

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of General Sessions

The Honorable DeAndrea Benjamin, Circuit Court Judge

Case No. 2011-GS-40-01375

The State of South Carolina.....Respondent

v.

Darius Domonic Mack..... Appellant.

**FINAL BRIEF OF APPELLANT**

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**SC Court of Appeals**

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## QUESTIONS PRESENTED

- I. Did the Trial Court err in denying Appellant's motion for a directed verdict when the State elicited no testimony that Appellant had kidnapped or forcibly confined the purported victim in a criminal sexual conduct in the first degree case?
- II. Did the Trial Court err in permitting a forensic nurse to testify as an expert to improperly bolster the testimony of the victim by addressing an ultimate issue in the case?

## STATEMENT OF THE CASE

This action arises from an incident that occurred at Spring Valley High School on October 14, 2011. On that date, the victim, as identified by the State, T.W. (hereinafter "T.W."), alleged that Appellant, Darius Domonic Mack ("Mack"), sexually assaulted her in the patio area connecting the main building of the high school with an annex where the high school's art classes were taught. At the time of the incident, T.W. was fourteen years of age, and Appellant was seventeen. T.W. claimed that Mack, with whom she had a prior relationship, rode the bus with her into school that morning, then took her to a corner of the patio before sexually assaulting her. A teacher at Spring Valley High School witnessed the two individuals engaged in a sex act, and attempted to restrain Appellant, who then left the premises. Mack was later arrested and charged with the crime of criminal sexual conduct in the first degree, S.C. Code Ann. § 16-3-652 (2003 rev.).

At trial, the State offered expert testimony, over the objections of Appellant's counsel, that the injuries to T.W. were consistent with a sexual assault. Appellant's counsel also moved for a directed verdict on the charge of criminal sexual conduct in the first degree at the close of the State's case-in-chief on the grounds that the State provided no evidence that the alleged victim had been kidnapped, which is a prerequisite for the

statute. The trial court overruled the objections of Appellant's counsel, and denied the motion for a directed verdict. Appellant was convicted by the jury and sentenced to twenty years in jail.

Appellant alleges that the trial court committed reversible error in denying the motion for a directed verdict at the end of the State's case-in-chief; erred in qualifying the sexual assault nurse examiner who took evidence from T.W. as an expert; and erred in permitting the nurse to improperly bolster T.W.'s testimony.

### FACTS

Appellant was charged with the crime of criminal sexual conduct first degree. On October 14, 2011, Appellant rode on the same bus as T.W. to Spring Valley High School, where T.W., but not Appellant, attended. (R.p. 65, ll. 9-11). T.W.'s first class was in a satellite building at the high school, which required her to traverse a patio. (R.p. 20, l. 24 – p. 22, l. 2; p. 34, ll. 4-16). While in this area, and before the first class of the school day, T.W. claims Appellant sexually assaulted her after pulling her into a corner of the patio. (R.p. 73, l. 17 – p. 75, l. 15). Appellant alleged the sex was consensual. (R.p. 312, l. 16 – p. 313, l. 25). A teacher at Spring Valley witnessed T.W. and Appellant in the corner of the patio and attempted to discern what was occurring, at which point Appellant left the high school. (R.p. 27, ll. 8-9).

The Fugitive Task Force brought Appellant to the Richland County Sheriff's Office on a warrant on October 20, 2011, and he was subsequently arrested and charged with criminal sexual conduct in the first degree. At trial, the State introduced several witnesses, including a sexual assault nurse examiner ("SANE nurse"), Donna DeBrew, who testified to performing an examination and collection of forensic evidence she

performed on T.W. (R.p. 225, l. 3 – p. 243, l. 23). DeBrew testified over the objections of Appellant’s trial counsel both regarding her qualifications (R.p. 211, l. 12) and the substance of her expert opinion (R.p. 238, l. 6). DeBrew claimed that the injury she identified on T.W.’s body, and her vagina particularly, was a so-called “mounting injury,” commonly seen in sexual assault cases (R.p. 237, l. 15 – p. 238, l. 30). At the end of the State’s case-in-chief, Appellant moved for a directed verdict, claiming that the State had not met its case regarding a kidnapping as part of the sexual assault. (R.p. 296, l. 5 – p. 297, l. 8). This motion was denied. (R.p. 299, l. 24 – p. 300, l. 4). After a jury found Appellant guilty on the sole criminal sexual conduct count, Appellant’s counsel renewed its objections and motioned for a new trial (R.p. 401, ll. 4-7), which was denied. This appeal follows.

## **ARGUMENT**

### **I. APPELLANT’S MOTION FOR A DIRECTED VERDICT SHOULD HAVE BEEN GRANTED.**

The trial court committed reversible error in denying Appellant a directed verdict on the count of first degree criminal sexual conduct, S.C. Code Ann. § 16-3-652 (2003 rev.). As the State admitted at trial, it sought a first degree criminal sexual conduct conviction on the grounds that Defendant kidnapped or forcibly confined the T.W. during the course of committing the sexual assault (R.p. 73, l. 17 – p. 75, l. 15). However, the State offered no evidence sufficient to show Defendant kidnapped or forcibly confined T.W. Accordingly, the court erred in not issuing a directed verdict in Defendant’s favor.

A. *Standard of Review.*

Under South Carolina law, an appellate court reviews a trial court's denial of a directed verdict where no evidence supports the trial court's ruling. State v. Phillips, 393 S.C. 407, 412, 712 S.E.2d 457, 459 (Ct. App. 2011). "When ruling on a motion for a directed verdict, the trial court is concerned with the existence of evidence, not with its weight." State v. Burroughs, 328 S.C. 489, 495, 492 S.E.2d 409, 411 (Ct. App. 1993). Trial courts should grant a motion for a directed verdict if evidence "merely raises suspicion that the accused is guilty." State v. Stuckey, 347 S.C. 484, 489, 556, S.E.2d 403,409 (Ct. App. 2001).

B. *The State presented no evidence of Appellant forcibly confining the alleged victim within the parameters of the statute.*

At the close of the State's case, Appellant's counsel moved for a directed verdict on the grounds that the State offered no evidence of a forcible confinement or kidnapping consistent with the usage of those terms in South Carolina jurisprudence. The trial court denied Appellant's motion and the charge of first degree criminal sexual conduct went to the jury after Appellant presented his case.

Under South Carolina law, first-degree criminal sexual conduct requires the State to present evidence that "the actor engages in sexual battery with the victim and if any one or more of the following circumstances are proven":

- (b) The 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.

S.C. Code Ann. § 16-3-652 (2003 Rev.). T.W.'s own testimony states that the Appellant sexually assaulted her at Spring Valley High School, where she was a student, on the way to her first class in the morning, which was held in the art building. (R.p. 73, l. 8 – p. 75, l. 15). T.W. testified that Appellant “was telling me to come over in the corner with him so he could show me how much he really loved me.” (R.p. 73, ll. 12-14). T.W. also testified that Appellant “had me against the wall and he was still in front of me.” (R.p. 74, ll. 5-8). Thus, the assault purportedly took place while T.W. was en route to her first class of the day.

Under South Carolina law, the crime of kidnapping is defined as “[w]hoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law[.]” S.C. Code Ann. § 16-3-910 (2003 rev.). State v. Tucker, 334 S.C. 1, 13, 512 S.E.2d 99, 105 (1999) (“kidnapping is a continuous offense. The offense commences when one is wrongfully deprived of freedom and continues until freedom is restored”). The State elicited no testimony to show that T.W. was deprived of her freedom in accordance with the State’s kidnapping statute.

A review of cases in South Carolina where defendants have been convicted of kidnapping highlights the State’s failure to produce evidence of kidnapping or forcible confinement. In State v. Hall, 280 S.C. 74, 310 S.E.2d 429 (1983), the assailant knocked the victim down from behind, held a knife to her throat, then lead the victim to an adjacent area, where the assailant sexually assaulted the victim. Id. at 75, 310 S.E.2d at 430. In Hall, the Supreme Court held that the assailant “procured the prosecutrix’s submission by threatening her with a deadly weapon. This threat of serious injury

continued until he released her some forty-five minutes later.” Id. at 78, 310 S.E.2d at 431.

Likewise, in State v. Tucker, the appellant was convicted at the trial court of kidnapping and first degree criminal sexual conduct where the victim was bound with duct tape. Tucker, 334 S.C. at 14, 512 S.E.2d at 105. The Supreme Court found that such an act “unquestionably deprived” victim of her freedom, and constituted restraint by applying the duct tape. Id. Unlike the restraint by duct tape in Tucker or the use of a deadly weapon in Hall, the State elicited no testimony that rises to the level of forcible confinement.

At trial, the State claimed that the act occurring at the wall of the patio areas was sufficient to meet the aggravating factor of kidnapping or forcible confinement (R.p. 297). However, the victim provided no direct evidence she was forcibly confined. Accordingly, T.W. testified at trial that Defendant “pulled me over to the corner,” and “he had me in the corner.” (R.p. 73, ll. 17-20). Further, when the alleged criminal sexual conduct occurred, T.W. testified that both individuals were standing up against the wall and “[Appellant] was in front of me.” (R.p. 74, ll. 7-8).

C. *The General Assembly did not intend for forcible confinement during the act of the criminal sexual assault itself to satisfy a charge in the first degree.*

“The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible.” State v. Baucom, 340 S.C. 339, 531 S.E.2d 922 (2000). “All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.” State v.

Morgan, 352 S.C. 359, 365, 574 S.E.2d 203, 206 (2002). “Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if can be done by any reasonable construction.” Id. The legislative intent in providing for multiple tiers of criminal sexual conduct charges reinforces the interpretation that the legislature did not meet its burden of proof in providing evidence of kidnapping or forcible confinement, when the only confinement, when viewing the State’s testimony in a light most favorable, occurred during the sex act itself. Only criminal sexual conduct in the first degree accounts for kidnapping or forcible confinement. The second and third degree of the same charge have no such requirement, yet the remaining elements of criminal sexual conduct remain in those charges.

Likewise, were the legislature to have intended for any sexual assault to be considered first degree, then the kidnapping or forcible confinement language would have been omitted from the first degree charge. T.W. was not taken off course from her path to class, and she was not restrained in any manner remotely approaching the confinement of the victims in Morgan and Tucker. Viewing the victim’s testimony in the light most favorable to the State, Appellant pulled the victim’s arm prior to engaging in the sexual assault, and he stood between her and the rest of the patio. These actions do not create an inference that T.W. was forcibly confined, and accordingly, the trial court erred in denying Appellant’s motion for a directed verdict on the single count of Criminal Sexual Conduct in the First Degree.

## II. THE STATE'S EXPERT WITNESS IMPROPERLY BOLSTERED THE TESTIMONY OF THE ALLEGED VICTIM.

The State's expert witness, Donna DeBrew, was unnecessarily qualified as an expert witness. This error by the trial court was compounded by the content of DeBrew's testimony exceeding the scope of her qualifications and impermissibly bolstering the testimony of T.W. For these reasons, Appellant was unduly prejudiced at trial, and should have his conviction reversed and remanded.

### *A Testimonial Background.*

The State's eliciting of so-called expert testimony from a forensic nurse was admitted in error. At trial, the State called Donna DeBrew ("DeBrew"), a Sexual Assault Nurse Examiner ("SANE Nurse"), during its case-in-chief, to testify as an expert witness. During a voir dire examination, DeBrew admitted that her purpose is to collect forensic evidence and she does not diagnose people. (R.p. 190, ll. 8-20). Appellant's trial counsel stated on the record that they had no objection to DeBrew being qualified as an expert in the collection of evidence and the administration of the exam given to individuals who have come to the hospital claiming to have been sexually assaulted (R.p. 191, ll. 6-11).

Prior to the trial court making a final ruling on DeBrew's qualifying as an expert witness, the judge sent the jury out of the court room, and counsel for the State and Appellant held a lengthy hearing with the judge regarding the boundaries under which DeBrew could testify. During the hearing, the following colloquy took place:

**State:** [A]s an expert, [DeBrew] has a little bit more knowledge – well, a lot more knowledge than the average juror, that thus making her an expert allowing her to give her opinion on what she saw, was it consistent with

what the victim said. It is for [the jury] to decide whether or not this was consensual or non-consensual.

**Court:** [B]ut you are going to ask her to come to a conclusion that she was sexually assaulted?

**State:** No.

**Court:** Okay. Okay. That is what her objection is, I believe.

**Appellant's Counsel:** Yes, ma'am. Either a direct question like that, or I believe [the State] actually mentioned it before, she would – she is going to say that it is consistent with sexual assault. That has the same effect as asking her.

**Court:** Well, she can testify to it being consistent[.]...I think she can testify as to whether or not it is consistent – in her experience if it is consistent with, are scratches on the neck consistent with somebody holding you by the neck. But I don't think she can give a conclusion as – that this lady was sexually assaulted based on what she saw, because I don't know if she can do that. I'm not sure if she – well, I know she can't do it, and I don't know if she needs to answer that question here today.

(R. p. 196, l. 15 – p. 198, l. 8). After additional arguments regarding the extent to which DeBrew could testify in court as well as what exhibits would be admissible, the Court made the following ruling:

**Court:** Can she say she had bruising, and she can say those are consistent with someone who has been sexually assaulted, but she cannot go into the details of it, is what the case law says. (R.p. 216, ll. 20-24).

[DeBrew] say whether or not it is consistent with what the victim told her, but she can't get into the actual statements of the victim because [State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012)] says it is bolstering.

(R.p. 217, l. 15). DeBrew testified immediately after this hearing, having been qualified as an expert in the area of adult sexual assault. (R.p. 221, ll. 12-15).<sup>1</sup> DeBrew testified that part of her duties as a SANE nurse included giving a sexual assault examination (R.p. 222, ll. 1-16). DeBrew testified that, “[a] sexual assault examination is to take care of the patient, and if he or she presents with any injuries to take care of those injuries.” (R.p. 222, ll. 1-3). DeBrew testified to the process involved in giving the sexual assault exam, starting with eliciting the medical history of the alleged victim and a statement of the alleged assault. DeBrew testified subsequently that, “[a]fter the history, I get a little more detailed in my questions and it gets very personal as far as what type of assault, was it a vaginal assault, an oral assault, rectal assault. (R.p. 225, ll. 18-21).

Ultimately, the State asked DeBrew to identify an injury documented in State's Exhibit 14, which was a photograph of T.W.'s vagina. (R.p. 237, ll. 13-15). DeBrew stated the injury “is very common to see [that] injury from sexual assault.” (R.p. 237, ll. 21-22). After Appellant's counsel objected on the grounds that the testimony exceeded the ruling permitted by the trial court in the hearing, the court overruled the objection and permitted DeBrew to testify. (R.p. 238, ll. 9-10). DeBrew stated that, in her expert opinion, to a reasonable degree of medical certainty, that injury “is very common to see injury from sexual assault” in that area. (R.p. 237, ll. 21-22). DeBrew further stated,

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<sup>1</sup> DeBrew claimed to have testified once before as an expert witness, in Kershaw County in November 2011. (R.p. 188).

“when an object is going in [to the vagina], it is going to hit here, then slide further in. So it hits and then goes in. That is normally where we would see an injury...A mounting injury is what we call in an injury like that.” (R.p. 238, ll. 13-20).

*B. DeBrew was unnecessarily qualified as an expert witness.*

DeBrew was unnecessarily qualified as an expert witness in the area of adult sexual assault. Expert witness testimony is controlled by the South Carolina Rules of Evidence. “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.” S.C. R. Ev. 702. “The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probably prejudice.” State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (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.

“[E]ven though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others.” State v. Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013). Where a witness testifies only to her personal observations and experiences, along with her interview of T.W., it is “unnecessary for the trial court to have qualified her as an expert.” State v. Douglas, 380 S.C. 499, 503, 671 S.E.2d 606, 608 (2009).

DeBrew testified to her personal observations of the victim, but was, by her own admission, not qualified to provide a diagnosis. As a consequence of her testimony

regarding the consistency of T.W.'s injury with those of a sexual assault, DeBrew exceeded her expertise by providing testimony outside of describing the collection of evidence. Thus, there was no evidentiary basis to support her giving such testimony. DeBrew's expert testimony unfairly prejudiced Appellant because even though DeBrew only collected evidence during the SANE exam, her diagnosing of the injury surpassed the scope of her authority. By identifying the injury as one consistent with a sexual assault, she was offering her opinion on the credibility of T.W.'s testimony. The result of the unnecessary testimony was that it created an improper appearance of authority and an undue tendency to suggest a decision by the jury on an improper basis of authority. State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)(quoting Fed. R. Evid. 403 advisory committee notes).

*C. DeBrew improperly bolstered T.W.'s testimony.*

DeBrew, who testified after T.W., improperly bolstered the victim's testimony by offering an opinion as to a "common injury" in instances of sexual assault. "The assessment of witness credibility is within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (2012)(citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)). Therefore, witnesses are generally not allowed to testify whether another witness is telling the truth. Id. (citing Burgess v. State, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998)). Such an issue is compounded when an expert, as deemed by the court, makes such a commentary before the jury. State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011). In Jennings, the expert witness did not comment directly on the veracity of the defendant, rather, "[t]here 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.” Id. at 480, 716 S.E.2d at 94. Such testimony is “patently inadmissible evidence.” Id. at 483, 716 S.E.2d at 96 (Kittredge Conc.).

Here, the reasoning of the Court in Jennings meets the facts of this matter on all fours. DeBrew’s expert testimony improperly bolstered T.W.’s testimony by going beyond the collection of evidence, and addressing the ultimate issue of whether Appellant sexually assaulted T.W. in accordance with T.W.’s allegations. DeBrew noted her exam records injuries from sexual assault in her testimony, and obtains from the patient a narrative of what has occurred before then giving an opinion as to the consistency of the injury with that of a sexual assault. There is no other way to interpret DeBrew’s testimony than to mean she believed T.W.’s narrative.

The Supreme Court of Virginia used similar reasoning in overturning a trial court verdict based on the testimony of a SANE nurse in Velazquez v. Commonwealth, 557 S.E.2d 212 (Va. 2002). In that case, a defendant’s conviction for rape was vacated and remanded for a new trial based on the testimony of a SANE nurse. Id. at 220. In that case, the SANE nurse testified, in response to a question from the Commonwealth, as to whether she had “an opinion within a reasonable degree of medical certainty as to whether the physical findings...are consistent with consensual sexual intercourse.” Id. at 216. The SANE nurse responded, “I have an opinion that its inconsistent with consensual intercourse...[b]ecause the injuries she had, are consistent with non-consensual intercourse.” Id.

Similar to the Supreme Court in Jennings, the Virginia Supreme Court found that the SANE nurse’s 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. Id. at 219. Similarly, under South Carolina law, an expert witness may not testify on the ultimate issue where that witness is not qualified. State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001)(citing State v. Wilkins, 305 S.C. 272, 407, S.E.2d 670 (Ct. App. 1991)). Accordingly, because DeBrew was not qualified to provide a diagnosis of the injury, but only to take evidence, her testimony on the ultimate issue of sexual assault improperly bolstered the testimony of T.W. and resulted in reversible error and unduly prejudiced the Appellant.

### CONCLUSION

For the foregoing reasons, Appellant requests that the verdict issued by the trial court convicting Appellant of one count of Criminal Sexual Conduct in the First Degree be reversed, and the case be remanded for a new trial consistent with any Order of this Court.

Respectfully submitted,



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October \_\_, 2014

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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 Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 7, 2014



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Richland County  
DeAndrea G. Benjamin, Circuit Court Judge  
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THE STATE,

RESPONDENT,

V.

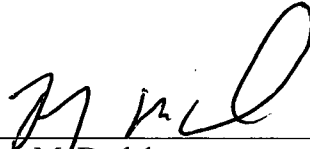
DARIUS DOMONIC MACK,

APPELLANT

APPELLATE CASE NO. 2012-212105

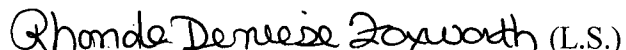
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The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 7th day of October, 2014.

  
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Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 7th day of October, 2014.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: October 17, 2021