted Appellant as indicted. (Tr. p. 619). Following the verdict, the trial judge sentenced Appellant to a twenty-year term of imprisonment. (Tr. p. 634).

ARGUMENT

I.

The trial judge properly denied Appellant's directed verdict motion as to the first-degree criminal sexual conduct charge because, when viewed in a light most favorable to the State, the evidence and testimony presented during trial established each element of the indicted offense, including that Appellant committed a sexual battery against the victim under circumstances where the victim was also the victim of forcible confinement or kidnapping.

Appellant contends the trial judge erred in denying his directed verdict motion as to the first-degree criminal sexual conduct charge. In support of that contention, Appellant maintains he was entitled to a directed verdict because no evidence was presented establishing he kidnapped or forcibly confined Victim during the course of committing the sexual assault. Appellant further maintains the legislature did not intend for an act constituting kidnapping or forcible confinement to constitute an aggravating circumstance sufficient to warrant a conviction for first-degree criminal sexual conduct if the act was committed during the course of the sexual battery itself. Contrary to Appellant's contentions, the trial judge committed no error in denying his directed verdict motion. Critically, when viewed in a light most favorable to the State as required, the evidence and testimony presented during Appellant's trial established Appellant committed a sexual battery against Victim in conjunction with an act constituting kidnapping or forcible confinement, which was exactly what was required to satisfy the statutorily-mandated elements of the indicted offense. As a result, the trial judge properly denied Appellant's directed verdict motion and submitted the first-degree criminal sexual conduct charge to the jury. Appellant's conviction should be affirmed.

When presented with a motion for a directed verdict, the trial judge is concerned with the existence or non-existence of evidence and not its weight. State v. Long, 325

S.C. 59, 62, 480 S.E.2d 62, 63 (1997). The trial judge should deny a directed verdict motion and submit the case to the jury if there is any substantial evidence reasonably tending to prove the guilt of the accused or from which guilt may be fairly or logically deduced. State v. Robinson, 310 S.C. 535, 538, 426 S.E.2d 317, 319 (1992); see State v. Littlejohn, 228 S.C. 324, 329, 89 S.E.2d 924, 926 (1955) ("[O]n a motion for direction of verdict, the trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.").

On appeal from the denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). If there is **any** direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must affirm the trial judge's ruling. State v. Cherry, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004). The appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). "[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986).

Pursuant to S.C. Code Ann. § 16-3-652(1), "[a] person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim and" if one of several statutory circumstances are established. Specifically, those circumstances

are: (1) "[t]he actor uses aggravated force to accomplish sexual battery[;]" (2) "[t]he victim submits to sexual battery by the actor under circumstances where the victim is also the victim of forcible confinement, kidnapping, trafficking in persons, robbery, extortion, burglary, housebreaking, or any other similar offense or act[;]" or (3) "[t]he actor causes the victim, without the victim's consent, to become mentally incapacitated or physically helpless by administering, distributing, dispensing, delivering, or causing to be administered, distributed, dispensed, or delivered a controlled substance, a controlled substance analogue, or any intoxicating substance." Id. As a result, a person can be convicted of first-degree criminal sexual conduct if the person commits a sexual battery against another person in conjunction with another criminal act, such as kidnapping or forcible confinement. Id.; see State v. Lynn, 277 S.C. 222, 229, 284 S.E.2d 786, 790-791 (1981) (interpreting a highly-similar earlier version of the first-degree criminal sexual conduct statute as requiring proof a person committed a sexual battery "in conjunction with aggravated force *or* with the commission of another crime (i.e., burglary)" in order for the person to be guilty of first-degree criminal sexual conduct (italics in original)).

In South Carolina, kidnapping can be committed and proven in a broad variety of ways. State v. Berntsen, 295 S.C. 52, 54, 367 S.E.2d 152, 153 (1988). Pursuant to South Carolina's kidnapping statute, a person commits the crime of kidnapping by "unlawfully seiz[ing], confin[ing], inveigl[ing], decoy[ing], kidnap[ping], abduct[ing] or carry[ing] away any other person by any means whatsoever without authority of law[.]" S.C. Code Ann. § 16-3-910; see State v. Owens, 291 S.C. 116, 118, 325 S.E.2d 474, 475 (1987) ("The crime of kidnapping requires proof that the defendant: (1) unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted or carried away; (2) any other person; (3) by any means whatsoever; (4) without authority of law."). As a result, the offense

may be established through proof of any one of a number of unlawful criminal acts taking a variety of forms. State v. East, 353 S.C. 634, 637, 579 S.E.2d 748, 750 (Ct. App. 2003). Significantly, "[k]idnapping is a continuous offense that commences when one is wrongfully deprived of freedom and continues until freedom is restored." State v. Porter, 389 S.C. 27, 39, 698 S.E.2d 237, 243 (Ct. App. 2010).

In the case sub judice, the trial judge properly denied Appellant's directed verdict motion as to the first-degree criminal sexual conduct charge. Critically, during trial, testimony and evidence was presented establishing Appellant grabbed Victim's arm, pulled her into a secluded corner at her school, and held her against a wall before engaging in non-consensual sexual intercourse with her. Viewing that testimony and evidence in a light most favorable to the State, it established each and every element of first-degree criminal sexual conduct. Specifically, the testimony and evidence unquestionably established Appellant committed a sexual battery against Victim by inserting his penis into her vagina without her consent. See S.C. Code Ann. § 16-3-651(h) (defining "sexual battery" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes"). Furthermore, the testimony and evidence established Appellant committed the sexual battery in conjunction with the kidnapping or forcible confinement of Victim through his acts of grabbing Victim by the arm, pulling her into a secluded corner, and forcibly holding her in the corner against her will, which constituted a wrongful deprivation of her freedom. See Owens, 291 S.C. at 118, 325 S.E.2d at 475 ("The crime of kidnapping requires proof that the defendant: (1) unlawfully seized, confined, inveigled, decoyed,

kidnapped, abducted **or** carried away; (2) any other person; (3) by any means whatsoever; (4) without authority of law." (emphasis added)); see also Porter, 389 S.C. at 39, 698 S.E.2d at 243 (recognizing kidnapping is a continuous offense that begins with the deprivation of another's freedom and does not end until that freedom is restored); cf. State v. Lindsey, 355 S.C. 15, 20, n. 2, 583 S.E.2d 740, 742 (2003) (finding evidence establishing Lindsey held the victim down in a locked car with his body and hands before raping her was sufficient to establish the elements of first-degree criminal sexual conduct under a theory requiring proof of forcible confinement). Notably, Victim specifically detailed how she unsuccessfully tried to fight Appellant off after he pulled her into the corner and attempted to tear her clothing off, and Pleasants testified Appellant was still holding Victim against the wall as Victim struggled to regain her freedom when she heard Victim's cries and discovered them up against the wall in the secluded corner. Therefore, based on the presentation of testimony and evidence establishing each element of the indicted offense, the trial judge properly denied Appellant's directed verdict motion and submitted the first-degree criminal sexual conduct charge to the jury.

In arguing to the contrary, Appellant first contends the testimony and evidence presented during his trial was insufficient to establish Victim was also the victim of a kidnapping or forcible confinement because he surmises the acts that occurred in his case were not as substantial as the deprivations of freedom that were inflicted upon the victims in State v. Hall, 280 S.C. 74, 310 S.E.2d 429 (1983), and State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999). However, neither Hall nor Tucker established the acts that occurred in those cases were necessary or required in order to prove a kidnapping has been committed. In fact, in South Carolina, our courts have expressly recognized the wide variety of ways in which the offense of kidnapping can be proven, including through

evidence of the temporary seizure of another person or the restraint or detention another person against that person's will. See East, 353 S.C. at 637, 578 S.E.2d at 750 ("South Carolina's kidnapping statue requires proof of an unlawful act taking one of several alternative forms, **including** seizure, confinement, inveiglement, decoy, kidnapping, abduction or carrying away." (emphasis added and footnote omitted)); see also Berntsen, 295 S.C. at 54, 367 S.E.2d at 153 ("At common law, false imprisonment was the unlawful restraint or detention of another against his will, without authority of law, by actual force or reasonable apprehended force. . . . The kidnapping statute is broad enough to include, yet not require, proof of the elements constituting false imprisonment. . . . Thus, the crime of false imprisonment has been incorporated into § 16-3-910 as one method of proving kidnapping."). As a result, the testimony and evidence establishing Appellant deprived Victim of her freedom by pulling her into a corner and holding her against a wall before sexually assaulting her was sufficient to require the submission of the first-degree criminal sexual conduct charge to the jury absent any additional evidence of aggravated conduct on Appellant's part.

Furthermore, in challenging the trial judge's denial of his directed verdict motion, Appellant also contends the trial judge should have granted his directed verdict motion because the legislature could not have intended for a forcible confinement or kidnapping committed during the actual course of the sexual assault itself to satisfy the elements of first-degree criminal sexual conduct. However, contrary to Appellant's contentions, Appellant's actions constituting the offense of kidnapping did not occur solely during the course of the sexual battery of Victim but, instead, preceded it and followed it. In fact, Appellant grabbed Victim's arm, pulled her into the corner, and deprived her of her freedom in order to facilitate his commission of the sexual battery. He then continued to

restrain her as she struggled to get away after the sexual battery was committed and only released Victim after he was caught in the act by an employee of Victim's school. Thus, although the commission of a kidnapping or the deprivation of a victim's freedom contemporaneous with the commission of a sexual battery is **exactly** what the legislature intended to constitute the more serious offense of first-degree criminal sexual conduct, Appellant's deprivation of Victim's freedom in order to facilitate and aid in the commission of the sexual battery clearly satisfied the mandates of the first-degree criminal sexual conduct statute. See Lynn, 277 S.C. at 229, 284 S.E.2d at 790-791 ("[The first-degree criminal sexual conduct statute] states that in order to be guilty of first degree criminal sexual conduct, [a defendant] must commit a sexual battery **in conjunction with** aggravated force *or* with the commission of another crime (i.e., burglary." (emphasis added and italics in original)). As a result, the trial judge properly denied Appellant's directed verdict motion.[7]

In conclusion, the evidence and testimony presented during Appellant's trial established each and every element of the indicted offense of first-degree criminal sexual conduct, including that Victim submitted to the sexual battery under circumstances constituting forcible confinement or kidnapping. Accordingly, in light of the presentation of that evidence and testimony, the trial judge was required to deny Appellant's directed motion and committed no error in submitting the first-degree criminal sexual conduct charge to the jury. See State v. Al-Amin, 353 S.C. 405, 411, 578 S.E.2d 32, 35 (Ct. App.

[7] Notably, our Supreme Court has also expressly held "a defendant may not escape conviction for kidnapping by asserting that the kidnapping was merely incidental to a rape, which is essentially the same offense as first degree criminal sexual conduct." Hall, 280 S.C. at78, 310 S.E.2d at 432; see also Porter, 389 S.C. at 40, 698 S.E.2d at 244 ("In this case, the State presented voluminous testimony from Bank employees and customers that they were confined while the robbery was taking place. Under Hall, that single act of confinement could support a finding of kidnapping regardless of whether it was merely incidental to the commission of the armed robbery.").

2003) (recognized the trial judge is "required" to submit a case to the jury when substantial evidence is presented reasonably tending to prove the guilt of the accused or from which the accused's guilt may be fairly and logically deduced). Appellant's conviction should be affirmed.

II.

Any issue with the trial judge's qualification of a sexual assault nurse examiner as an expert and admission of her testimony regarding the victim's injuries and the significance of those injuries was not properly preserved for appellate review because defense counsel elicited cumulative testimony to the objected-to testimony during her own examination of the witness without reserving an objection to that testimony. However, regardless of any issue preservation concerns, the expert's testimony was properly admitted and did not improperly invade the province of the jury or bolster the credibility of the victim. Furthermore, even assuming the testimony had somehow been improper, any error was entirely harmless and resulted in no prejudice to Appellant.

Appellant contends the trial judge committed reversible error by allowing the introduction of expert testimony explaining Victim's injuries were consistent with sexual assault injuries. In support of that contention, Appellant maintains DeBrew, the SANE nurse and expert witness who presented that testimony, was unnecessarily qualified as an expert and permitted to improperly bolster Victim's testimony by testifying in a manner that could only be interpreted as an indication she personally believed Victim's allegations. Initially, any issue with the admission of the objected-to expert testimony was waived and not properly preserved for appellate review because defense counsel elicited cumulative testimony to the objected-to testimony during her own examination of DeBrew without reserving an objection to that testimony. However, even if the issue had somehow been properly preserved for appellate review, the trial judge properly qualified DeBrew as an expert based on her knowledge, skill, training, and experience and permitted her to testify in regard to the injuries she observed during her medical examination of Victim and the significance of those injuries. Furthermore, DeBrew's testimony did not improperly bolster Victim's testimony or constitute a comment on the ultimate issue to be decided in the case. Significantly though, even if the trial judge erred in admitting DeBrew's testimony, any error was entirely harmless and resulted in no

prejudice to Appellant and, thus, did not warrant a reversal of Appellant's conviction. Appellant's conviction should be affirmed.

A. Issue Preservation

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 appellant; (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, 912-913 (Ct. App. 2004). Imposing issue preservation requirements on a party "is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005).

However, even if a party properly raises an objection during trial, a party may still waive his right to argue error in regard to that objection on appeal under certain circumstances. See State v. O'Neal, 210 S.C. 305, 312, 42 S.E.2d 523, 526 (1947) (recognizing a previously-raised objection can be waived). Significantly, a party can waive an objection to an issue by indicating to the trial judge the party no longer has an objection to an issue the party previously objected to or by eliciting similar testimony to testimony to which the party previously raised an objection without reserving that earlier objection. See State v. McKinney, 258 S.C. 570, 571, 190 S.E.2d 30, 30 (1972) ("During the course the trial certain testimony was admitted over the objection of [McKinney's] counsel. Thereafter, counsel for [McKinney] cross-examined the witness thereabout without reserving the objection previously made. The objection was thereby lost and if any error had been committed in the admission of the testimony it was cured."); O'Neal,

210 S.C. at 312, 42 S.E.2d at 526 ("An objection to the admission of evidence is waived where the same or similar evidence has been elicited by the objector."); State v. Rios, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010) (holding Rios waived his right to allege error with a jury charge on appeal where the trial court specifically asked if there were any objections to the instructions given and Rios responded there were none); State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) ("Dicapua's sole objection to the videotape came in the form of a motion in limine to suppress the videotape because of its lack of audio. Once the State moved to enter the videotape into evidence and publish it to the jury, however, Dicapua's counsel specifically stated he had 'no objection.' We find this amounted to a waiver of any issue Dicapua had with the videotape.").

In the case at bar, any issue with DeBrew's testimony indicating Victim's injuries were consistent with a non-consensual sexual battery was not properly preserved for appellate review. Critically, during defense counsel's own examination of DeBrew, defense counsel directly and intentionally elicited testimony indicating injuries resulting from sexual assaults are usually observed in the area of the vagina where Victim sustained an injury. Because defense counsel personally elicited testimony from DeBrew confirming Victim's vaginal injury was consistent with the injuries typically sustained during a sexual assault **without** reserving any objection to that testimony, Appellant is precluded from now challenging the admission of DeBrew's testimony on that subject on appeal. See McKinney, 258 S.C. at 571, 190 S.E.2d at 30 (holding McKinney lost the right to complain about testimony he previously raised an objection to by subsequently eliciting testimony on the same subject during cross-examination); State v. Smith, 245 S.C. 59, 62, 138 S.E.2d 705, 706 (1964) ("After the testimony complained of had been

admitted in evidence over objection, counsel cross-examined the witness thereabout without reserving the objection previously made. The objection was thereby by lost and if any error had been committed in the admission of the testimony, it was cured."); O'Neal, 210 S.C. at 311-312, 42 S.E.2d at 525-526 ("Error is assigned because the court, over objection, permitted the witness, Bracey, to testify to certain statements made to him by Aileen Thompson, a waitress in the Five O'clock Club[.] . . . It is not necessary for this court to say whether the admission of this testimony constituted error or prejudicial error. An examination of the record shows that counsel for appellant brought out the same evidence upon their cross-examination of the witness, Bracey."); see also State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) ("A party cannot complain of an error which his own conduct induced."). Accordingly, Appellant's appellate issue with DeBrew's testimony cannot properly be considered or addressed on appeal.[8] See O'Neal, 210 S.C. at 312, 42 S.E.2d at 526 ("Under this well known rule, the appellants are in no position to complain of the court's ruling."). Appellant's conviction should be affirmed.

B. Admissibility of the Expert Testimony of the Sexual Assault Nurse Examiner

"Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge." Watson v.

[8] Likewise, to the extent Appellant is arguing on appeal the trial judge's qualification of DeBrew as an expert was "unnecessary" or improper, such an argument was not properly preserved for appellate review because defense counsel did not raise such an argument to the trial judge and, instead, specifically assured the trial judge she was **not** objecting to DeBrew being qualified as an expert during trial. See State v. Bryant, 372 S.C. 305, 315-316, 642 S.E.2d 582, 588 (2007) (recognizing an issue conceded during trial cannot subsequently be argued on appeal); see also State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); In re Walter M., 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009) ("Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review."); State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal.").

Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). Such testimony "differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions." Id. at 445-446, 699 S.E.2d at 175. Pursuant to the South Carolina Rules of Evidence, expert testimony is admissible under the following circumstances:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE. Moreover, in South Carolina, expert testimony " 'in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.' " State v. Fripp, 396 S.C. 434, 439, 721 S.E.2d 465, 467 (Ct. App. 2012) (quoting Rule 704, SCRE).

Trial judges have considerable discretion in determining whether to admit or exclude expert testimony and other evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion **resulting in prejudice** to the defendant. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives **great deference** to the trial court." (emphasis added)); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."); see also State v. Bixby, 388

S.C. 528, 556, 698 S.E.2d 572, 587 (2010) ("[D]eference is due to the trial court's admission of the evidence."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

In Appellant's case, the trial judge committed no error in qualifying DeBrew as an expert in the field of sexual assault nurse examination, and DeBrew's testimony was entirely proper and did not impermissible bolster Victim's testimony. As to the qualification of DeBrew as an expert, DeBrew testified during trial about the medical examination she performed on Victim and the injuries she discovered during that examination. Critically, DeBrew's ability to detect the injuries was based on her specialized training, background, experience, and knowledge, and her opinion on Victim's injuries concerned an area of specialized medical knowledge outside of the ordinary knowledge of a lay witness. See Commonwealth v. Johnson, 456 Pa. Super. 251, 256, 690 A.2d 274, 277 (Pa. Super. Ct. 1997) ("[T]he physical condition of a sexual assault victim is not a matter that is typically within the knowledge of average jurors."). Therefore, it was necessary for her to be qualified as an expert to testify about her examination of Victim and Victim's injuries, and the trial judge committed no error in qualifying her as an expert in light of her knowledge, skill, training, and experience as a nurse and sexual assault nurse examiner. See Watson, 389 S.C. at 445, 699 S.E.2d at 175 (recognizing it is necessary for a witness to be qualified as an expert when the witness testifies in regard to an area of specialized knowledge, training, or skill). Moreover, the substance of DeBrew's expert testimony was entirely appropriate and not inadmissible. Specifically, through her testimony, DeBrew explained to the jury the injuries she discovered during her examination of Victim, which included an internal abrasion to the

posterior fourchette area of Victim's vagina. She also explained the internal abrasion resulted from something entering Victim's vagina and was consistent with the injuries commonly sustained during a sexual assault while **also** explaining the abrasion was completely consistent with other causes, such as childbirth and consensual sexual intercourse. As a result, DeBrew's testimony provided medical information outside of an area of ordinary lay knowledge to the jury, and that testimony was critical in regard to the jury's ability to understand the evidence and testimony presented during trial and reach a correct decision in Appellant's case. See Young v. Mississippi, 106 So. 3d 775, 781 (Miss. 2012) (finding no error in the admission of the testimony of a sexual assault nurse examiner where "[the nurse's] expert testimony at trial was that [the victim]'s injuries were *consistent with* blunt force trauma" and "[a]t no point did [the nurse] assert that [the victim]'s injuries were *caused by* sexual assault or penetration of genitalia" (italics in original)); see also Velazquez v. Commonwealth, 263 Va. 95, 103-104, 557 S.E.2d 213, 219 (Va. 2002) ("[I]t has long been accepted that nurses and other healthcare professionals with the proper training, expertise, and experience are qualified to give expert opinions on medical causation in appropriate circumstances."). For those reasons, the trial judge committed no error in qualifying DeBrew as an expert, in permitting her to testify about the injuries she observed during her evaluation, or in allowing her to explain the significance of those injuries to the jury.

In arguing to the contrary, Appellant contends DeBrew was unnecessarily qualified as an expert. In support of that contention, Appellant relies upon our Supreme Court's decision in State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009), and appears to suggest DeBrew – like the forensic interviewer in Douglas – did not need to be qualified as an expert because her area of expertise was allegedly solely related to her

own personal observations along with the collection of evidence. However, unlike the forensic interviewer in Douglas, DeBrew's testimony was **not** related to her evaluation of a victim's statements and was not based solely on her own personal observations. Instead, DeBrew's testimony – consistent with her role in providing medical care as a SANE nurse – was related to a specialized area of medical knowledge, involved her opinion as to whether her medical evaluation of Victim yielded evidence of any injuries and what the significance of those injuries was, and did **not** involve rendering a diagnosis in regard to the Victim. See Young, 106 So. 3d at 783 ("We further note that in sexual-assault cases, many of our sister states allow SANEs to register testimony similar to that of Nurse Thomas in this case. In fact, we are unable to find a single state whose caselaw prohibits SANEs from testifying as to *causation* at sex-crime trials." (italics in original)). Because her testimony required medical knowledge outside of the realm of knowledge of an ordinary lay witness, it was unquestionably necessary for DeBrew to be qualified as an expert in order to offer such testimony, and DeBrew personally possessed the qualifications of an expert through her nursing background, status as a registered nurse, twenty-three years of nursing experience, experience working on approximately 180 to 190 cases as a SANE nurse, and her SANE nurse training and certification. See Watson, 389 S.C. at 445, 699 S.E.2d at 175 (recognizing it is necessary for a witness to be qualified as an expert when the witness testifies in regard to an area of specialized knowledge, training, or skill). Therefore, the trial judge committed no error in qualifying DeBrew as an expert before she testified during Appellant's trial.

Furthermore, in challenging the admission of DeBrew's expert testimony, Appellant contends DeBrew's testimony improperly addressed the ultimate issue in the case and bolstered Victim's credibility. In support of that contention, Appellant avers

there was no other way to interpret DeBrew's testimony other than as an affirmation she personally believed Victim's testimony. Critically though, contrary to Appellant's contentions and despite the fact expert testimony embracing an ultimate issue to be decided by the trier of fact is admissible in South Carolina, DeBrew's testimony did not embrace the ultimate issue in Appellant case and could **not** reasonably have been interpreted as a statement she believed Victim's allegations. See Rule 704, SCRE ("Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."). That is true because DeBrew specifically informed the jury Victim's injuries were consistent with sexual assault but were **also** consistent with and could be caused by a variety of other things, including the friction that occurred during consensual sexual intercourse. See Mackey v. State, 235 Ga. App. 209, 211, 509 S.E.2d 68, 71 (Ga. Ct. App. 1998) ("Testifying that the results of an examination are consistent with sexual assault does not address the ultimate question of fact (whether Mackey raped or sexually molested the child) and is 'within the bounds of permissible expert testimony.' " (footnote omitted)); State v. Ross, 203 Wis. 2d 66, 81-82, 552 N.W.2d 428, 434 (Wis. Ct. App. 1996) ("[H]er testimony was not an impermissible expert opinion on the victim's veracity, but merely her expert opinion on whether the victim's physical condition at the time of her treatment was consistent with the victim's statement to her that her vagina had been penetrated."); see also Velazquez, 263 Va. at 105, 557 S.E.2d at 219 (only finding error in the admission of a sexual assault nurse examiner's testimony because the "testimony as a whole clearly expressed her opinion that [the victim] was raped because her opinion **excluded all other trauma as the cause of [the victim]'s injuries**." (emphasis added)). Thus, DeBrew's testimony in no way improperly bolstered Victim's

testimony or suggested DeBrew believed Victim in the manner proscribed by our appellate courts' decisions addressing the propriety of the testimony of forensic interviewers. Cf. State v. Kromah, 401 S.C. 340, 360, 737 S.E.2d 490, 500 (2013) (instructing that forensic interviewers should not testify about a child's veracity or tendency to tell the truth, vouch for a child's believability, state that they made a compelling finding of abuse, assert that they believed the child, or indicate that the child's behavior suggests the child was telling the truth); State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (finding a forensic interviewer's testimony constituted improper vouching where the interviewer testified the victims provided compelling disclosures of abuse by Jennings and provided details consistent with the background information provided by the victims' mother, the police report, and other children); State v. McKerley, 397 S.C. 461, 465-466, 725 S.E.2d 139, 142 (Ct. App. 2012) (finding a forensic interviewer's testimony to be improper where the interviewer testified about giving an opinion as to whether something happened and about consistent information and compelling findings).

However, even assuming DeBrew's testimony indicating Victim's injuries were consistent with injuries commonly found in sexual assault victims was somehow improper, the admission of that testimony was entirely harmless and resulted in no articulable prejudice to Appellant. Significantly, because DeBrew's testimony clearly conveyed to the jury the abrasion to Victim's vagina was consistent with **both** a non-consensual sexual assault and consensual sexual intercourse, the admission of that testimony could in no way have bolstered Victim's testimony or suggested DeBrew believed Victim was sexually assaulted. See State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009) ("A trial court's decision to admit or exclude expert testimony

will not be reversed absent a **prejudicial** abuse of discretion." (emphasis added)). For that reason, even assuming an error occurred in the admission of DeBrew's testimony, it would not warrant a reversal of Appellant's conviction.[9] See State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008) ("Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained."); State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991) ("[An appellate court] will not set aside a conviction due to insubstantial errors not affecting the result.").

In conclusion, the trial judge committed no error in either qualifying DeBrew as an expert in the field of sexual assault nurse examination or permitting her to testify in regard to the injuries she discovered during her examination of Victim and the significance of those injuries. However, even assuming that testimony had somehow been improper, any error in its admission was entirely harmless, resulted in no prejudice to Appellant under the circumstances, and did not warrant the reversal of Appellant's conviction in light of the lack of resulting prejudice. See, e.g., Calderon v. California, 525 U.S. 141, 146 (1998) ("The social costs of retrial or resentencing are significant. . . . The State is not to be put to this arduous task based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error." (citations omitted)). Appellant's conviction should be affirmed.

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[9] Moreover, because defense counsel elicited testimony from DeBrew during her examination of the witness confirming it was common for the area of the vagina to which Victim suffered an injury to be injured during a sexual assault, any error in the admission of the objected-to testimony was entirely harmless because it was merely cumulative to testimony elicited by defense counsel. See State v. McFarlane, 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983) ("It is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence."); State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence.").

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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Attorney General

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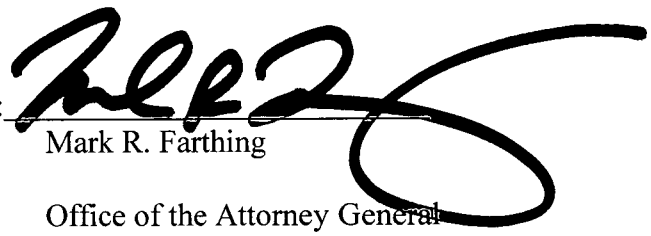
BY: 
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ATTORNEYS FOR RESPONDENT

July 21, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Honorable DeAndrea G. Benjamin, Circuit Court Judge
Appellate Case No. 2012-212105

THE STATE,

Respondent,

vs.

DARIUS DOMINIC MACK,

Appellant.

PROOF OF SERVICE

I, Mark R. Farthing, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 21st day of July, 2014.

Mark R. Farthing
Assistant Attorney General

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ALAN WILSON
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July 21, 2014

Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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RE: State v. Darius Dominic Mack – Appellate Case No. 2012-212105

Dear Mr. Dudek:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Please note the Initial Brief of Appellant contains personal data identifiers in the form of the victim's initials on pages 3, 5, 6, 7, 9, 10, 11, 12, 14, 15, 16, 17, and 18. Pursuant to the Order of the South Carolina Supreme Court, dated April 15, 2014, entitled RE: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, this information, along with any other personal data identifiers, must be redacted from the Initial Brief of Appellant – and from the Final Brief of Appellant and Record on Appeal – in a manner consistent with the order.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services