STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY

Court of General Sessions

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2014-002376

THE STATE,

Respondent,

v.

MARIO V. GONZALEZ HERNANDEZ,

Appellant.

FINAL BRIEF OF RESPONDENT

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II.

Appellant's argument concerning Investigator Goodman's testimony about Appellant's interview at the police station is not preserved for appellate review. However, even if Appellant's argument was preserved, the trial judge properly admitted Investigator Goodman's testimony where his statements were not hearsay because Corporal Alvarado was merely acting as a conduit for Appellant; Furthermore, any alleged error is harmless, as Investigator Goodman's testimony was cumulative to Corporal Alvarado's testimony about the interview with Appellant.

III.

Appellant's argument concerning improper bolstering is not preserved for appellate review. However, even if Appellant's argument was preserved, the vast majority of Debrew's testimony elicited by the State was admissible as the statements at issue were made for purposes of medical diagnosis; Debrew's single comment that may be construed as inappropriate was not intentionally elicited by the Solicitor and was rendered harmless by later statements made by Debrew in response to questioning by Defense Counsel. Also, as to Debrew's testimony that was elicited by Defense Counsel, Appellant cannot complain on appeal about an error that the conduct of his own counsel caused. Furthermore, any alleged error in this case is harmless due to the overwhelming evidence of Appellant's guilt.

STATEMENT OF THE CASE

Appellant was indicted during the August 2013 term of the Newberry County Grand jury for one count of first-degree criminal sexual conduct with a minor (2013-GS-36-0498) and one count of second-degree criminal sexual conduct with a minor (2013-GS-36-0500). Appellant proceeded to a jury trial from October 27-29, 2014, in Newberry, South Carolina. At the conclusion of trial, Appellant was found guilty of second-degree criminal sexual conduct with a minor. He was sentenced by the Honorable Eugene C. Griffith, Jr. to imprisonment for a period of sixteen years. Appellant timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

STATEMENT OF FACTS

Sometime in 2009, Mother and her children moved in to the home of Pastor Mario Hernandez, the appellant in this case. ROA. p. 159.[1] Mother has one daughter, Victim, and one son, S.M.. S.M. was born in 2007 and was two years old at the time Mother moved in to Appellant's home. ROA. pp. 181-182. ROA. pp. 159-160. Victim was born on May 7, 2001. ROA. p. 160. On June 29, 2013, Mother entered Victim's bedroom and turned on the light to discover Victim lying on the floor without underwear on. ROA. pp. 167-168. When Mother entered the room, Victim got up quickly and went into the bathroom. ROA. p. 168. Appellant was also in the room and got up from the floor very quickly. ROA. p. 168. Mother testified when she entered the room, Appellant was on top of Victim. ROA. p. 172. Mother noticed Appellant's penis was exposed. ROA. p. 172

When Victim came out of the bathroom, Mother asked her what was happening. ROA. p. 168. Victim began crying and told Mother Appellant abused her. ROA. p. 168. Mother testified Appellant told her he had touched and had relations with Victim. ROA. p. 169. Mother told Appellant she was going to call the police. ROA. p. 169. Appellant began crying and threatened to kill himself. ROA. p. 169. Appellant took away Mother's cell phone, causing Victim to run to a neighbor's house to call the police. ROA. p. 169.

Around twenty minutes later, the police arrived. ROA. p. 174. Mother called Liz Rivera, a neighbor who lives a few blocks away, to help interpret when the police arrived. ROA. p. 175. Mother does not speak very much English. ROA. p. 175. Rivera is self-employed as an interpreter. ROA. p. 231. Andrew Rowe, the first responding officer,

[1] All references to the transcript dated October 28, 2014 will be cited as "Tr." All citations to the October 27, 2014 transcript will be cited as "October 27 Tr."

testified he was met by Mother and Rivera when he arrived at the home. ROA. p. 212. Rivera interpreted for Mother. ROA. p. 214. When he arrived at the scene, Mother and Rivera told Rowe Appellant locked himself in the home and had made statements he wanted to kill himself. ROA. p. 214. After a few minutes, Appellant exited the home. ROA. p. 215.

Once Appellant was outside of the home, investigators placed him into handcuffs for an investigative detention. ROA. p. 216. Rivera assisted investigators in interpreting for Appellant. ROA. p. 216 After having his rights explained to him by Rivera, Appellant agreed to speak with investigators. ROA. p. 218. Appellant admitted to inappropriately touching Victim on several occasions. ROA. p. 221. Specifically, Appellant stated, "She walks around the house, has been walking around the house in provocative clothing which enticed him. He said that he was a pastor, but he was also a man. And he responded to that enticement as any man would but denied actual sexual intercourse with the juvenile." ROA. pp. 221-222. Following these statements, law enforcement took Appellant into custody. ROA. p. 223.

Investigator Kevin Goodman spoke with Appellant at his office at the Sheriff's Department around noon on July 1st. ROA. p. 299. Appellant was transported to Goodman's office by Corporal Boris Alvarado. ROA. p. 303. Alvarado is fluent in Spanish and often assists in investigating cases involving Spanish-speaking individuals. ROA. p. 356. Spanish is Alvarado's native language, as he grew up in Bolivia. ROA. p. 355. Alvarado testified that while Appellant is from Guatemala, he did not have any difficulty understanding the Guatemalan dialect. ROA. p. 359. Appellant provided both oral and written statements to Alvarado and Goodman. ROA. p. 359. While Appellant

made his oral statements, Alvarado interpreted for Goodman. ROA. p. 360. Alvarado stated:

> During the interview, Mr. Hernandez made the statement that around December 2012 is when the touching had started. Also, it was also said that during that time, it was more confidence built into it. And there was inappropriate touching in the private parts. And also it was said to, that there was no intercourse or penetration. But it was, and he also said that at all times he had his clothes on.

ROA, p. 361.

Appellant's written statement read:

> 9/2010, they came to, I live in my house. There was, unintelligible, I too play with the child, the female child. They played. Okay. They went to go live in Atlanta in December 2011 and they returned July 2012. . . There began a game with the little girl when a man and part of the boy. . . The man and the father of the boy went. From then on, there was a confidence with the child, the female child. She played a lot. She touched my buttocks or my butt. She bit my cheeks. Even, unintelligible, in the night was doing tickling on the, repeat please? Was doing tickling on the shoulders, the ribs and the legs. All of this was given with some, with the mother or in front her, there was no sexual act. Saturday 30 was getting my clothes and went to leave some clothes, went into the room to leave my clothes. Of the mother, I asked her first and told her in, unintelligible, in her room or in the room. And when she, the female child, was in the bathroom and the door open, another thing, too, when I lay down or when I laid myself down on the sofa the female girl always threw herself on top of me. Again, in front of her mother and now she accuses me that, that I have raped her child, her female child, but I have not done that to her.

ROA. pp. 372-373.

Victim testified at trial. ROA. pp. 460-485. Victim described sex as, "when a male puts his part in the female's part." ROA. pp. 471-472. Victim stated Appellant began sexually abusing her when her family moved into Appellant's home. ROA. p. 472. Victim was eight or nine years old at the time the abuse began. ROA. p. 472. Victim disclosed that she never told her mother when the abuse began because Appellant told her that her mother would not believe her. ROA. p. 473. Mother, a diabetic, was hospitalized

on several occasions. ROA. p. 473. When Mother was at the hospital, Appellant would sexually abuse Victim. ROA. p. 474.

Victim testified she remembered what happened on the evening of June 29, 2013. ROA. p. 464. Victim was lying in bed with her pajamas on when she heard Appellant come into her room. ROA. p. 468. Appellant ripped the covers off the bed and threw Victim on the floor. ROA. p. 469. Appellant then crawled on top of Victim and raped her. ROA. p. 469. At the time of the assault, Mother was in S.M.'s room. ROA. p. 475. Mother eventually walked into Victim's bedroom, turned on the lights, and saw Appellant on top of Victim. ROA. p. 475. Victim stated that she was scared so she ran into the bathroom. ROA. p. 475. When Victim emerged from the bathroom, she told Mother Appellant assaulted her. ROA. p. 477. When the police arrived, Victim spoke with them and fully described Appellant's abuse. ROA. pp. 478-479. Victim also travelled to the hospital where she was physically examined. ROA. p. 479.

Donna Debrew, a forensic nurse examiner at Palmetto Health Richland, examined Victim in the early morning hours of June 30, 2013. ROA. pp. 389, 393-394. At the time of the examination, Victim was complaining of vaginal discomfort. ROA. p. 396. Victim disclosed to Debrew she had been sexually assaulted. ROA. p. 396. Debrew noticed bruising and discoloration of Victim's hymen. ROA. p. 398. Debrew testified her findings during the physical examination were consistent with some sort of trauma. ROA. p. 402.

ARGUMENT

I.

Appellant's argument concerning the DNA evidence establishing a presence of male DNA and that Appellant could not be included or excluded as a contributor is not preserved for appellate review. However, even if Appellant's argument was preserved for review, Jennifer Bartman's testimony concerning the DNA evidence was relevant and its probative value was not substantially outweighed by its prejudicial effect.

Relevant Facts

Jennifer Bartman, a forensic scientist, performs DNA analysis in the SLED DNA case work department. ROA. p. 425. At trial, Bartman was qualified as an expert in DNA analysis. ROA. p. 427. Bartman performed DNA analysis on four pieces of evidence recovered at the scene: buccal, vaginal, and rectal swabs from Victim obtained during the sexual assault examination by Debrew; a buccal swab from Appellant; a cutting from Victim's underwear; and a cutting from the chest area of Victim's nightgown. ROA. p. 428-429. Bartman performed two types of DNA testing on the items in this case, STR testing and YSTR testing. ROA. p. 432. With STR analysis, the analyst examines fifteen different locations on the DNA as well as a gender marker which indicates whether the DNA is male or female. ROA. p. 431. In YSTR analysis, the analyst focuses only on the male DNA that is present. ROA. p. 432. Bartman testified she performed the YSTR test on the nightgown because there was some male DNA present. ROA. p. 447. Bartman further testified the testing for acid phosphate was positive. The presence of acid phosphate is indicative of semen. ROA. p. 447.

Bartman explained the YSTR profile developed from the cutting from Victim's nightgown is a mixture of two individuals and, "No conclusive statement can be made

regarding the inclusion or exclusion of Appellant as a contributor to this mixture." ROA. p. 440. Bartman later elaborated, "we can either include someone, we can exclude someone or there can just not be enough information to make a determination whether he can be included or excluded from a profile." ROA. p. 445. The Solicitor later asked Bartman, "Now we are all looking at it and we see a lot of these numbers that are matching one another. Why can't you make a conclusion, just not reaching your level of confidence I guess." Bartman responded:

> Because it is a mixture. We typically look at mixtures more cautiously, it is as cut and dry as it is them, or it is not them. So, in this case there are some numbers that are around the parenthesis, so there are some lower level DNA there which you can see. This one and some of the other ones. So there is just enough, there is not conclusively say that he cannot be excluded from that profile.

ROA. p. 446.

During a recess prior to Donna Debrew's testimony, Defense Counsel had stated:

> Your Honor, I understand that this afternoon the State intends to call a DNA expert from SLED and we don't contest their qualifications. The results, Your Honor, will be as I understand from their providing the discovery that, that they performed various tests. And on some of the items they saw signs that they, that prompted them to submit it to the DNA analyst who would be testifying. And that person, ultimately, can neither included nor exclude the defendant. The results are "inconclusive". And, Your Honor, I just got this citation overnight. And but, basically, other courts have held, Your Honor, that if the DNA profile developed from the crime scene evidence, if it's inconclusive then it is therefore evidence of nothing.

ROA. p. 381.

The court responded, "Well, here's what the State is trying to do. I know exactly what they're doing. If they don't call the DNA experts who ran the test, then you're going to say well they didn't even run the test and they don't want to be caught in that box." ROA. pp. 381-382. The court added, "The State has not mentioned yet one single thing

about DNA and y'all have brought it up every chance you got is you collect evidence for DNA testing." ROA. p. 382. Defense Counsel responded:

> In any event, Your Honor, at the appropriate time I'd like to object to the Court, I'd like to ask the Court to not allow the State to introduce the DNA report and a chart of an inconclusive sample. Because it invited, the jury becomes amateur analysts by making their own comparison especially when the State highlights particular consistencies between the evidence profile and the defendant's profile that are scientifically inconclusive.

ROA. p. 383. The court then asked the Solicitor what he intended to do with the DNA report. ROA. p. 383. The Solicitor responded the cutting from the nightgown revealed a presence of male DNA. ROA. p. 383. Defense Counsel later argued:

> And so I would just submit respectfully that under 403, when evidence doesn't help the trier of fact to better understand the testimony, then the evidence should just stay out. The chart should stay out. It would just confuse them. And Jennifer Bartman, I would submit she is an expert and she can state, you know, all the king's horses and all the king's men tried to get what we could out of this but all we can say is inconclusive, the samples we got don't shed any light on this, who's DNA this is. And let me add, Your Honor, that I would not open the door at any point by saying that if these things had been tested that they would have not found his DNA in the items that were not tested.

ROA. p. 387.

The trial court ruled:

> I think the State can call an expert witness in a field of particularity if that expert is qualified in the field of DNA. They can call them, question them and if it gets outside of the scope of assisting the fact finder in determining the questions of fact they have then at that point, the testimony would not be allowed. However, what's been presented thus far is consistent with the DNA testimony I've heard in the past subject to cross-examination of, not having heard the testimony yet it's hard for me to rule on. An expert is allowed to proffer opinions and to proffer comments on the things they've analyzed and the facts and the data they relied upon in reaching those opinions and are subject to cross-examination. So I think at this time, I will listen for questions outside of the scope of assisting the trier of fact. But thus far, I think the State would be allowed to call that person and to testify consistently what she's done in this case.

ROA. p. 388.

Defense Counsel responded, "I understand your ruling and at this point my only objection remaining would be I just don't want them to put in a chart that I will submit doesn't assist the trier of fact and understanding it." ROA. p. 388. Defense Counsel elaborated "So it's not the testimony I object to but the chart." ROA. p. 388. Defense Counsel later objected to the chart of the DNA profiles being made an exhibit on the grounds that it did not tell the trier of fact anything. ROA. p. 435. The court responded, "I agree with you if she is just giving the numbers. If she is giving the results and she said, not included or excluded" ROA. p. 436. Defense Counsel responded "Well, I don't have a problem with that-I have a problem with the --." ROA. p. 436. Defense Counsel continued to elaborate on his desire to have the chart excluded from evidence. ROA. p. 436. The Chart was ultimately not entered into evidence. ROA. p. 438.

Discussion

Appellant contends the trial judge court in admitting expert testimony that no conclusion could be reached regarding whether Appellant could be included or excluded as a contributor to the DNA analysis because the evidence was irrelevant and invited the jury to speculate as to its meaning. Specifically, Appellant asserts Bartman's testimony had no probative value whatsoever and could not have assisted the jury determined any fact in issue. Appellant further asserts any probative value of the DNA evidence was substantially outweighed by the risk of prejudice. However, this argument is without merit, as the DNA evidence was certainly relevant in the case and the very high probative value of the evidence was not substantially outweighed by the risk of unfair prejudice.

Furthermore, any alleged error is harmless because the State presented overwhelming evidence of Appellant's guilt.

Firstly, the State would note Appellant's arguments that the DNA evidence was meaningless and of no probative value due to a lack of statistical context are not preserved for appellate review. Appellant argues, "The statistical context of DNA analysis is crucial to determining what inferences a jury may reasonably take from the results, regardless of what the result was." Br. of App. p. 9. Appellant elaborates that Bartman's testimony was somehow insufficient because she failed to provide a statistical analysis as to the meaning of her conclusion that Appellant could not be included nor excluded in the class of potential suspects. This argument was not raised below, and thus is not preserved for appellate review. Appellant's objection to relevance did not include any sort of argument as to the inclusion of any statistical context of the DNA results. The appellate court will not consider any issues or arguments that were not presented to or passed upon by the trial court, and an appellant is limited on appeal solely to the grounds raised during trial. State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970); see State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); see also State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal."). Appellant's argument is thus not preserved for appellate review. Furthermore, Defense Counsel was more than welcome to cross-examine Bartman as to the statistical context of the DNA results finding Appellant could not be included nor excluded in the class of potential suspects.

Secondly, the State would note Appellant's contention in section "A" of his argument concerning Rule 702 of the South Carolina Rules of Evidence is conclusory and lacks support. Aside from asserting in his argument heading that the DNA evidence should not have been admitted under Rule 702, Appellant offers no support for the proposition that Bartman's testimony somehow violated the rule. Appellate courts will not consider arguments or issues raised on appeal in a conclusory or unsupported manner. Savannah Bank, N.A. v. Stalliard, 400 S.C. 246, 252, n. 3, 734 S.E.2d 161, 164 (2012). See also State v. Garner, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct. App. 2010) (holding a conclusory, unsupported argument was abandoned on appeal). This Court should, therefore, disregard Appellant's statements concerning Rule 702.

Thirdly, the State contends the remainder of Appellant's argument is without merit. In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing an evidentiary ruling, the appellate court gives great deference to the trial judge because the reception or exclusion of evidence is a matter left largely to the sound discretion of a trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) ("[D]eference is due to the trial court's admission of the evidence."). An 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."). "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 must 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).

Probative value is the measure of the importance of a piece of evidence's tendency to prove or disprove some fact or issue relevant to the outcome of a case. State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012), rev'd on other grounds, 409 S.C. 524, 763 S.E.2d 22 (2014). 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 though, 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). That is true because all evidence introduced by the State in a criminal trial is meant to be prejudicial to the defendant. Id. It is only unfair prejudice that must be avoided. Id.

Trial judges have "particularly wide discretion" in ruling on the comparative probative value and potential prejudicial effect of evidence. Collins, 398 S.C. at 209, 727 S.E.2d at 757. 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 the present case, the trial judge properly found the DNA evidence admissible, as it was certainly relevant. The DNA evidence demonstrated that male DNA was found on the Victim's nightgown, the DNA tested positive for acid phosphate, an indicator that semen was present, and that Appellant could not be excluded as a contributor. This evidence is absolutely relevant in a CSC prosecution, especially where the Appellant was the only adult male living in the home, Mother testified she walked into Victim's room and saw Appellant on top of Victim with his penis exposed, and Victim testified Appellant forced her onto the floor and sexually abused her. The evidence was also relevant to demonstrate law enforcement had fully investigated the case by conducting DNA testing. Law enforcement witnesses testified several items were taken for DNA testing, thereby making the results of that test a relevant matter that needed to be presented to the jury.

Additionally, the DNA evidence's significant probative value was not outweighed by the risk of unfair prejudice whatsoever, much less substantially outweighed. All the prejudice stemming from the admission of the DNA evidence was a result of the legitimate probative force of the evidence. "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Gilchrist, 329 S.C. at 630, 496 S.E.2d at 429. While the DNA evidence was certainly indicative of Appellant's guilt, it did not suggest a decision on an improper basis.

Moreover, even if the trial court somehow erred in admitting the DNA evidence, any error would be harmless in light of the overwhelming evidence of Appellant's guilt. Error is harmless when it could not reasonably have affected the result of the trial. State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990). The key factor for determining whether a trial error constitutes reversible error is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012) (citations and internal quotations are omitted). The alleged error in this case did not contribute to the jury's verdict whatsoever, as the jury was presented with overwhelming evidence of Appellant's guilt. The jury heard unrebutted testimony from Victim who described years of sexual abuse at the hands of Appellant. The jury also heard Mother recount walking into her daughter's room and discovering Appellant on top of Victim with his penis exposed. Appellant also made multiple statements to investigators where he admitted that he touched Victim inappropriately. Furthermore, the jury heard testimony from Donna Debrew that Victim's injuries were consistent with trauma and Victim's hymen was bruised and discolored when she was examined the evening of Appellant's arrest. The jury also heard male DNA was found on Victim's nightgown and that said DNA tested positive for acid phosphate, which could be indicative of semen. The jury, therefore, was presented with overwhelming evidence proving Appellant committed criminal sexual conduct in the second degree. Appellant's conviction and sentence should be affirmed.

II.

Appellant's argument concerning Investigator Goodman's testimony about Appellant's interview at the police station is not preserved for appellate review. Even if Appellant's argument was preserved, the trial judge properly admitted Investigator Goodman's testimony where his statements were not hearsay because Corporal Alvarado was merely acting as a conduit for Appellant; Furthermore, any alleged error is harmless, as Investigator Goodman's testimony was cumulative to Corporal Alvarado's testimony about the interview with Appellant.

Relevant Facts

As discussed in Respondent's Statement of Facts, Appellant made oral and written statements to Investigator Goodman and Corporal Alvarado at the police station. ROA. p. 359. Alvarado interpreted Appellant's oral statements for Investigator Goodman. At trial, Investigator Goodman testified:

> I picked up from his conversations on the incident night about the inappropriate touching. And I asked him when had that started, and he said around December 2012. We talked about the inappropriate touching and he said, you know, they would touch each other on their private parts and their clothes would always be on. The mama was present. He spoke of her sitting on top of him while sitting on the couch. But I took that to be her sitting on his lap or something, not necessarily him laying down on top of him, but sitting on his lap. Those kind of things, sitting on his lap. Inappropriate touching, the clothes would always be on. We talked about the night in question, June 29th, June 30th and he said that he was in her room sitting on the bed. She was in the bathroom. Their clothes were on. The light was on and mom came in and nothing happened and he didn't put his penis inside of her. That's all he would say.

ROA. p. 304.

During trial, Corporal Alvarado testified:

> During the interview, Mr. Hernandez made the statement that around December 2012 is when the touching had started. Also, it was also said that during that time, it was more confidence built into it. And there was inappropriate touching in the private parts. And also it was said to, that there was no intercourse or penetration. But it was, and he also said that at

all times he had his clothes on. And some of that stuff that I can recollect from.

ROA. p. 361.

During a pretrial hearing, Defense Counsel stated, "Judge, if we may briefly discuss the oral statements made to Officer Alvarado." ROA. p. 124. Defense Counsel argued:

> In Goodman's Office, Your Honor, again this was coming through Alvarado who said he hadn't used Spanish in 14 years since the year 2000; that he didn't know a simple word such as merry-go-round. It's a kid's word. Your Honor, I just think the oral translation of the private parts things that he says that my client said are not retorted in any form, not able to disprove that other than questioning him, I think that those things are outside the scope of the handwritten declaration that Your Honor said can come in.

ROA. p. 124.

The trial court ruled:

> Well, I think that Alvarado is qualified to interpret Spanish because it's his native language, his first language. He grew up in Bolivia. Learned English when he got to New York. Certainly it's subject to cross examination. He can translate the Spanish that he understands. I don't think he would be allowed to translate the Spanish prose. I think that's kind of outside the scope of his expertise, but I think clearly he's demonstrated to me a comfort zone in speaking Spanish as well as translating it to, I'm sorry, interpreting it to English so he would be allowed to repeat the Spanish spoken by Mr. Hernandez back to Officer Goodman. I don't want him, Officer Goodman to be allowed to say his version of what was said in Spanish that he could not understand. So Goodman can't say anything that was told by Hernandez. He can say I was present. He looked lucid. He looked comfortable. He didn't appear threatened. He can describe his observations, but two people downstream translating Spanish to English, English to Goodman's English, no, I'm not going to allow that.

ROA. pp. 254-255.

The trial court clarified, "Goodman can't tell what Alvarado said to him." ROA. p. 255. At trial, the issue of exactly what Investigator Goodman could testify to arose

again. ROA. pp. 255-256. The State sought to proffer Investigator Goodman's testimony as to the contents of Appellant's oral statement. ROA. p. 261. The court stated, "Sure, let's do that." ROA. p. 261. Following the proffer of Investigator Goodman's testimony, the trial court found, "I think under 402 and 403 and completeness that he be allowed to testify to what Alvarado said and then to transmit - - the translation of the written statement, I think you get it all." ROA. p. 288. Defense Counsel responded, "All or nothing." The trial court then stated, "Or it's going to really confuse the jury because the testimony has been inconsistent thus far and this albeit, his version of what he was told through a translator and through a victim is yet again consistently inconsistent. I think you get it all. I think he's got to be able to say it all and you get to cross-examine just like you have." ROA. pp. 288-289. Defense Counsel responded, "I just don't think that these things, Your Honor, bore a relationship to the verbal things that may lack trustworthiness but I think your opinion is the one that counts." ROA. p. 289. The trial judge then stated:

> I think he gets to say what Alvarado translated back to him as he initiated the oral interview being, tell me when this started, who was there, how's it happened, just like what he said. He's allowed - - he will be allowed to do that and you're allowed the full breadth of cross-examination about what else he didn't do or analyze or otherwise.

ROA. p. 289.

The following morning, the trial court asked the parties whether they wanted to put something on the record. ROA. p. 290. Defense Counsel stated "I just wanted to understand about the cross-examination and you have been very patient with me. It is my understanding is that the ruling is, I can cross-examine him on the deficiencies on his investigation. Whatever and that somehow opens the door for these statement that were not otherwise recorded." ROA. p. 290.The trial court responded:

> After I heard the proffer it seems to me that the completeness of the interviews of the victim, the victim's mother, and the defendant all are so intermixed with the translation issue and the credibility of the translators or interpreters, whichever the proper were we educated on, that everything should come just so the jury gets a complete story of the multitude of facts that they are to consider. I don't think it would be fair to the jury to preclude that. I have heard too much and too many variations to exclude it.

ROA. pp. 290-291.

The trial court elaborated:

> After I have heard it I think they get to have it. But if I change my mind, I don't think it is unduly prejudicial to your client. I think it is more probative to the jury to hear the whole story and if they do then you have got full reign to cross-examine at your discretion, whatever issues you want. I am not going to limit you on certain thing. I think I changed my mind, particularly this, first we were talking and the proffer was about the statement of the defendant and after I heard the statements and the variations of the victim and the victim's mother. That is when I believe under the probative value of what he was told by your client is probative toward all the issues that are subject to the jury's evaluation.

ROA. p. 292. Defense Counsel then noted, "And so it is kind of a ruling on completeness and res gestae. There is a complete understanding of that." ROA. p. 292. The trial judge responded, "And probative prejudicial, the jury needs to hear everything. The negative remarks as far as the fact finders, I don't think this puts any more prejudice towards him by the version that the detective heard. To me it is all very similar but I think the jury needs to hear it all." ROA. p. 292.

Discussion

Appellant asserts the trial court erred in admitting Investigator Goodman's testimony about his interview with Appellant on July 1, 2013, where Corporal Alvarado translated Appellant's statements for him. Appellant contends Investigator Goodman's testimony was inadmissible hearsay not subject to any exception. This argument is without merit, as Corporal Alvarado served only as a language conduit between

Goodman and Appellant. Furthermore, any alleged error is harmless as Goodman's testimony was merely cumulative to Alvarado's testimony of the exact same course of events and the jury was presented with overwhelming evidence of Appellant's guilt.

Initially, this Court need not reach the merits of Appellant's argument, as it is not preserved for appellate review. If an error is not presented to and ruled upon by the trial judge, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). The appellate court will not consider any issues or arguments that were not presented to or passed upon by the trial judge, and an appellant is limited on appeal solely to the grounds raised during trial. State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970); see State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."). Appellant's objection to the evidence, and the trial judge's ruling, seem to focus on the rule of completeness, relevance, and the probative value and prejudicial effect of the evidence. There was no objection raised, and no ruling by the trial judge, as to whether Investigator Goodman's testimony constituted inadmissible hearsay. As such, Appellant's argument is not preserved for appellate review.

Even if Appellant's argument was preserved, the trial court properly admitted Investigator Goodman's testimony, as Corporal Alvarado's statements did not constitute inadmissible hearsay. Corporal Alvarado was merely acting as a language conduit between Appellant and Investigator Goodman. As Appellant concedes in his brief, a number of courts have recognized that interpreters serve only as a language conduit between the defendant and the interpreter. See e.g. United States v. Vidacak, 533 F.3d 344 (4th Cir. 2009); United States v. Shibin, 722 F.3d 233 (4th Cir. 2013); United States

v. Ushakow, 474 F.2d 1244 (9th Cir. 1973); United States v. Nazemian, 958 F.2d 522 (9th Cir. 2000); United States v. Martinez-Gaytan, 213 F.3d. 890 (5th Cir. 2000); Correa v. Superior Court, 27 Cal. 4th 444, 40 P.3d 739 (Cal. 2002), Lopez v. State, 281 Ga. App. 623, 636 S.E.2d 770 (Ga. Ct. App. 2006).

In United States. v. Vidacak, 553 F.3d 344 (4th Cir. 2009), the Fourth Circuit found translated statements of the defendant during an interview with law enforcement were not inadmissible hearsay. The Court ruled the translations did not create double hearsay because the translator was merely a "language conduit" and not a declarant under the hearsay rule. Id. at 352. The Court noted some courts have carved out a narrow exception that is applied "where the particular facts of a case cast significant doubt upon the accuracy of a translated confession." Id. The Court further noted four factors have been identified by courts to determine whether this exception applies: 1) which party supplied the interpreter; 2) whether the interpreter had a motive to mislead or distort; 3) the interpreter's qualifications and language skills; and 4) whether actions taken subsequent to the conversation were consistent with the statements translated. Id.

In weighing the aforementioned four factors, the situation at hand is analogous to that in United States v. Romo-Chavez, 681 F.3d 955 (9th Cir. 2012). In Romo-Chavez, ICE Special Agent Andrew Simboli questioned Romo-Chavez. Id. at 958. Simboli required a translator to facilitate conversation with Romo-Chavez, so Customs and Border Protection Officer David Hernandez acted as a translator to facilitate conversation between Romo-Chavez and Simboli. Id. Simboli testified he recognized proper nouns such as "Phoenix" and "Dillard's," but otherwise depended on Officer Hernandez's translation. Id. In weighing the factors, the Court found the first factor

weighed slightly in favor of Romo-Chavez. Id. at 959. The Court stated, however, "though never dispositive, this factor would have greater weight if Officer Hernandez had 'acted as both a translator and a federal law enforcement officer,' by 'ask[ing] the types of questions he 'normally would ask' in his capacity' as a government agent." Id. at 359-60. The Court noted Officer Hernandez did not initiate any of the questions with Romo-Chavez. Id. at 360. The Court found the second factor weighed in favor of the government, as the district court found Officer Hernandez had no motive to distort the translation. Id. The Court declined to adopt a presumption that a public servant is inherently biased. Id. The Court also found the third factor weighs in favor of the government. Id. The Court emphasized Officer Hernandez grew up in El Paso speaking Spanish, studied it in school, spoke it at home with his wife, and conducted interviews in Spanish on a regular basis. Id. The Court found the fourth factor was not relevant in the case, as Officer Hernandez took no further action after the translation. Id. After weighing the factors together, the Court concluded the district court did not err in concluding Officer Hernandez served merely as a language conduit for Romo–Chavez. Id. at 961.

Here, as in Romo-Chavez, the four factors establish the narrow exception to the conduit rule does not apply. Regarding the first factor, as in Romo-Chavez, the fact that the State supplied the interpreter should not weigh too heavily against the State. Corporal Alvarado was acting only as an interpreter and not acting as an investigator, as he asked no questions of his own and simply translated Investigator Goodman's statements to Appellant and vice-versa. As to the second factor, there is absolutely no evidence in the record that Alvarado had any intent to mislead or distort. As noted in Romo-Chavez, there is no presumption that a law enforcement officer is inherently biased. Furthermore,

the statement itself belies the contention that Alvarado intended to exaggerate Appellant's culpability, as logic dictates he would have created a much more damaging admission than the one relayed. As to the third factor, Alvarado was adequately qualified to translate in Spanish for Appellant and Investigator Goodman. Alvarado's native language is Spanish, as he was born in Bolivia. Due to his Spanish fluency, Alvarado often assists the department in cases involving Spanish-speaking individuals. Furthermore, Alvarado testified he clearly understood the Guatemalan dialect spoken by Appellant. As to the fourth factor, Appellant's subsequent written statement is fairly consistent with his oral statements. While the written statement does not include the words "private parts" or "inappropriate touching," the statement discussed Victim's confidence, Victim touching Appellant's buttocks, tickling him, and biting his cheek, Victim throwing herself on top of him, and how he played with Victim. This statement is consistent with Appellant's oral statements which contained references to Victim's confidence and admissions that inappropriate touching occurred. The weighing of the four factors does not reveal a situation where the particular facts of a case cast significant doubt upon the accuracy of a translated confession. Goodman's statements were thus admissible, as Alvarado was acting merely as a language conduit.

Furthermore, any alleged error in this case is harmless, as Investigator Goodman's testimony was merely cumulative to the testimony of Corporal Alvarado. When other properly admitted testimony reveals essentially the same information, the jury's exposure to improper evidence is harmless. State v. Brown, 344 S.C. 70, 75, 543 S.E.2d 552, 554-555 (2001). Alvarado's testimony concerning Appellant's oral statements was indisputably admissible under Rule 801(d)(2), SCRE, as an admission by party-opponent.

Appellant argues Alvarado's testimony provided slightly less detail than Goodman's, however the substance of the two statements is essentially identical. In both Goodman's and Alvarado's accounts of Appellant's statement, Appellant admits inappropriate touching of Victim's private parts, Appellant stated the touching began in December of 2012, Appellant asserts he and Victim's clothes stayed on during the touching, and there was never any penetration. The substance of Alvarado's and Goodman's statements, are thus nearly identical. Therefore, Goodman's testimony was merely cumulative to the admissible testimony of Alvarado.

As discussed in Respondent's Issue I, any alleged error is also harmless due to the overwhelming evidence of Appellant's guilt. Appellant's conviction and sentence should be affirmed.

III.

Appellant's argument concerning improper bolstering is not preserved for appellate review. Even if Appellant's argument was preserved, the vast majority of Debrew's testimony elicited by the State was admissible as the statements at issue were made for purposes of medical diagnosis; Debrew's single comment that may be construed as inappropriate was not intentionally elicited by the Solicitor and was rendered harmless by later statements made by Debrew in response to questioning by Defense Counsel. Also, as to Debrew's testimony that was elicited by Defense Counsel, Appellant cannot complain on appeal about an error that the conduct of his own counsel caused. Furthermore, any alleged error in this case is harmless due to the overwhelming evidence of Appellant's guilt.

Relevant Facts

During Debrew's testimony, she discussed her initial involvement in the case, stating, "So I received a call at home. Spoke with the nurse that was taking care of her at the time and they called me to the hospital and said law enforcement is there and they're requesting a forensic exam." ROA. p. 394. Debrew testified her understanding of the case was:

> The brief information that I was given was that she was assaulted by or was reporting that she was assaulted by someone in the home which was a male that was much older than her. It was a 12-year-old victim at that time and when I got to the hospital I spoke with the physician. He had done his initial exam and had cleared her, because the physician has to see the patient before I see them, and he had cleared her for me to do my exam.

ROA. p. 394. Debrew testified Victim "explained to me that she was assaulted by the landlord and I think she called him the pastor." Debrew was asked about the nature of the assault. ROA. p. 396. Debrew responded, "He penetrated her - - with the questions that we ask, we get very specific what is touching or where something is put. And she did say that, when I questioned her on, did he put his penis in your vagina, she answered yes."

During cross-examination, Defense Counsel asked Debrew to refer to her report from the evening of June 30, 2013. ROA. p. 403. Defense Counsel asked "On the third page, ma'am, she gave as part of your interview a statement as to what happened or what she says happened?" ROA. p. 403. Debrew answered:

> This is what I typed when she was talking to me. Like in the night, it was 11:00 or 12:00 and he, (the pastor), that should be, came in the living room and then he came in my room. He had a bad attitude. He takes down my underpants and he abused me. I was like, mommy, and I ran to the bathroom. My mom came and he acted like nothing happened. My mom went, why are my daughter's underwear on the floor? My mom asked me and I was trembling and I was really scared. The pastor said, nothing was going on and you're lying on me. He said that twice. My mom got the phone. She was going to call 911, and he was like begging and crying for her to stop or for her not to call. My brother was there watching. I went to the neighbor and she called the police and they came and brought us here.

ROA. p. 404.

Discussion

Appellant contends Debrew's testimony constituted improper bolstering of Victim's testimony. This argument is without merit, as the vast majority of Debrew's testimony elicited by the State did not constitute improper bolstering and was admissible for purposes of medical diagnosis under Rule 803(4), SCRE. Debrew's single comment that may be construed as inappropriate was not intentionally elicited by the Solicitor and was rendered harmless by later statements made by Debrew in response to questioning by Defense Counsel. As to the testimony elicited by Defense Counsel, Appellant cannot complain on appeal about an error the conduct of his own counsel caused. Furthermore, any alleged error in this case is harmless due to the overwhelming evidence of Appellant's guilt.

Appellant's argument is not preserved for appellate review, as Defense Counsel did not object to Debrew's testimony at issue. If an error is not presented to and ruled upon by the trial judge, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). The appellate court will not consider any issues or arguments that were not presented to or passed upon by the trial judge, and an appellant is limited on appeal solely to the grounds raised during trial. State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970). Since Defense Counsel failed to object to Debrew's testimony, Appellant cannot raise this issue on appeal for the first time.

In any event, the vast majority of Debrew's testimony was admissible under Rule 803(4), SCRE, because the statements at issue were made for purposes of medical diagnosis. As one of the recognized exceptions to the hearsay rule, the medical diagnosis or treatment exception allows for the admission of out-of-court statements of a declarant "made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" despite the general prohibition against hearsay evidence. Rule 803(4), SCRE. In order for a statement to be admissible pursuant to the medical diagnosis or treatment exception, two conditions must be met: (1) the declarant's motive in making the statement must be consistent with the purpose of promoting diagnosis or treatment; and (2) the content of the statement must be such as is reasonably relied upon by a medical provider in making a diagnosis or providing treatment. Willingham v. Crooke, 412 F.3d 553, 562 (4th Cir. 2005). Significantly, the medical diagnosis or treatment "exception to

the hearsay rule is premised on the notion that a declarant seeking treatment 'has a selfish motive to be truthful' because 'the effectiveness of medical treatment depends upon the accuracy of the information provided.' " Id.; see White v. Illinois, 502 U.S. 346, 356 (1992) ("[A] statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility that a trier of fact may not think replicated by courtroom testimony.").

Debrew's testimony did not constitute improper bolstering because she was recounting injury-specific information she was given in order to treat Victim. Debrew's statement, "she was assaulted by or was reporting that she was assaulted by someone in the home which was a male that was much older than her. It was a 12-year-old victim at that time and when I got to the hospital I spoke with the physician," was made for the purpose of medical diagnosis. The fact that Victim was assaulted in the home was relevant to potential medical issues arising from incest. The fact that the assailant was an older male was also pertinent as to what kind of injuries Victim may have suffered and how severe her injuries may be. Debrew's statement "he penetrated her - - with the questions that we ask, we get very specific what is touching or where something is put. And she did say that, when I questioned her on, did he put his penis in your vagina, she answered yes," was similarly a statement Victim made for purposes of medical diagnosis. The nature of the assault is overwhelmingly relevant to Victim's medical treatment and did not amount to improper bolstering.

The only portion of Debrew's testimony that could be considered unduly corroborative of Victim's testimony was where she testified, "she explained to me that

she was assaulted by the landlord and I think she called him the pastor." ROA. p. 396. Debrew gave that answer after being asked by the Solicitor, "What was your understanding of the type of assault?" ROA. p. 396. The Solicitor's question regarding the type of assault does not seem to have been intended to elicit the identity of the perpetrator from Debrew, and Appellant neither objected to or moved to strike the response. Further, Debrew's statements where she noted Victim disclosed she was assaulted by her landlord were later rendered harmless to the testimony elicited by Defense Counsel. Debrew's report from the interview, which she read at trial at the behest of Defense Counsel, contained the same identification of "the pastor" as the man who assaulted her, as well as many more specific details about the assault. Additionally, this testimony elicited on cross does not appear to be responsive to or necessitated by the allegedly objectionable comment on direct.

Appellant's contention that the testimony elicited by Defense Counsel constituted improper bolstering is wholly without merit, as Appellant cannot complain about an error directly caused by his own conduct. See State v. Logan, 279 S.C. 345, 348, 306 S.E.2d 622, 624 (1983) ("Appellant can neither take advantage of an error he contributed to at trial nor preserve a vice and, upon learning of the outcome of trial, raise it on appeal."); 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 has induced."). Defense Counsel specifically asked Debrew if she had her report from her examination of Victim, and then asked her to tell the jury what the report indicated Victim said. Appellant cannot assert these statements are improper bolstering when he specifically had them admitted at trial.

As discussed in Respondent's Issues I and II, any alleged error in this case is harmless due to overwhelming evidence of Appellant's guilt. Appellant contends under South Carolina law, testimony amounting to improper bolstering cannot be considered to be harmless. In support of this argument, Appellant cites State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011). However, in Jennings, the South Carolina Supreme Court repudiated the per se rule, and reaffirmed that admission of testimony, even cumulative testimony, can be harmless. Jennings, 394 S.C. at 478–79, 716 S.E.2d at 93–94 (2011) (Kittredge & Hearn, JJ., concurring) (Toal, C.J., dissenting) (rejecting a per se rule of prejudice when corroboration testimony is cumulative to the victim's testimony); State v. Young, 378 S.C. 101, 107, 661 S.E.2d 387, 390 (2008) (requiring a showing of prejudice for an appellate court to reverse based on the erroneous admission of evidence). This Court therefore should find any alleged error harmless due to the overwhelming evidence of Appellant's guilt. Appellant's conviction and sentence should be affirmed.

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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June 3, 2016

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Newberry County
Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

MARIO V. GONZALEZ HERNANDEZ,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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vs.

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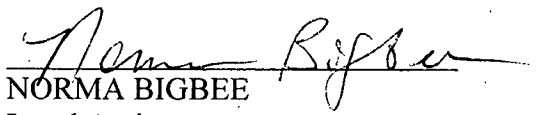
PROOF OF SERVICE

I, Norma Bigbee, 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: Graham R. Billings, Esquire, 1320 Main St, 17th Floor, Columbia, SC 29201 and Robert M. Dudek, Esquire, Chief Appellate Defender, SC Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 3rd day of June, 2016.



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