STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of General Sessions

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2013-001951

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

ANDREW ANTONIO CLEMONS,

APPELLANT.

INITIAL BRIEF OF RESPONDENT

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The trial judge did not err by allowing a pediatrician, who was qualified by stipulation as an expert in child sexual assault examinations, to testify that the injury to the eight-year-old victim's hymen was consistent with a penetrating injury.

STATEMENT OF THE CASE

Appellant was indicted in Anderson County for criminal sexual conduct with a minor in the first degree and lewd act upon a minor. On May 13-15, 2013, Appellant was tried in his absence before the Honorable R. Lawton McIntosh and a jury. The jury found Appellant guilty of both offenses, and Judge McIntosh sealed the sentences. On September 12, 2013, Judge McIntosh revealed his sentences of twenty-five years for criminal sexual conduct with a minor in the first degree and fifteen years, concurrent, for lewd act upon a minor. A timely notice of appeal was served and filed.

ARGUMENT

The trial judge did not err by allowing a pediatrician, who was qualified by stipulation as an expert in child sexual assault examinations, to testify that the injury to the eight-year-old victim's hymen was consistent with a penetrating injury.

Evidence Presented at Trial

Appellant was charged with criminal sexual conduct with a minor in the first degree and lewd act upon a minor for events occurring between December 2009 and August 2010. (See Indictments). The victim, who was the daughter of Appellant's girlfriend, was age seven during the majority of this time, although she turned eight years old in June 2010. (R. p. 58-59; p. 73). The victim was age ten at the time of Appellant's trial. (R. p. 73, lines 13-14). The victim's mother testified that she and Appellant began dating when she was nineteen and Appellant lived with her from December 2009 until August 2010. (R. p. 58-61). Since Appellant was not working at the time, he was at home with the victim and her sister after school. (R. p. 60-61). The victim's sister was Appellant's biological daughter. (R. p. 96-98).

At some point while Appellant was living in the same house with the victim, Appellant began sexually abusing the victim while her mother was not home. (R. p. 76-91). On one occasion, the victim and Appellant were alone in the living room together watching television. (R. p. 76). Appellant summoned the victim over to the "short couch" and made the victim pull down her pants and panties. (R. p. 76-77). Appellant also pulled down his clothes. (R. p. 77, line 2). Appellant then made the victim touch his private parts, and he touched the victim's private parts with his private parts. (R. p. 77, lines 8-16). Specifically, Appellant touched his private part to the victim's private part between her legs while moving the victim back and forth. (R. p. 78, lines 10-23).

During another incident, Appellant and the victim were alone in her mother's bedroom and Appellant made the victim touch his private parts with her hands and rub her hands up and down. (R. p. 79, lines 4-25). Appellant made the victim take off her pants and underwear during this incident also. (R. p. 79, lines 11-14). At the conclusion of the incident, "something came out" of Appellant's private part. (R. p. 80, lines 1-4). When the victim left the bedroom following these events, Appellant's sister observed the victim run out of the bedroom without pants on. (R. p. 79, lines 9-11; p. 87, line 25 – p. 88, line 9; p. 98-99). The victim then went into her room and slipped on some pants because her mother had just arrived at home. (R. p. 99-100).

On a third occasion, the victim and Appellant were alone on the "short couch" in the living room, and Appellant made the victim touch his private parts again. (R. p. 80, lines 12-17). However, the victim's sister and a friend from down the street tried to get in the front door, and Appellant told them to go around to the back door. Then Appellant hastily took the victim back to her room and "put the covers over [her]" before the victim's sister and friend came into the house. (R. p. 80-82).

On other occasions, Appellant would place his private part in the victim's mouth, put his hands on her head, and move her head up and down. (R. p. 86-87). At least once, "something came out" of Appellant's private part and went in the victim's mouth, but she spit it out. (R. p. 87, lines 2-8). Additionally, Appellant showed videos to the victim on two occasions in the bedroom. (R. p. 86, line 4; p. 87, lines 15-17). On these videos, "[i]t was people on there doing what he was doing to me, but they were older." (R. p. 85, lines 10-22). Some of the people in the videos had clothes on and some of them did not. (R. p. 85, lines 23-25).

The victim testified that Appellant did these things to her after school when her mother was at work. (R. p. 88, lines 13-17). Although the victim's sister would generally be at home with them, she would usually go outside to play. (R. p. 88-89). When Appellant finished each episode of sexual abuse, he told the victim "not to tell anyone or [she] would get in very big trouble and he would get in very big trouble." (R. p. 90, lines 18-21). The victim testified she did not tell her mother about the abuse right away because she was scared she would get in trouble. (R. p. 91, lines 11-12). Note that the victim's mother had not ever discussed the specifics of anatomy with the victim and had only warned the victim not to let anyone touch her "chest or her butt." (R. p. 67, lines 12-18).

On cross-examination, defense counsel asked if Appellant put his penis "inside" the victim's vagina or butt. (R. p. 93, lines 5-14). The victim denied it. (R. p. 93, lines 8-15). Defense counsel also asked the victim why she did not mention "the oral sex" when she was doing her forensic interview. (R. p. 217, lines 14-17). Significantly, the victim never used that terminology during her trial testimony; she only testified that Appellant put his private part in her mouth and moved her head up and down. (R. p. 86, line 10 - p. 87, line 8). In any event, the victim testified she did not know why she did not mention "the oral sex" two years previously in her forensic interview. (R. p. 217, lines 18-22). She stated that the first person she told was a counselor she was talking to sometime last year. (R. p. 217, line 24 – p. 218, line 4).

The victim's mother found out about the sexual abuse after the victim's sister reported the incident in which she saw the victim running out of Appellant's bedroom without any pants on. (R. p. 62-63; p. 91, lines 4-10). Following the sister's revelation,

the victim's mother spoke with the victim personally and the victim provided some details about the abuse, including that it occurred in the living room and in the bedroom and that it happened when she was about to turn eight years old. (R. p. 62-63; p. 66, lines 15-22). The victim's mother then called the victim's father and they scheduled an appointment with the victim's pediatrician. (R. p. 63-64). The pediatrician performed a basic visual exam without using any specialized equipment. (R. p. 64, lines 17-18). The pediatrician told the victim's mother she could not rule anything in or out, but she did not think there had been any penetration because the victim "was still crescent-moon shaped." (R. p. 64, lines 19-22).

Subsequently, the Department of Social Services ("DSS") became involved in the case, and the victim was taken to Foothills Alliance Child Advocacy Center for a forensic interview on March 28, 2011. (R. p. 65-66; p. 168-71). The victim's sister also had a forensic interview at Foothills. (R. p. 175-76). The videos of both forensic interviews were introduced at trial and published to the jury. (R. p. 175-78). In April 2011, Dr. Sallie Carter, a pediatrician and expert in child sexual assault examinations, performed a physical examination of the victim. (R. p. 187-92). Dr. Carter made an "abnormal" finding regarding the victim's genital exam because the posterior portion of her hymen was absent. (R. p. 194, lines 13-14). She stated that typically "some sort of injury" would cause the hymen to be "torn or worn or absent" and that her findings regarding the victim were "consistent with a penetrating injury." (R. p. 196, lines 1-3; p. 204, lines 7-12).

After the State rested, the defense presented no witnesses. (R. p. 219-20). Following closing argument and the jury charge, the jury deliberated for thirty minutes

and found Appellant guilty of both charges. (R. p. 290, lines 8-24). Since Appellant's trial was conducted in his absence, the trial judge sealed the sentences. (R. p. 292-94). When Appellant was apprehended in September 2013, his sentences were unsealed and read. Appellant's sentence was twenty-five years for criminal sexual conduct with a minor in the first degree and fifteen years, concurrent, for lewd act upon a minor. (Sentencing Hearing Transcript, p. 2).

Dr. Carter's Testimony

After several witnesses had already testified before the jury, the State requested a hearing outside the presence of the jury regarding the testimony of Dr. Sallie Carter. (R. p. 48-49; p. 109, lines 6-11; p. 132-67). The purpose of the hearing was to determine whether or not photographs taken by Dr. Carter were admissible and to determine whether or not her specific findings were "reliable and allowable." (R. p. 137, line 24 – p. 138, line 9). Following Dr. Carter's testimony about her qualifications, defense counsel stipulated that Dr. Carter was an expert in the field of child sexual assault examinations. (R. p. 132-37). Dr. Carter then testified that she performed a physical examination of the victim when the victim was eight years old. (R. p. 138-39). After describing the exam, Dr. Carter testified there were no abnormalities except for in the genital area. (R. p. 139-40). She stated that the victim had an "absent posterior hymen" and that she could "see clearly into the vagina." (R. p. 140, lines 11-12). Dr. Carter testified that the absence of the hymen was "significant" in an eight-year-old child because it is not a condition a child is born with and such an abnormality is typically seen after penetrating injuries. (R. p. 141-43).

Following Dr. Carter's testimony, the trial judge asked defense counsel whether he objected to the photographs and related testimony. (R. p. 145, lines 18-21). Defense counsel responded by stating that since in the victim's trial testimony, she denied that Appellant had penetrated her anus or vagina, "I don't know why we really need this testimony at all." (R. p. 145, line 22 – p. 146, line 1). The trial judge understood the objection as "saying it's not probative to the facts in this case." (R. p. 146, lines 5-8). The solicitor responded that the forensic interview was "a little bit different" than her trial testimony in regard to penetration, but that in any event, in light of the testimony that the victim "didn't know what her anatomy was" and "doesn't even know that she has two openings down there other than bathroom functions," the fact that there was a vaginal injury consistent with penetration – when there was no other type of accident that would have caused such an injury – could lead one to a conclusion that Appellant's penetration, "however slight" caused the abnormality. (R. p. 146-47). She also pointed out that the victim may not have even been aware that "penetration" as such was occurring. (R. p. 147, line 25 – p. 148, line 1). The victim stated there was "rubbing," but as an eight-year-old child, she "doesn't know what he's doing with his penis on her private part." (R. p. 148, lines 3-5).

The trial judge then asked Dr. Carter if she could say to a reasonable degree of medical certainty that some type of intrusion caused the hymen not to be present in this specific case. (R. p. 148, lines 6-10). Dr. Carter responded, "Yes, something caused the hymen not to be present. And that would certainly be consistent with a penetrating type of injury. Now, other types of injuries can cause hymenal damage and urethral damage. And I've seen other types of injuries cause damage in the genital area, and I could

comment on some of those. (R. p. 148, lines 11-17). She further stated that, in her experience and in the literature, children "don't really have a language to describe what happened" when dealing with things they are unfamiliar with in the genital area and that a lot of times, "their testimony is incomplete." (R. p. 148, lines 18-25). In clarifying for the judge that she could not testify to a reasonable degree of medical certainty that Appellant's actions in fact caused the absence of the victim's hymen, Dr. Carter stated that "although I can say that [the victim's vaginal abnormality] is consistent with penetration, I cannot tell you what caused the injury." (R. p. 149-50). She did state that, as a part of her exam, she would have interviewed the child and the parents regarding other surgeries or injuries that could have caused the vaginal abnormality. (R. p. 150, lines 9-17).

After reviewing case law and the principles of Rule 702, SCRE, the trial judge found that the subject matter of Dr. Carter's testimony was appropriate expert testimony because it is "scientific, technical, or other specialized knowledge that will assist the trier of fact understand the facts." (R. p. 152-53). The trial judge then pointed out that Dr. Carter "has been qualified as an expert by your own stipulation." (R. p. 153, lines 4-6). The judge stated that "I guess the issue for me is under the facts of this case, are there sufficient facts and evidence or will there be sufficient facts and evidence that would lead this not to be mere speculation but is probative to the issue before the jury for their determination." (R. p. 153, lines 13-18). After some back-and-forth regarding whether it would be speculation to conclude Appellant vaginally penetrated the victim, the trial judge requested that Dr. Carter review the forensic interview DVD. (R. p. 154-59).

Following Dr. Carter's review of the forensic interview, the judge asked whether she had "an opinion to a reasonable degree of medical certainty that this event related by this child is most likely one of the causes of the lack of the hymen being present." (R. p. 159, line 24 – p. 160, line 3). Dr. Carter responded that "there just wasn't enough description to determine whether or not there was penetration" by Appellant but that watching the video led her "to think that there was every opportunity for there to be penetration." (R. p. 160-62). She also stated that her opinion regarding the child's lack of hymen and its relation to the events for which Appellant was on trial was more than speculation. (R. p. 161, lines 3-11).

The trial judge then asked defense counsel for "some particularized objections" to consider. (R. p. 162, lines 17-19). Defense counsel again stated that the victim testified at trial that "she was not penetrated except orally." (R. p. 162, lines 20-24). When asked if his argument was that "there's not sufficient facts in the record for her to give that opinion in this case," defense counsel stated "I'm saying that there are absolutely contradictory facts." (R. p. 163, lines 5-10). He also said "if you've got the child saying that she wasn't penetrated, how is it anything other than speculation that she was?" (R. p. 163, lines 19-22). Defense counsel stated that he also had the Rule 403 argument that "it's more prejudicial than probative." (R. p. 163, lines 24-25). After further discussion with Dr. Carter, the judge ruled that he would allow Dr. Carter's testimony into evidence. (R. p. 164-65). He stated that he had initially been concerned about the reliability aspect of the doctor's anticipated testimony. (R. p. 165, lines 8-10). However, he ruled, clearly the topic is subject to expert testimony because it assists the trier of fact. (R. p. 165, lines 12-13). Second, the doctor has "been stipulated to be an expert in child sexual assault

examinations." (R. p. 165, lines 13-15). Third, Dr. Carter stated that "she can't say one hundred percent that this caused it, but to a reasonable degree of medical certainty it could be one of the causes for the lack of the hymen. At this point, then that goes to its weight, not its admissibility." (R. p. 165, lines 17-22).

The trial judge then again requested that defense counsel place his objections on the record. (R. p. 165, line 24 – p. 166, line 5). Defense counsel stated as follows: "I object to the introduction of Dr. Sallie Carter's testimony not because she's not an expert, but because her testimony is going to be more prejudicial than probative because the victim or alleged victim, herself, has stated that she was not penetrated by this Defendant. And that is about as simple as I can make it. She has said it in the videos. She has said it on the witness stand. And that's as simple as I can make it." (R. p. 166, lines 10-18). Before the jury returned, defense counsel added to his objection "that it also includes the argument that it is, at best, speculative." (R. p. 167, lines 13-16).

Following these discussions and the judge's ruling regarding Dr. Carter's testimony, the forensic interviewer testified. (R. p. 168-87). In addition, the forensic interview DVDs of both the victim and her sister were introduced into evidence and published to the jury. (R. p. 175-78). Thereafter, the State called Dr. Carter to testify before the jury. (R. p. 187).

After Dr. Carter detailed her qualifications, the defense once again stipulated that Dr. Carter was an expert in child sexual assault examinations. (R. p. 187-91). Dr. Carter then testified that she performed a physical examination of the victim on April 4, 2011, when the victim was eight years old. (R. p. 192). Dr. Carter performed a full head-to-toe exam and then did a genital inspection using a piece of medical equipment called a

colposcope, which is used to magnify and examine the genital area. (R. p. 192, lines 12-23). The colposcope was equipped with a high-powered light and a digital camera. (R. p. 192-93). The victim had a normal physical exam with the exception of the genital area. (R. p. 194, lines 11-13). Dr. Carter made an "abnormal" finding regarding the genital exam because the posterior portion of the victim's hymen was absent.[1] (R. p. 194, lines 13-14). The doctor testified that "absent" is not a normal variation in the female population. (R. p. 195, lines 13-23). She testified that typically "some sort of injury" would cause the hymen to be "torn or worn or absent." (R. p. 196, lines 1-3). She also testified that her findings regarding the victim were "consistent with a penetrating injury." (R. p. 204, lines 7-12). However, she also explained that other injuries to the female genital area can occur, and that unless there is something like a brand-type burn, it is impossible for a doctor to know with certainty what actions caused the injury. (R. p. 204, lines 12-21). When asked whether the vicitm's allegations, as set forth in the forensic interview, were consistent with the injury found in the physical examination, defense counsel objected on the ground that "the allegations were that there was no penetration basically." (R. p. 205, lines 4-14). The trial judge overruled the objection. (R. p. 205, line 15).

Dr. Carter then explained that when she conducts physical examinations, she does not obtain any history of allegations from the child so that she will not inadvertently bring any "presumption" to the exams. (R. p. 205, lines 18-24). She stated that she followed that procedure in this case and did not have any history on the victim at the time

[1] One of the images from the victim's genital exam was admitted at trial over objection as State's Exhibit # 3. (R. p. 197-98). In addition, an image taken from the same colposcope and resulting from the same exam procedure depicting the normal hymen of a same-aged child was admitted over objection as State's Exhibit # 4. (R. p. 198-202).

of the exam. (R. p. 206, lines 2-3). She testified that she had not seen the forensic interview "until the judge asked me to listen to it about two or three hours ago." (R. p. 206, lines 3-5). She stated that she was "more concerned" after listening to the forensic interview because, although the victim may not have had the "language" to describe how the injury occurred, "the child did draw a picture of a person who groomed her for sexual activity or sexual abuse." (R. p. 206, lines 5-11). When Dr. Carter mentioned that the sexual incidents happened "in the presence of pornographic media," defense counsel objected on the ground that "pornographic has not been used" and that the testimony was that the victim "saw a video of two naked people kissing." (R. p. 206, line 20 – p. 207, line 3). After the jury was sent out, defense counsel elaborated that he did not believe that the characterization of two naked people kissing is "pornographic" because it is on television every day. (R. p. 207, line 11 – p. 208, line 1). The trial judge overruled the objection and stated "that's not a proper objection here." (R. p. 208, lines 2-20).

When the jury returned, Dr. Carter pointed out the victim's lack of sexual knowledge as an eight-year-old child, the fact that the victim was unable to explain what "hunching" was in one of the videos she attempted to describe on the forensic interview, and the fact that the victim indicated that Appellant had taken her pants down and involved her in sexual activity, and stated that when those things are considered alongside the abnormal genital exam, in her professional opinion, "that's like saying one and one is two or two and two is four." (R. p. 210, line 24 – p. 211, line 20). She added, however, that "I wasn't there. I didn't see it." (R. p. 210, lines 20-21). Dr. Carter then explained that children are not able to describe things that happen to them in the same way as adults because children "have to learn the language of sexual activity." (R. p. 211, lines 2-10).

If a child has not learned "the right words and the right description and the right function" of body parts, then "they don't have a very good way to describe sometimes the things that happen to them." (R. p. 211, lines 11-14). Dr. Carter also explained that a report of abuse from a child is often a continuing or gradual process rather than a one-time report of all allegations. (R. p. 211, line 20 – p. 212, line 2). Finally, Dr. Carter testified that, having reviewed the victim's medical history, she did not see anything else that could have caused an absent hymen in the victim. (R. p. 212, lines 3-15).

On cross-examination, Dr. Carter testified that she could not say, to a reasonable degree of medical certainty, that the defendant caused the injuries to the victim. (R. p. 213, lines 19-22). She stated that she could not possibly say who caused the injury unless the person left genetic material such as DNA behind. (R. p. 213-14). When asked again whether she could tell to a degree of medical certainty whether this was a penetrating injury, she stated that the way she wrote it up was that it was "consistent with penetration." (R. p. 214, lines 5-10). When defense counsel asked what else it was consistent with, Dr. Carter stated that this injury was "most consistent with penetration," but that a child can have a traumatic vaginal injury that could cause a similar injury. (R. p. 214, lines 11-17). She elaborated that such a traumatic vaginal injury would include things like falling astride a tree limb, fence, rake with rigid teeth, or bicycle handlebars. (R. p. 214, lines 14-21). In this case, she stated, "all I can say is the injury that I saw is consistent with a penetrating vaginal injury." (R. p. 215, lines 9-11). When asked the time frame in which this injury would have occurred, Dr. Carter stated that it was not an acute injury and that it would have happened "some weeks to months earlier" because it

was "completely healed" and there was not any fresh bruising or swelling. (R. p. 215, lines 12-19).

Issue Preservation

Appellant contends that the trial judge erred by allowing Dr. Carter to testify that the victim's injuries were "consistent with penetration" where the victim testified no penetration occurred. Appellant asserts this opinion testimony was speculative and any probative value it had was outweighed by its unduly prejudicial effect under Rule 403. Appellant's argument is not preserved for three reasons. First, Appellant did not make a contemporaneous objection when the doctor testified before the jury that her findings were "consistent with a penetrating injury."[2] (R. p. 204, lines 7-12). See, e.g., State v. King, 334 S.C. 504, 509-10, 514 S.E.2d 578, 581 (1999) (a contemporaneous objection is required to preserved an issue for appellate review). Although defense counsel objected

[2] Although defense counsel objected in a mid-trial hearing, this hearing did not immediately precede Dr. Carter's trial testimony. (See R. p. 132-216). In fact, significant evidence was presented following the *in camera* hearing which could have changed the trial judge's ruling regarding admission of the challenged testimony. See State v. Floyd, 295 S.C. 518, 520, 369 S.E.2d 842, 842 (1988) (a ruling on an *in limine* motion is not the ultimate disposition on the admissibility of evidence; it remains subject to change based upon developments during trial). Specifically, in between the *in camera* hearing and the doctor's trial testimony, the forensic interviewer testified and the forensic interview videos of both the victim and her sister were admitted in evidence and published to the jury. (R. p. 168-86). Because the *in camera* hearing, and counsel's objection therein, did not occur immediately prior to the admission of the challenged testimony during trial, and because significant evidence was received between the initial ruling and the admission of the disputed testimony at trial, counsel was required to contemporaneously object when Dr. Carter testified before the jury in order to preserve the issue for appellate review. See State v. King, 349 S.C. 142, 149-50, 561 S.E.2d 640, 643-44 (Ct. App. 2002) (finding an issue not preserved where the defendant failed to renew his pre-trial motion at the time the evidence was offered for admission during trial and evidence was presented in between the pre-trial hearing and the admission of the challenged evidence); cf. State v. Mueller, 319 S.C. 266, 268-69, 460 S.E.2d 409, 410-11 (Ct. App. 1995) (finding an issue was preserved where the defendant sought a ruling on the admissibility of a witness' testimony *immediately before* calling that witness and *no evidence* was presented in between); and State v. Forrester, 343 S.C. 637, 642-43, 541 S.E.2d 837, 839-40 (2001) (finding an issue preserved was preserved where the pre-trial hearing regarding admission of the disputed evidence was held *immediately prior to* opening statements and the witness testifying about the disputed matter was the first witness called by the State; the Supreme Court held that "[s]ince *no opportunity* existed for the court to change its ruling, Forrester did not need to object a second time to the introduction of the cocaine for the issue to be properly preserved for review." (emphasis added)). Indeed, the fact that defense counsel subsequently objected to the same testimony during the doctor's trial testimony illustrated that he recognized the court's previous ruling was not a final one. (See R. p. 205, lines 4-15).

later, when the solicitor asked whether the type of injury she found in the victim was consistent with the victim's allegations as set forth in the forensic interview, this objection came too late where the "consistent with a penetrating injury" testimony was already properly in the record. (See R. p. 204, lines 11-12; p. 205, line 4-15). See, e.g., State v. King, 349 S.C. 142, 157, 561 S.E.2d 640, 647 n1 (Ct. App. 2002) ("To the extent King challenges this particular testimony as to prior bad acts of selling drugs to Kirken twenty times and to others forty times, no objection was made contemporaneously with this testimony so as to preserve the issue for review. King's belated objection to subsequent testimony came too late."); State v. Curtis, 356 S.C. 622, 633, 591 S.E.2d 600, 605 (2004) (holding that an objection made after several pages of testimony came too late to preserve the issue). In that vein, the previous, un-objected-to testimony was merely cumulative to the subsequent testimony to which defense counsel did object. See, e.g., State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (any error in admission of evidence cumulative to other unobjected-to evidence is harmless).

Second, the issue is also not preserved because Appellant elicited exactly the same testimony on cross-examination without reserving any objection. (R. p. 214, lines 5-12). 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."); State v. O'Neal, 210 S.C. 305, 311-12, 42 S.E.2d 523, 525-26 (1947) ("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. . . . An objection to the admission of evidence is waived where the same or similar evidence has been elicited by the objector."); 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."); 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."). Therefore, Appellant's previous objection was waived and he is not in a position to complain about the testimony on appeal.

Finally, the argument on appeal regarding Rule 403 is not preserved because Appellant did not argue below that the doctor's testimony was unduly or unfairly prejudicial; instead, he only argued that the testimony was "more prejudicial than probative." (R. p. 163, lines 24-25; p. 166, lines 12-13). The aim of Rule 403 is to exclude testimony or evidence that is *unfairly* or *unduly* prejudicial - beyond the normal prejudice that results from evidence against a defendant - because it suggests a decision on an improper or inflammatory basis. State v. Collins, 409 S.C. 524, 536, 763 S.E.2d 22, 28 (2014) ("[T]he standard is not simply whether the evidence is prejudicial; rather, the standard under Rule 403, SCRE is whether there is a danger of *unfair* prejudice that *substantially* outweighs the probative value of the evidence." (emphasis in original)).

The limited argument made below, which failed to assert that the challenged testimony was *unfairly* or *unduly* prejudicial or that there was a danger of unfair prejudice that *substantially outweighed* the probative value of the evidence, was not sufficient to preserve a proper Rule 403 issue. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal."); State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) ("For an objection to be preserved for appellate review, the objection must be made ... with sufficient specificity to inform the circuit court judge of the point being urged by the objector."); cf. State v. Perry, 410 S.C. 191, 763 S.E.2d 603, 611 (Ct. App. 2014) (Few, C.J., concurring in part and dissenting in part) (pointing out that an objection must be based upon a specific rule of evidence and that an objection on the ground of "improper bolstering" is of no legal consequence).

For the three reasons discussed above, the issue raised on appeal regarding Dr. Carter's testimony is not preserved for appellate review. This Court should dismiss the appeal on error preservation grounds.

Discussion of the Merits

Even assuming the issue was somehow preserved, the trial judge correctly permitted Dr. Carter to testify that the victim's injury was consistent with a penetrating injury. The reception or exclusion of evidence is a matter left largely to the sound discretion of the trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980). On appeal, appellate courts give "great deference" to trial judges when reviewing evidentiary rulings. State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010); see 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."). Moreover, an appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006) ("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 probable prejudice."); 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."). "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).

All relevant evidence is admissible, and only relevant evidence should be admitted at trial. Douglas, 369 S.C. at 430, 632 S.E.2d at 848; see Rule 402, SCRE ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible."). "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." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' ").

However, even if relevant, evidence may be excluded from trial if its probative value is substantially outweighed by the danger of unfair prejudice. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); see Rule 403, SCRE ("Although relevant, evidence may 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 considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). The determination of the probative value of evidence relative to its potential prejudicial effect must be based on the entire record and the result generally hinges on the facts of each particular case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

Unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000). Significantly, unfair prejudice does **not** mean damage to a defendant's case that results from the legitimate probative force of a piece of evidence. State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998); State v. Collins, 409 S.C. at 536, 763 S.E.2d at 28 ("Moreover, the standard is not simply whether the evidence is prejudicial; rather, the standard under Rule 403, SCRE is whether there is a danger of *unfair* prejudice that *substantially* outweighs the probative value of the evidence." (emphasis in original)). Indeed, all evidence introduced by the State in a criminal trial is meant to be prejudicial to the defendant. Gilchrist at 630, 496 S.E.2d at 429. It is only unfair prejudice that must be avoided. Id.; see also U.S. v. Mohr, 318 F.3d 613, 618 (4th Cir. 2003) ("Rule 403 requires exclusion of evidence "only in those instances where the trial judge believes that there is a genuine risk that the emotions of the jury will be excited to irrational behavior,

and that this risk is disproportionate to the probative value of the offered evidence.") (citation omitted).

Trial judges have particularly wide discretion in ruling on the comparative probative value and potential prejudicial effect of evidence. State v. Stephens, 398 S.C. 314, 728 S.E.2d 68 (Ct. App. 2012) (citation omitted). A trial judge's ruling on such a matter should be afforded great deference on appeal and should only be reversed in exceptional circumstances. State v. Lyles, 379 S.C. 328, 339-340, 665 S.E.2d 201, 207 (Ct. App. 2008). Importantly, "[a] trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593-594 (Ct. App. 2001), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." Id. at 358, 543 S.E.2d at 594.

In Appellant's case, the trial judge did not abuse his discretion by allowing Dr. Carter to testify that the victim's injuries were consistent with a penetrating injury because this testimony was relevant, not improperly speculative, and not violative of Rule 403. First, the results of a physical examination conducted following the minor victim's disclosure of sexual abuse are obviously relevant. Notably, Appellant stipulated below that Dr. Carter was an expert in child sexual abuse examinations. (R. p. 137, lines 2-17; p. 191, lines 1-7). Second, Dr. Carter's testimony was not "speculative." A medical doctor's opinion that a type of injury is consistent with a particular mechanism of injury

is not, by itself, "speculative testimony." Instead, this is standard medical testimony that is routinely admitted. See, e.g., State v. Douglas, 380 S.C. 499, 504, 671 S.E.2d 606, 609 (2009) (a pediatric nurse practitioner who examined the child victim testified that the victim had vaginal tearing and scarring "consistent with past penetration"); Brown v. State, 383 S.C. 506, 510-11, 680 S.E.2d 909, 912 (2009) (expert in child sexual assault and child sexual abuse testified that she examined the child victim after the incident and that she found redness around the labia and surrounding tissue that "could be consistent with someone penetrating the child's labia"); State v. Kromah, 401 S.C. 340, 347, 737 S.E.2d 490, 493 (2013) (pediatrician testified regarding the victim's injuries and stated they were the result of physical abuse and not accidental); State v. Hill, 394 S.C. 280, 286, 715 S.E.2d 368, 372 (Ct. App. 2011) (doctor who was qualified as an expert in child sexual assault examinations testified that she found an abnormal area in the minor victim's anal area that was "consistent with a penetrating injury"); State v. Kirton, 381 S.C. 7, 20-21, 671 S.E.2d 107, 113 (Ct. App. 2008) (doctor who conducted a physical examination of the child victim testified that she found a complete transection of the hymen caused by a penetrating injury); State v. Portillo, 408 S.C. 66, 68, 757 S.E.2d 721, 723 (Ct. App. 2014) (an expert in the field of pediatrics in sexual assault cases found redness and irritation between the labial lips "consistent with Victim's allegations of sexual assault").

To the extent Appellant is arguing that such testimony was "confusing" because it invited the jury to speculate in this particular case because the minor victim herself denied penetration, a specific argument regarding "confusion" was not made below. (See Brief of Appellant, p. 11; see R. p. 132-67; p. 205, lines 9-15). See State v. Dunbar, 356

S.C. at 142, 587 S.E.2d at 694 ("A party may not argue one ground at trial and an alternate ground on appeal."). Regardless, despite the fact that the ten-year-old victim denied at trial that Appellant put his penis "inside" her during the incidents that happened more than two years previously, there was circumstantial evidence supporting that penetration did in fact occur. See State v. Johnson, 334 S.C. 78, 85, 512 S.E.2d 795, 798-99 (1999) ("[I]t is not essential that penetration be proven by testimony of the victim. Instead, it may be established by circumstantial evidence."); see also State v. Miller, 211 S.C. 306, 315, 45 S.E.2d 23, 27 (1947) (the corpus delicti of rape, including the element of penetration, may be proved in whole or in part by circumstantial evidence, just the same as any other fact in controversy). Accordingly, Dr. Carter's testimony was not "confusing," was sufficiently connected to the facts of the case, and was properly admitted.

The victim described at trial incidents where she and Appellant had skin-to-skin contact in the genital area. (See R. p. 76-90). In the forensic interview, the victim described an incident where Appellant put his "wee wee" between her legs from the front, and she pointed on an anatomical drawing to the area just below the vagina. (See State's Exhibit # 5, Forensic Interview DVD, approximately seventeen minutes into the video). She stated that Appellant got on top of her, placed his leg astride her, inserted his penis into the area between her legs, and began moving up and down. When he stopped moving up and down, a clear "something" came out of his "wee wee" and ended up all over the victim's thighs.

The foregoing account is likely the best description of sexual intercourse that an eight-year-old can provide. (See R. p. 157, lines 9-13). As Dr. Carter explained without

objection, an eight-year-old child victim may not have the ability to understand exactly what is happening to her when she is being sexually abused. (R. p. 206-13). See Johnson, 334 S.C. at 85, 512 S.E.2d at 799 ("The physician who performed the physical examination testified young children are often unable to distinguish between 'in' and 'out.'"). In that vein - and particularly if she does not understand what happened - a child victim may not be able to accurately describe what happened. (See R. p. 206-13). Where a child victim, as here, is shown to have a significant "abnormal" finding on her physical examination - specifically, an absent posterior hymen, which is not a condition existing since birth - and where there is no history of any other trauma to the vaginal area, a jury could reasonably conclude that Appellant's vaginal penetration of the victim was the cause of the victim's hymen injury.

In State v. Mathis, 287 S.C. 589, 593, 340 S.E.2d 538, 541 (1986), the six-year-old victim testified that, although she could not remember whether or not the defendant put his penis inside her, the defendant touched her with his penis and she indicated this hurt. Id. Significantly, there was no medical testimony establishing vaginal injuries. Id. Our Supreme Court held that the defendant's directed verdict motion was properly denied despite the defendant's claim that there was insufficient evidence of "intrusion" as is required for a sexual battery. Id.

In Appellant's case, although the victim did not testify that the sexual contact with Appellant hurt, she did have a significant abnormal medical finding. This finding in an eight-year-old child is, in and of itself, compelling evidence of penetration where there was no explanation for it other than the sexual contact with Appellant. Compare State v. Johnson, 334 S.C. 78, 85-86, 512 S.E.2d 795, 799 (1999) (evidence was insufficient to

create a jury question on the issue of penetration because the child's testimony did not establish an intrusion where she testified the defendant touched her "lu-lu" under her clothes and that it made her "feel bad" and **where her physical examination did not reveal any signs of a sexual battery**). Further, a photograph of the victim's vaginal injury was introduced into evidence and the jury was able to compare the photograph of the victim's vagina with a photograph of a normal child's vagina. (R. p. 198-202). Moreover, despite defense counsel's argument below that "[y]ou've got to be kidding me that [penetration's] not going to hurt an eight-year-old child," Appellant was obviously grooming the child and one could reasonably infer that he would have necessarily been extremely gentle with the victim so as to ensure the secrecy of the abuse and thus ensure the victim would be available for future sexual encounters. See Underwood v. State, 309 S.C. 560, 563-64, 425 S.E.2d 20, 22-23 (1992) (a case where our Supreme Court found proper a doctor's testimony explaining why the child victim's vaginal injuries were slight and why this was nevertheless consistent with sexual abuse: "A person who wants to have sex with or to accomplish penile-vagina penetration with a child may be one of two kinds of people. He may be a person who is so wound up in his own needs or so angry that he doesn't care how much it hurts the child at all. In that case, you can have a very violent rape. You can have significant damage to the child which requires a surgical repair. That is not-that is-a lot of people feel that that's the common kind of sexual abuse of children. That's not true. Very prominently, people who want to become sexually involved with children are people who want and need the children to like them, to trust them, and to come back for more. If you hurt a child very badly, that child is going-another adult is going to find out more likely. The child isn't going to come back, and you

will be discovered. Therefore, many people who want to be sexually involved with children are careful of the children with whom they become sexually involved."). The fact that the victim did not testify that the abuse was painful is therefore not dispositive where the genital examination reveals abnormal and significant findings.

Based upon all the evidence in the case, including the victim's trial testimony, the victim's forensic interview, the mother's testimony that the victim had not been taught about her sexual anatomy at age eight, the presence of the vaginal injury, the photograph of the vaginal injury, and the doctor's other un-objected-to testimony, a jury could reasonably conclude that Appellant's vaginal penetration of the victim was the cause of the victim's hymen injury. See S.C. Code § 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"). Such a conclusion would not be "speculation" but would instead be a rational conclusion based upon the circumstantial evidence in the case. See Hartfield v. Getaway Lounge & Grill, Inc., 388 S.C. 407, 413-15, 697 S.E.2d 558, 561-62 (2010) (despite appellant's objection to an expert's testimony as being "speculative," the trial court properly admitted the testimony where sufficient circumstantial evidence was presented to provide "reasonable support" the expert's opinions); cf. State v. Irick, 344 S.C. 460, 464-65, 545 S.E.2d 282, 285 (2001) (it was not error for the trial judge to exclude testimony from an expert witness that the victim had alcohol and crack cocaine in his system and therefore might have provoked the defendant

by threatening him where the proffered testimony was "highly speculative" and "merely conjectural" because it was not based upon **any** factual predicate in the record).

To hold that the circumstantial evidence in this case was insufficient to support Dr. Carter's testimony would create a further incentive for rapists to select young minor victims who will not likely report the abuse or will be unable to accurately describe it. See Villalon v. State, 791 S.W.2d 130, 133-34 (Tex. Cr. App. 1990) ("The rules [that penetration may be proved by circumstantial evidence and that there is no requirement that a prosecutrix be able to testify as to penetration] reflect the important public policy that we cannot expect the child victims of violent crimes to testify with the same clarity and ability as is expected of mature and capable adults. To expect such testimonial capabilities of children would be to condone, if not encourage, the searching out of children to be the victims of crimes such as the instant offense in order to evade successful prosecution."). The trial judge did not abuse his discretion by finding that Dr. Carter's testimony was sufficiently connected to the facts of the case so as to be admissible for the jury's consideration.

Finally, the trial judge also did not abuse his discretion by failing to exclude the "consistent with a penetrating injury" testimony under Rule 403, SCRE. Under Rule 403, a trial judge may exclude evidence if its probative value is "substantially outweighed" by the danger of unfair prejudice. Here, the probative value of Dr. Carter's testimony on this point was high where the physical exam was the result of the victim's allegations against Appellant. Moreover, contrary to Appellant's argument on appeal that the "speculative nature" of the testimony made it "unduly prejudicial" (Brief of Appellant, p. 10), Appellant has not explained below or on appeal why the "speculative" nature of evidence

would render it *unduly* or *unfairly* prejudicial as contemplated by Rule 403. (See R. p. 163, lines 24-25; p. 166, lines 10-18). While the speculative nature of certain evidence may reduce the probative value of that evidence, the fact that evidence is speculative is wholly unrelated to whether or not the evidence is inflammatory to the jury and therefore unfairly prejudicial. See Collins, 409 S.C. at 536, 763 S.E.2d at 28 ("[T]he standard is not simply whether the evidence is prejudicial; rather, the standard under Rule 403, SCRE is whether there is a danger of *unfair* prejudice that *substantially* outweighs the probative value of the evidence." (emphasis in original)); see also U.S. v. Mohr, 318 F.3d 613, 618 (4th Cir. 2003) ("Rule 403 requires exclusion of evidence "only in those instances where the trial judge believes that there is a genuine risk that *the emotions of the jury will be excited to irrational behavior*, and that this risk is disproportionate to the probative value of the offered evidence." (citation omitted) (emphasis added)).

Here, the only potential prejudice that could have resulted from the admission of the doctor's testimony came solely from the legitimate probative force of the evidence. Cf. Gilchrist, 329 S.C. at 630, 496 S.E.2d at 429 ("The prejudice Gilchrist seeks to escape is the prejudicial impact any criminal defendant faces when the State produces relevant evidence that implicates guilt of a crime charged."). There was no unfair or undue prejudice that could have resulted from this testimony that would have caused the jury to decide the case based upon passion or sympathy or some other arbitrary factor. Accordingly, the trial judge did not abuse his broad discretion in declining to exclude the evidence under Rule 403.[3] See Hamilton, 344 S.C. at 358, 543 S.E.2d at 593-594 ("If

[3] Appellant argued below that the expert's opinion regarding the injury being consistent with penetration was not appropriate because of "absolutely contradictory facts" from the victim. (See R. p. 163, lines 5-25). However, the existence of contradictory evidence in the record would not mean an expert's testimony is inadmissible; instead contradictory facts are pertinent only to the weight of the evidence and not its

judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal."). Appellant's convictions should be affirmed.

Harmless Error

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). The harmlessness of an error in the admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003); see State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) ("No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case."). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

In Appellant's case, even assuming the trial judge erred in admitting Dr. Carter's testimony that the victim's injury was consistent with a penetrating injury, any error was entirely harmless. Initially, defense counsel was able to fully exploit - in both cross-

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admissibility. See, e.g., Chesser v. Taylor, 232 S.C. 46, 50, 100 S.E.2d 540, 542 (1957) ("In view of the contradictory nature of the evidence given in this case, more than one reasonable inference can be drawn therefrom ... When such is the situation, it is the duty of the trial Judge to submit such questions of fact to the jury for determination.").

examination and closing argument - the fact that the doctor herself could not say what caused the victim's vaginal injury. (R. p. 213-15; p. 264, lines 2-6; p. 268, lines 9-21). Defense counsel urged the jury not to use "speculation" in deciding the facts of the case. (R. p. 264, lines 2-6; p. 268, lines 9-21). Moreover, the jury was correctly instructed regarding credibility, the testimony of experts, and the burden of proof. (R. p. 277-82). There is absolutely no reason to believe the jurors would improperly use Dr. Carter's testimony to reach a conclusion that Appellant vaginally penetrated the victim if they did not believe the facts of the case supported such a conclusion.

Furthermore, contrary to Appellant's argument that vaginal penetration was a "key" issue in this case, the elements of criminal sexual conduct in the first degree were met regardless of vaginal penetration because the victim also testified about oral sex with Appellant. (See Brief of Appellant, p. 5 and p. 9; see R. p. 156, lines 2-5). See S.C. Code § 16-3-655(A)(1) (stating that a person is guilty of criminal sexual conduct with a minor in the first degree if the actor engages in "sexual battery" with a victim who is less than eleven years of age) & S.C. Code § 16-3-651(h) (specifically including "fellatio" in the definition of "sexual battery"). Significantly, while defense counsel attempted to attack the oral sex allegations as recent fabrication, he admitted in closing argument that he did not know of any reason why the victim would have made up the allegations. (R. p. 186, lines 7-13; p. 217-18; p. 262-70; p. 267, lines 21-22). In that vein, the jury in this case had no valid reason to disbelieve the victim or doubt the credibility of her allegations. Finally, it should be noted that the jury asked no questions of the court and deliberated only thirty minutes before unanimously finding Appellant guilty of both charges. See Brown v. State, 383 S.C. 506, 519, 680 S.E.2d 909, 916 (2009) (in finding

no prejudice from solicitor's improper "Golden Rule" comments in a child sex abuse case, the Supreme Court pointed out that "the jury only deliberated for thirty-eight minutes before finding Brown guilty of both charges"). Based upon the foregoing, the State submits that any error with regard to the challenged testimony was harmless. See Bailey, 298 S.C. at 5, 377 S.E.2d at 584 ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result."). Appellant's convictions should be affirmed.

CONCLUSION

For the reasons discussed above, the State requests that this Court affirm Appellant's convictions and sentences.

Respectfully submitted,

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