STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Honorable R. Markley Dennis, Jr., Circuit Court Judge
Appellate Case No. 2013-000895

THE STATE,

Respondent,

vs.

STEVEN LEE MORGAN,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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II.

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STATEMENT OF THE CASE

On January 29, 2012, Appellant Steven Lee Morgan was arrested in Augusta, Georgia, following an investigation into a violent home invasion and sexual assault that took place earlier that day in Goose Creek, South Carolina. In April of 2012, Appellant was indicted by the Berkeley County Grand Jury for one count of first-degree criminal sexual conduct, one count of first-degree burglary, one count of kidnapping, one count of attempted murder, and one count of possession of a weapon during the commission of a violent crime. On April 19, 2013, a jury trial was commenced in the Berkeley County Court of General Sessions with the Honorable R. Markley Dennis, Jr., circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to consecutive terms of imprisonment of forty years for first-degree burglary and five years for possession of a weapon during the commission of a violent crime along with concurrent terms of imprisonment of thirty years for first-degree criminal sexual conduct, thirty years for kidnapping, and thirty years for attempted murder. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

In December of 2011, Rose Lampkin ("Victim"), a resident of Goose Creek, South Carolina, who had been in a relationship with Appellant Steven Lee Morgan for the preceding two years, decided to end her relationship with Appellant because he was treating her in an increasingly threatening and accusatory manner. (R. p. 38; pp. 40-41; p. 87). To end the relationship, Victim loaded all of Appellant's belongings into her pickup truck with the help of her college-aged son, left the truck for Appellant at a truck stop, and instructed Appellant not to return to her home.[1] (R. pp. 39-42; p. 76; p. 87; p. 89). However, a few weeks later, Appellant defied Victim's instructions, returned to her home, and attempted to force his way inside shortly after midnight. (R. pp. 76-78). Ultimately though, Appellant's attempt to force his way into Victim's residence was unsuccessful because her son was home at that time and alerted the authorities of Appellant's actions. (R. p. 77).

After that, Appellant did not return to Victim's home for several weeks. (R. p. 76). However, at approximately 4:00 a.m. on January 29, 2012, Appellant returned to Victim's residence and threw a piece of wood through Victim's rear sliding glass door. (R. pp. 32-33; pp. 42-44; pp. 58-60). The resulting noise awakened Victim, and she started to go downstairs to investigate.[2] (R. pp. 42-44). As she did so, Appellant, who was armed with a knife, entered the house and ran up the stairs "in a vengeance." (R. pp. 44-45). Appellant then grabbed Victim, began choking and striking her, and told her he would kill her if she did not do what he told her to do. (R. pp. 44-45). Thereafter,

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[1] Appellant was a professional truck driver at the time Victim ended her relationship with him (R p 87)

[2] The noise was loud enough to also awaken Victim's next-door neighbor (R pp 32-33)

Appellant threw Victim to her bed, removed her clothing, forced her to perform oral sex on him, and raped her both anally and vaginally. (R. pp. 45-46; p. 51; p. 94; p. 151).

Once Appellant finished sexually assaulting Victim, he calmed down, sat on the bed, and started smoking a cigarette. (R. p. 46). Appellant then got up from the bed and began looking out the window. (R. pp. 46-47). When he did so, Victim grabbed her cell phone and tried to flee from the home. (R. pp. 46-47). However, Appellant chased after her as she fled, pushed her down the stairs, followed her to the bottom of the stairs, and began slamming her head onto the floor. (R. p. 47). He then ordered Victim to return upstairs while threatening her with his knife, but she was unable to do so because she had badly injured her knee when she fell down the stairs. (R. pp. 47-48). Undeterred, Appellant cut Victim's neck with the knife, dragged her back upstairs by her hands and hair, threw her on the bed, and again raped her. (R. pp. 47-48; p. 62).

After Appellant was once again done sexually assaulting Victim, he began to pace around Victim's house. (R. p. 49). He then retrieved a towel, wiped blood off of Victim's face, and attempted to wipe away any evidence from Victim's vagina. (R. p. 49). After that, he tore the towel into strips, covered Victim's face with a strip of the towel and some tape, stuffed a strip of the towel into her mouth, and hog-tied her hands and feet together with strips of the towel along with pieces of wire hangers he retrieved from Victim's closet. (R. pp. 49-50). Appellant then took Victim's keys, destroyed her cell phone, covered her with clothing and blankets, informed her he was going to get coffee and would be back, and left the residence. (R. pp. 50-51; p. 65).

Thereafter, Victim remained bound on the bed for thirty to forty-five minutes but was eventually able to wriggle free from the restraints despite her injuries. (R. pp. 52-53). Victim then crawled down the stairs, opened the front door, and screamed for help

when she saw a neighbor walk by her house.[3] (R. p. 53). In response, the neighbor quickly alerted another of Victim's neighbors, John McCurdy, and McCurdy rushed over to Victim's home. (R. p. 116). When he arrived, he noticed Victim appeared to have been beaten to such an extent her face was nearly unrecognizable, and he immediately called 911. (R. pp 117-118)

Within minutes, Officer William Tisdale of the Goose Creek Police Department arrived at Victim's residence and found her seated in the doorway to her home. (R. pp. 122-124). At that time, Victim was "very" battered, her face was bloody and swollen, she was suffering from numerous cuts and bruises, and her kneecap was swollen and out of place. (R. p. 124). Officer Tisdale briefly spoke with Victim, and Victim advised him Appellant broke into her residence and sexually assaulted her. (R. p. 125). In response, Officer Tisdale relayed a description of Appellant – and the truck in which Appellant left Victim's residence – to dispatch, and Victim was transported to the emergency room at M.U.S.C. (R. pp. 125-126).

At the hospital, Victim was treated by medical personnel, who noted she was suffering from a knee deformity, abrasions to her knee, a puncture wound to the neck, eye redness symptomatic of strangulation, and numerous facial injuries. (R. pp. 137-138; p. 142). Additionally, Investigator Leroy Goodyear of the Goose Creek Police Department spoke with Victim and took a statement from her about the incident. (R. p. 171; pp. 173-174). Several hours later, Victim was examined by Nancy Hall, a sexual assault nurse examiner and registered nurse.[4] (R. p. 147). During the examination, Victim advised

[3] Victim was forced to resort to crawling instead of walking or running due to her injuries, which included a broken kneecap (R. pp 52-53, p 85)

[4] Prior to the sexual assault examination, Victim urinated several times at the hospital (R p 144) During trial, Hall, who was qualified as an expert in nurse examination, explained evidence could be lost from a

Hall she had been physically and sexually assaulted in her home earlier that morning, and Hall collected samples from Victim's body along with a D.N.A. sample from Victim. (R. pp. 151-152; p. 156). However, Hall was unable to perform a full examination of Victim due to the injuries Victim sustained to her knee. (R. pp. 156-157).

Meanwhile, Wendy Myers, a crime scene investigator and evidence technician from the Goose Creek Police Department, processed Victim's residence for evidence. (R. pp. 201-202). During her investigation, she located strips torn from a towel near the front door, a piece of wood leaning against a wall, a trail of broken glass leading from the piece of wood to a broken sliding glass door, several cigarette butts discarded onto the floor in the dining room and hallway, bloodstains leading up the stairwell, more strips of towel and some wire at the top of the stairs, even more strips of towel and wire in the master bedroom, a pile of clothing on the bed, a blood-stained green jacket with a hole in the collar on the floor, more cigarette butts on the floor next to the bed, and a stained sheet on Victim's bed. (R. pp. 203-206; p. 213; pp 217-218). In response, Myers collected all of the evidence she discovered, and the evidence was sent off for analysis. (R. p. 205; pp. 214-218).

Later that day, Appellant was apprehended and arrested in Augusta, Georgia, while in possession of Victim's truck. (R. p. 65; pp. 69-70; p. 175; p. 182). Following his arrest, Investigator Nicholas Powell of the Goose Creek Police Department collected a sample of Appellant's D.N.A. for analysis, and Victim's truck was transported back to South Carolina and searched. (R. pp. 175-177; pp. 194-195). Although no evidence was discovered in the initial search of the vehicle, Victim's friend, Victor Mazyck, later

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sexual assault victim's vaginal area if the victim urinated or the vaginal area was cleaned prior to the examination (R pp 148-149, pp 157-158) That testimony was later corroborated by an expert in forensic science and D N A analysis, who agreed urination or cleaning could eliminate sperm or semen from a victim's vagina (R p 281, p 289)

removed the center console from the vehicle in order to replace it after buying the truck from Victim and discovered the set of keys Appellant took from Victim during the incident along with the knife Appellant wielded during the incident.[5] (R. pp. 65-68; pp. 176-178; pp. 186-188). That evidence was then turned over to the authorities, and the knife was submitted for analysis. (R. p. 178; p. 232).

Subsequently, the evidence collected from Victim's residence was transported to Intelligenetics, a D.N.A. testing laboratory. (R. p. 229; pp. 231-232). At the laboratory, Dr. Daniel DeMiers, an expert in forensic science and D.N.A. analysis, analyzed the submitted evidence, including the strips of towel, the green jacket, the pieces of wire, the cigarette butts, and Appellant's knife. (R. pp. 231-232; p. 248). Based on his analysis, Dr. DeMiers determined Appellant's D.N.A. was present on the green jacket in a concentration too significant to have resulted from casual contact, and he further determined Appellant's D N.A. and semen were conclusively present on the torn strips of towel. (R. pp. 241-244; p. 263). Additionally, Dr. DeMiers located Appellant's D.N.A. on the pieces of wire from the hangers, the cigarette butts collected from Victim's bedroom, and the cigarette butt collected from Victim's hallway. (R. pp. 245-248). Furthermore, Dr. DeMiers concluded the D.N.A. of three contributors was present on the handle of the knife, and he could not exclude either Victim or Appellant as contributors of that D.N.A. (R. pp. 248-251).

Similarly, the evidence collected during the sexual assault examination of Victim was transported to S.L.E.D. for analysis and was analyzed by Mary Boehm, a forensic D.N.A. analyst at S.L.E.D. (R. pp. 282-284; pp. 299-300; pp. 386-391). As part of her

[5] The keys found in the truck were readily identifiable as belonging to Victim because the key ring had a leather band with Victim's first name on it attached to it (R p 178)

analysis, Boehm developed D.N.A. profiles from the samples collected during the sexual assault examination and compared them to profiles developed from the D.N.A. of Appellant and Victim. (R. pp. 286-289). Based upon that analysis, it was determined Appellant's D.N.A. profile conclusively matched the D.N.A. profile developed from semen found on a rectal swab collected during the sexual assault examination of Victim. (R. p. 290).

Thereafter, Appellant was indicted for first-degree burglary, first-degree criminal sexual conduct, kidnapping, attempted murder, and possession of a weapon during the commission of a violent crime, and he proceeded to trial. (R. pp. 15-17; pp. 393-394; pp. 396-397; pp. 399-400; pp. 402-403; pp. 405-406). At the outset of trial, the solicitor moved to admit the expert testimony of Amanda Webb, a D.N.A. analyst at S.L.E.D. and peer reviewer of Boehm's work in Appellant's case, in regard to her own expert opinion about the evidence originally analyzed by Boehm, who was on medical or maternity leave at the time of trial and was not available to testify. (R. pp. 7-8; p. 278; p. 280; pp. 386-391). In making that motion, the solicitor specifically noted no report prepared by Boehm would be admitted into evidence during Appellant's trial. (R. pp. 386-391). In response, defense counsel objected, arguing the admission of Webb's testimony would impermissibly allow for the admission of Boehm's opinions without having Boehm present during trial. (R. pp. 8-9). After considering the arguments of counsel, the trial judge indicated Webb's expert testimony would be admissible if she was properly qualified and instructed he could make a determination as to the admissibility of the testimony during trial immediately before it was to be presented to the jury. (R. pp. 9-11). Following the trial judge's ruling, defense counsel pointed out to the trial judge the United States Supreme Court proposed several jury instructions in regard to expert

testimony admitted under circumstances similar to what was being proposed in Appellant's case in its decision in Williams v. Illinois, __ U.S. __, 132 S. Ct. 2221 (2012), while noting the issue "may be really premature."[6] (R. pp. 10-11). After considering the proposed instructions, the trial judge determined those instructions would constitute a comment on the facts and indicated he intended to instead present the standard South Carolina jury instructions on expert testimony, which he asserted would address all of the concerns raised by defense counsel. (R. pp. 11-13). The trial judge then proceeded forward with the trial. (R. p. 13; pp. 18-32).

Subsequently, during trial, Victim recounted the terrifying details of the incident involving Appellant, and she identified Appellant in the courtroom as her assailant. (R. pp. 39-86). Likewise, McCurdy, the investigating officers, and the medical personnel who treated Victim after the incident testified about Victim's numerous visible injuries following the attack and sexual assault, about Victim's consistent identification of Appellant as her assailant, and about the readily-observable evidence of the struggle that had occurred in Victim's home. (R. pp. 117-119; pp. 124-126, p. 130; p. 138; p. 142; pp. 151-152; pp. 156-157; p. 166; pp. 171-174; pp. 202-216). Furthermore, Dr. DeMiers testified about the results of his analysis of the evidence collected from Victim's home following the incident, indicated Appellant's D.N.A. was discovered on many of the pieces of evidence, and confirmed Appellant's semen and D.N.A. were present on some of the torn strips of towel recovered from Victim's home. (R. pp. 241-251; p. 263).

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[6] Specifically, defense counsel indicated the Supreme Court's opinion stated the jury should be instructed "that out-of-court statements cannot be accepted for their truth and that an expert's opinion is only as good as independent evidence as the underlying premises And that if the prosecution cannot muster any independent admissible evidence to prove that foundational facts that are essential to the relevance of the expert's testimony, then the expert's testimony cannot be given any weight by the triers of the facts " (R p 11)

Thereafter, Webb, who was qualified as an expert in forensic science and D.N.A. analysis without objection, testified for the prosecution.[7] (R. p. 278; p. 281). During her testimony, Webb noted every D.N.A. analysis conducted at S.L.E.D. was reviewed by two other S.L.E.D. analysts, and she confirmed she conducted a peer review in Appellant's case as part of the mandated peer review process. (R. p. 280). In conducting the peer review, Webb indicated she reviewed the case report, the incident report, the sexual assault nurse examiner's notes, the evidence received by the original D.N.A. analyst, and the analyst's notes and scientific data before checking the analyst's work for accuracy and scientific validity. (R. p. 282). Based on that review, Webb opined – without objection – semen was present on both the vaginal and rectal swabs taken from the victim, no male D.N A. profile could be developed from the vaginal swab, and the D.N.A. profile developed from the rectal swab matched Appellant's D.N.A. profile. (R. p. 286, pp. 288-290). Furthermore, on cross-examination, Webb readily acknowledged she was not present when the original laboratory work was performed, her opinions and conclusions were based on work performed by Boehm, and they were premised on her assumption Boehm conducted her analysis correctly. (R. pp. 290-291).

Following Webb's testimony, both the solicitor and defense counsel rested their cases, and the trial judge conducted a charge conference to ascertain what jury instructions the parties desired to be presented to the jury. (R. p. 298; pp. 309-315). During the charge conference, neither the solicitor nor defense counsel requested any jury instructions based on the suggested instructions from the United States Supreme Court's

[7] Prior to her qualification as an expert, Webb detailed her education, background, training, and experience. (R pp 278-281) Specifically, Webb noted she had obtained a bachelor's degree in science and forensic chemistry, a master's degree in forensic science, had worked as a D N A analyst for five years, had received specialized training in D N A analysis, had worked on approximately five-hundred cases, and had previously been qualified as an expert in the fields of forensic science and D N A analysis approximately fifteen times (R pp 278-281)

decision in Williams. (R. pp. 309-315). Thereafter, the solicitor and defense counsel presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. (R. pp. 316-371). As part of his jury charge, the trial judge instructed the jury on evaluating the testimony of expert witnesses and determining the credibility of witnesses in general. (R. pp. 349-352). Specifically, the trial judge explained:

> I would instruct you to consider any expert opinion received in evidence in this case like any other evidence that has been received. That means, give it the weight that you think that it deserves. If you decide that the expert's opinion is not based on sufficient evidence and experience or if you conclude that the reasons given in support of the opinion are not sound or that the opinion is outweighed by other evidence in the case, you may disregard the opinion in its entirety.

(R. p. 350). Then, at the conclusion of the jury charge, the trial judge asked the parties if there were any exceptions to his instructions or any additional instructions desired, and defense counsel directly responded: "No, sir." (R. p. 371).

Subsequently, at the conclusion of trial, the jury convicted Appellant of first-degree burglary, first-degree criminal sexual conduct, kidnapping, attempted murder, and possession of a weapon during the commission of a violent crime. (R. pp. 375-376). Following the verdict, the trial judge sentenced Appellant to an aggregate term of imprisonment of forty-five years. (R. pp. 383-384).

ARGUMENT

I.

Appellant's issue regarding the admission of a D.N.A. analyst's expert testimony was not properly preserved for appellate review because defense counsel only raised an objection to the testimony during a pre-trial hearing and did not renew that objection or raise any other objections to the testimony when it was presented during trial despite the facts the trial judge only issued a preliminary ruling on the admissibility of the testimony during the pre-trial hearing and the D.N.A. analyst did not testify immediately after the trial judge issued his preliminary ruling.

Appellant contends the trial judge committed reversible error by admitting the expert testimony of Webb, the forensic D.N.A. analyst from S.L.E.D. In support of that contention, Appellant maintains the admission of Webb's testimony impermissibly violated his constitutional right to confront the witnesses against him because Webb's expert opinion was based upon laboratory work performed by an expert who did not testify and, thus, was not subject to cross-examination. However, Appellant's issue with the admission of Webb's testimony cannot properly be raised or addressed on appeal because it was not properly preserved for appellate review in the trial court. Critically, in Appellant's case, defense counsel raised a pre-trial objection to the admission of Webb's testimony, and the trial judge issued a preliminary, non-final ruling in regard to that testimony. Thereafter, during trial, several witnesses testified for the State prior to Webb, and, when Webb testified, defense counsel did not object or renew his pre-trial objection to her testimony. As a result, Appellant's issue with Webb's testimony was not properly preserved for appellate review, and the issue cannot properly be raised or addressed on appeal. Accordingly, Appellant's convictions must be affirmed on issue preservation grounds.

In order for an issue to properly be preserved for appellate review, the issue must be: (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); see JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review); see also In re Care and Treatment of Corley, 365 S.C. 252, 258, 616 S.E.2d 441, 444 (Ct. App. 2005) ("Constitutional issues, like most others, must be raised to and ruled upon by the trial court to be preserved for appeal."). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has 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).

Generally, a motion in limine seeks a pre-trial evidentiary ruling to prevent the disclosure of potentially prejudicial evidence to the jury, and a ruling on such a motion is preliminary, subject to change based on developments during trial, and not a final ruling on the admissibility of the challenged evidence. State v. Smith, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999); see State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996) ("A ruling in limine is not a final ruling on the admissibility of evidence."). As a result, even if a pre-trial objection has been raised, a defendant must object at the time evidence is introduced during trial in order to preserve an issue with the evidence's admission for appellate review. State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993); see State v. Griffin, 339 S.C. 74, 77, 528 S.E.2d 668, 669 (2000) ("[A]n in limine ruling is not final and does not preserve the issue for appeal."). "However, where a judge makes a ruling on the admission of evidence on the record **immediately prior to** the

introduction of the evidence in question, the aggrieved party does not need to renew the objection." State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) (emphasis added). "This exception is based on the fact that when the trial court's ruling is not preliminary, but instead is clearly a final ruling, there is no need to renew the objection." State v. Wiles, 383 S.C. 151, 156-157, 679 S.E.2d 172, 175 (2009).

In the case sub judice, defense counsel objected to the solicitor's pre-trial motion seeking the admission of Webb's expert testimony during a preliminary hearing, and the trial judge issued a preliminary ruling holding Webb's expert testimony would be admissible **if** Webb was properly qualified during trial while noting the issue could be revisited during trial before the challenged testimony was introduced. Thereafter, during trial, the solicitor called Webb to the witness stand, Webb was qualified as an expert without objection, and Webb offered her expert opinion about the D.N.A. evidence submitted to S.L.E.D. for analysis. At that time, defense counsel did **not** renew his pre-trial objection to the admission of Webb's expert testimony or raise any other objection to that evidence. Thus, in Appellant's case, the only objection raised to the admission of Webb's testimony was raised during a pre-trial hearing, and the trial judge only ruled on the admissibility of that testimony in a preliminary fashion while clearly conveying his ruling on the matter was **not** final and, instead, was subject to change based on the evidence and testimony presented during trial.

Because the trial judge's pre-trial ruling was not a final ruling and the testimony was not admitted immediately after the trial judge issued his preliminary ruling, defense counsel was required to renew the objection to Webb's testimony during trial in order to preserve any issue with the admission of that testimony for appellate review. See State v. Atieh, 397 S.C. 641, 646, 725 S.E.2d 730, 733 (Ct. App. 2012) ("A ruling in limine is not

final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review."), see also Armstrong v. Atl. Coast Line R.R. Co., 137 S.C. 113, 121, 133 S.E.2d 826, 828 (1926) ("In each case the trial Judge clearly indicated that his action in admitting the testimony *was not final,* and that he would thereafter hear objections on a motion to strike out the testimony, and in each case no further effort to secure a final ruling on a motion to strike out was made. Under no construction can the motion to strike out with the Judge's ruling thereon, in the case at bar, be considered a final settlement of the question of admissibility." (italics in original)). However, defense counsel did **not** do so. Cf. State v. Stokes, 339 S.C. 154, 163, 528 S.E.2d 430, 434 (Ct. App. 2000) ("[T]he record reflects that this issue was only raised and ruled on in limine. Stokes never raised the issue again at any time during the trial. Merely raising an argument in limine does not preserve the issue for appellate review."). Accordingly, Appellant's issue in regard to the admission of Webb's expert testimony was not properly preserved for appellate review and cannot properly be raised or addressed on appeal. See State v. Head, 330 S C. 79, 87, 498 S.E.2d 389, 393 (Ct. App. 1997) (instructing an appellate court "cannot address unpreserved errors"). Appellant's convictions should be affirmed.[8]

[8] Notwithstanding the fact Appellant's issue with the admission of Webb's testimony was blatantly unpreserved for appellate review and even assuming arguendo the admission of that testimony was improper, any error that could have resulted from its admission was entirely harmless in light of the other evidence and testimony presented during trial See State v Bailey, 298 S C 1, 5, 377 S E 2d 581, 584 (1989) ("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 "), see also United States v Hastings, 461 U S 499, 509 (1983) ("[T]he [United States Supreme] Court has consistently made clear it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations[ ]") Critically, aside from Webb's testimony, Dr DeMiers offered cumulative expert testimony linking Appellant to the home invasion and sexual assault by confirming Appellant's semen was present on the torn strips of towel taken from Victim's home and Appellant's D N A was present on Victim's bloody jacket, on the cigarette butts found on the floor of Victim's home, on the wire used to restrain Victim, and potentially on the knife used in the crimes 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

II.

Appellant's issue with the trial judge's failure to present certain jury instructions Appellant now contends should have been presented to the jury during trial was not properly preserved for appellate review because defense counsel did not request those jury instructions at an appropriate time during trial and expressly waived any issue he had in regard to those instructions by affirming to the trial judge he had no objection to the jury instructions as presented after the trial judge finished instructing the jury on the applicable law.

Appellant contends the trial judge erred in declining to instruct the jury: (1) out-of-court statements cannot be accepted for their truth and an expert's opinion is only as good as the independent evidence that establishes its underlying premises; and (2) if the prosecution cannot muster any independent admissible evidence to prove the foundational facts that are essential to the relevance of the expert's testimony, then the expert's testimony cannot be given any weight by the trier of fact. In support of that

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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.") Additionally, Victim fully testified about the incident and identified Appellant as her assailant without contradiction, testimony was presented establishing Victim's keys and a knife were found hidden in the truck Appellant was found in after the incident, and numerous other witnesses testified about Victim's severe injuries following the assault, Victim's unwavering identification of Appellant as her assailant, and the readily-observable evidence of the struggle that had occurred in Victim's home See State v Tench, 353 S C 531, 537, 579 S E 2d 314, 317 (2003) ("Given the abundant evidence of Tench's guilt, we find any error in admission of the seized items clearly harmless beyond a reasonable doubt "), State v Gathers, 295 S C 476, 480-481, 369 S E 2d 140, 143 (1988) (finding an error to be harmless beyond a reasonable doubt in light of the overwhelming evidence of the appellant's guilt), see also State v Key, 256 S C 90, 97, 180 S E 2d 888, 891 (1971) ("The jury had before it positive identifications of each of the defendants Such identifications were not denied It is academic that failure of the defendants to testify created no inference of guilt against them They did not have the burden of proving anything However, undisputed testimony is more conclusive than testimony which is in dispute, and it is less difficult for this court to reason that guilt is conclusively proven when there is no denial, than when an accused person disputes the truthfulness of the State's evidence ") Furthermore, on cross-examination, Webb made clear to the jury her expert opinion was founded upon work performed by another analyst See State v Price, 368 S C. 494, 499, 629 S E 2d 363, 366 (2006) (finding the improper admission of hearsay evidence to be harmless where the hearsay evidence was impeached by the jury's exposure to the fact the evidence was not based on any first-hand knowledge) Accordingly, under those circumstances, any error in the admission of Webb's testimony could not have impacted the verdict in Appellant's case and was harmless beyond a reasonable doubt See State v Bryant, 369 S C 511, 518, 633 S E 2d 152, 156 (2006) ("[A]ppellate courts will not set aside convictions due to insubstantial errors not affecting the result "), cf Schneble v Florida, 405 U S 427, 432 (1972) ("[U]nless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required In this case, we conclude that the 'minds of an average jury' would not have found the State's case significantly less persuasive had the testimony as to Snell's admission been excluded The admission into evidence of these statements, therefore, was at most harmless error " (citation omitted))

contention, Appellant maintains the trial judge was required to give those instructions in light of the United States Supreme Court's plurality decision in Williams v. Illinois, __ U.S. __, 132 S. Ct. 2221 (2012). However, Appellant's issue with the trial judge's failure to give the identified instructions cannot properly be raised or addressed on appeal because it was not properly preserved for appellate review and was specifically waived during trial. Critically, in Appellant's case, defense counsel called the trial judge's attention to the identified instructions during a pre-trial hearing but failed to request those instructions at an appropriate time during the charge conference conducted at the close of the evidentiary phase of trial.[9] Then, after the trial judge presented the jury instructions to the jury, defense counsel specifically affirmed to the trial judge he had no objections to those instructions. Under those circumstances, Appellant's issue with the trial judge's failure to give the now-desired jury instructions was not properly preserved for appellate review and, instead, was expressly waived. Accordingly, Appellant's convictions must be affirmed on issue preservation grounds.

In addition to the general issue preservation requirements in South Carolina, the South Carolina Rules of Criminal Procedure provide specific guidance in regard to raising and preserving an objection to a jury charge. See Rule 20, SCRCrimP (outlining the requirements for requesting jury instructions and objecting to a jury charge). Pursuant to those criminal procedure rules, a defendant must object to the jury instructions as given or request a jury instruction at an appropriate time when afforded the opportunity to do so in order to properly preserve an objection to or issue with a jury charge. State v. Stone, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985); see Rule 20(a),

[9] Notably, defense counsel conceded during trial his pre-trial discussion of the jury instructions, which occurred before any evidence had been introduced, might be "really premature" (R pp 10-11)

SCRCrimP ("All requests for legal instructions to the jury shall be submitted at the close of the evidence, or at such earlier time as the trial judge shall reasonably direct."); Rule 20(b), SCRCrimP ("Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the hearing of the jury. Any objection shall state distinctly the matter objected to and the grounds for objection."). The rule in South Carolina "is firmly established that failure to object to a charge, or failure to request an additional charge when the opportunity is afforded, constitutes a waiver of any right to complain on appeal of an alleged error in the charge." State v. Williams, 266 S.C. 325, 335, 223 S.E.2d 38, 43 (1976); see Rule 20(b), SCRCrimP ("Failure to object in accordance with this rule shall constitute a waiver of objection.").

In the case sub judice, defense counsel called the trial judge's attention during a pre-trial hearing to several jury instructions defense counsel contended would be appropriate if an expert witness subsequently testified in a particular manner during trial. In response to defense counsel's contention, the trial judge indicated he believed the identified instructions would not be proper under South Carolina law. Thereafter, at the close of the evidentiary phase of trial, the trial judge conducted a charge conference to determine what jury instructions would be presented to the jury and gave the parties an opportunity to request any jury instructions they believed would be appropriate. At that time, defense counsel did **not** request the jury instructions he had previously identified during the pre-trial hearing or make any other reference to those instructions. Subsequently, the trial judge instructed the jury on the applicable law and then asked the parties if they had any objections to the instructions as presented. In response to that inquiry, defense counsel did **not** object and, instead, specifically indicated he had no

objection to the jury instructions that had been presented to the jury. Thus, in Appellant's case, the only reference to the jury instructions Appellant now contends should have been given was made pre-trial prior to the introduction of any evidence that could have warranted the giving of those instructions, defense counsel never requested those instructions be given at an appropriate time during trial, and defense counsel directly assured the trial judge he had no objection to the jury instructions that were actually presented despite the fact they did **not** include the particular instructions Appellant now contends should have been included.

Because defense counsel did not request the jury instructions Appellant now contends should have been given when presented with an opportunity to do so at an appropriate time during trial, any issue in regard to the trial judge's failure to give the jury instructions was not properly preserved for appellate review. See Rule 20(a), SCRCrimP ("All requests for legal instructions to the jury shall be submitted **at the close of the evidence, or at such earlier time as the trial judge shall reasonably direct.**" (emphasis added)); see also Williams, 266 S.C. at 335, 223 S.E.2d at 43 ("The rule in this State is firmly established that failure to object to a charge, or failure to request an additional charge when the opportunity is afforded, constitutes a waiver of any right to complain on appeal of an alleged error in the charge."). As a result, Appellant's appellate issue with the trial judge's failure to give the jury instructions he now believes should have been given cannot appropriately be raised or addressed on appeal. See State v. Hall, 253 S.C. 294, 295, 170 S.E.2d 379, 380 (1969) ("The defendant did not raise the objections to the instructions at the trial although full opportunity was afforded to do so . . . . The failure of the defendant to object or request additional instructions, when

opportunity was afforded, constituted a waiver of any right to complain on appeal of errors in the charge.").

However, even assuming the issue somehow had been properly preserved for appellate review through defense counsel's pre-trial remarks, any issue with the desired jury instructions **still** could not appropriately be raised or addressed on appeal because defense counsel expressly waived the issue during trial. 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). Critically, after the trial judge instructed the jury on the applicable law without presenting the jury instructions Appellant now contends should have been given, defense counsel specifically informed the trial judge he had no objections to the jury charge as presented. See State v. Brown, 402 S.C. 119, 125, 740 S.E.2d 493, 496 (2013) (holding Brown's issue with a jury instruction was not preserved for appellate review where Brown explicitly stated to the trial judge he had no objection to the instruction); State v. Rios, 388 S.C. 335, 342, 696 S.E 2d 608, 612 (Ct. App. 2010) ("Even after the trial court specifically asked if there were any objections to the charges given, Rios responded, 'None.' By failing to contemporaneously object to the jury charges, Rios has waived his right to allege error on appeal."); see also Burke v. AnMed Health, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011) ("When a party states to the trial court that it has no objection to the introduction of evidence, even though the party previously made a motion to exclude the evidence, the issue raised in the previous motion is not preserved for appellate review."); 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."). Accordingly, because defense counsel affirmed he had no objections to the jury instructions after they were presented to the jury, any issue defense counsel may have had in regard to the trial judge's jury instructions was expressly waived, and Appellant is precluded from now raising an issue with the jury charge on appeal. See State v. Pauling, 322 S.C. 95, 100, 470 S.E.2d 106, 109 (1996) ("Having denied the trial judge an opportunity to cure any alleged error by failing to contemporaneously object to the charge, Appellant is procedurally barred from raising these issues for the first time on appeal."). Appellant's convictions should be affirmed.[10]

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[10] Even assuming Appellant's issue with the jury instructions was somehow not completely unpreserved for appellate review, the instructions presented by the trial judge in regard to expert testimony largely covered the substance of the jury instructions Appellant now contends should have been given in light of the fact the trial judge's instructions fully explained to the jurors they could disregard an expert's testimony entirely if they determined it was unsound, unsupported, or outweighed by the other evidence presented. See State v Rye, 375 S C 119, 123, 651 S E 2d 321, 323 (2007) ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied "), State v Taylor, 356 S C 227, 231, 589 S E 2d 1, 2 (2003) ("[T]he trial judge is required to charge only the current and correct law of South Carolina "), State v Burkhart, 350 S C 252, 261, 565 S E 2d 298, 302 (2002) ("The substance of the law must be charged to the jury, not particular verbiage "), State v Ezell, 321 S C 421, 425, 468 S E 2d 679, 681 (Ct App 1996) ("A jury charge which is substantially correct and covers the law does not require reversal ") Additionally, to the extent Appellant contends the trial judge should have instructed the jurors the prosecution's expert testimony could not be given any weight if the prosecution could not muster any independent admissible evidence to prove the foundational facts that are essential to the relevance of that testimony, that particular instruction was **not** identified as an appropriate jury instruction in the United States Supreme Court's decision in Williams and could have constituted an impermissible comment on the facts in South Carolina in light of the fact it was focused solely on an expert witness presented by the prosecution as opposed to by either side See Williams, 132 S Ct at 2241 (identifying four safeguards that would prevent a confrontation clause violation from resulting from the admission of expert testimony while identifying **only** the following jury charge as one of those safeguards "[I]f such evidence is disclosed, the trial judges may and, under most circumstances, must, instruct the jury that out-of-court statements cannot be accepted for their truth, and that an expert's opinion is only as good as the independent evidence that establishes its underlying premises "), see also S C Const art V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law ") Moreover, even assuming for argument's sake the now-desired jury instructions should have been given, any error in the trial judge's failure to give those instructions was entirely harmless in light of the jury instructions that were actually given coupled with the overwhelming evidence of guilt presented during trial See State v Belcher, 385 S C 597, 611, 685 S E 2d 802, 809 (2009) ("Errors, including erroneous jury instructions, are subject to harmless error analysis "), see also State v Pagan, 369 S C 201, 212, 631 S E 2d 262, 267 (2006) ("Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained."), Burkhart, 350 S C at 263, 565 S E 2d at 304 (instructing there is no reversible error when the jury instructions given "afford the proper test for determining the issues"), Gathers, 295 S C at 480-481, 369 S E 2d at 143 (finding an error to be harmless beyond a reasonable doubt in light of the overwhelming evidence of the appellant's guilt)

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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January 13, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Honorable R. Markley Dennis, Jr., Circuit Court Judge
Appellate Case No. 2013-000895

THE STATE,

Respondent,

vs.

STEVEN LEE MORGAN,

Appellant.

CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Laura R. Baer, Esquire
S.C. Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served. This 13th day of January, 2015.

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January 13, 2015

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RE: State v. Steven Lee Morgan – Appellate Case No. 2013-000895

Dear Ms. Baer:

I am enclosing two (2) copies of the Final Brief of Respondent, along with proof of service, in the above-referenced case

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

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