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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of General Sessions
Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2013-GS-36-00500
Appellate Case No. 2014-002376

The State, ... Respondent,

v.

Mario Valerio-Gonzalez Hernandez, ... Appellant.

FINAL BRIEF OF APPELLANT

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Statement of the Case

This appeal arises out of a conviction and sentence of Appellant Mario Valerio-Gonzalez Hernandez of criminal sexual conduct with a minor in the second degree. Mr. Hernandez was found guilty by a jury after a trial in the Newberry County Court of General Sessions from October 28, 2014 to October 30, 2014. The State argued at trial that Mr. Hernandez sexually assaulted the minor child of his girlfriend, Tomasa Aguirre-Cruz, both of whom lived at the same residence as Mr. Hernandez. The State theorized that the alleged criminal sexual conduct had occurred from approximately 2010, when the minor was eight years old, until June 29, 2013, when the minor was twelve. The State brought two charges against Mr. Hernandez: criminal sexual conduct with a minor in the first degree and criminal sexual conduct with a minor in the second degree.

At trial, Ms. Aguirre-Cruz testified that, on the evening of June 29, 2013, she found Mr. Hernandez and the minor, who was not wearing underwear, lying on a blanket on the floor of the minor's bedroom. (Tr. 38-44; R. 167-173.) Ms. Aguirre-Cruz testified that the minor told her that Mr. Hernandez had touched and "had relations" with the minor. (Tr. 40; R. 169.) Ms. Aguirre-Cruz testified that the minor left to call the police at a neighbor's house and Ms. Aguirre-Cruz called Liz Rivera, a Spanish-speaking neighbor, to assist at the scene. (Tr. 41, 46-47; R. 170, 175-176.)

Andrew Rowe, a police officer with the Newberry Police Department, testified that he was dispatched and met Ms. Rivera, Ms. Aguirre-Cruz, and the minor at the house. (Tr. 82-84; R. 211-213.) Officer Rowe testified that he brought Mr. Hernandez out of the home for questioning. (Tr. 84-86; R. 213-215.) Officer Rowe testified that he read Miranda rights in English, and Ms. Rivera orally translated the Miranda rights into Spanish to Mr. Hernandez. (Tr.

87-89; R. 216-218.) Officer Rowe then questioned Mr. Hernandez regarding what occurred. (Tr. 92-94; R. 221-223.) Officer Rowe called Investigator Kevin Goodman to the home, and Investigator Goodman testified that he overheard Sgt. Rowe questioning Mr. Hernandez through Ms. Rivera. (Tr. 168; R. 297.) After the conclusion of the interview, Mr. Hernandez was taken to prison. (Tr. 168; R. 297.)

Inv. Goodman testified that, on July 1, 2013, Mr. Hernandez was brought to the police department for an interview. (Tr. 174; R. 303.) He testified that Mr. Hernandez was Mirandized in both English and Spanish, after which Mr. Hernandez signed a Spanish language waiver form. (Tr. 176-81; R. 305-310.) During the interview, Inv. Goodman asked questions to Corporal Boris Alvarado in English, who interpreted the questions and asked them to Mr. Hernandez in Spanish. (Tr. 174; R. 303.) Mr. Hernandez then responded in Spanish to Cpl. Alvarado, who interpreted the response back to Inv. Goodman in English. (Tr. 174; R. 303.) After questioning Mr. Hernandez, Inv. Goodman offered him an opportunity to give a written statement, and Mr. Hernandez wrote a statement in Spanish. (Tr. 181-82; R. 310-311.) Inv. Goodman also interviewed Ms. Aguirre-Cruz and the minor, and the minor also prepared a voluntary statement in English. (Tr. 171-74; R. 300-303.)

On June 29, 2013, after the alleged criminal sexual conduct, the minor was taken to the hospital for a sexual assault examination by Donna Debrew, a sexual assault nurse examiner at Palmetto Health. (Tr. 265; R. 394.) Ms. Debrew testified that she interviewed the minor and performed a sexual assault examination consistent with the answers provided by the minor within six hours after the alleged assault. (Tr. 267-71; R. 396-400.)

Jennifer Bartman, a DNA analyst employed by the State Law Enforcement Division, testified that she performed a DNA analysis on four pieces of evidence recovered from the scene:

buccal, vaginal, and rectal swabs from the minor obtained during the sexual assault examination; a buccal swab from Mr. Hernandez; a cutting from the chest area of the minor's nightgown; and a cutting from the minor's underwear. (Tr. 299-300; R. 428-429.) Ms. Bartman generated DNA profiles from each of the pieces of evidence, then performed short tandem repeat ("STR") and Y-chromosome short tandem repeat ("YSTR") analyses on the profiles. (Tr. 302; R. 431.) The STR analyses identified fifteen loci for comparison, and Ms. Bartman compared the number of repeating sections of DNA in the profile between Mr. Hernandez and the minor at the fifteen loci against established statistical standards to reach conclusions on the data. (Tr. 302; R. 431.) Ms. Bartman testified that Mr. Hernandez could be excluded as a contributor to the DNA mixture samples generated from the vaginal and rectal swabs and the cutting from the minor's underwear. (Tr. 322-23, 327; R. 451-451, 456.) She testified that no conclusion could be made regarding the inclusion or exclusion of Mr. Hernandez as a contributor to the DNA mixture generated from the cutting of the minor's nightgown. (Tr. 311; R. 440.)

Mr. Hernandez was found not guilty of criminal sexual conduct with a minor in the first degree and guilty of criminal sexual conduct with a minor in the second degree. (Tr. 393; R. 522.) A sentence of sixteen years of incarceration was imposed. (Tr. 399; R. 528.) Mr. Hernandez timely filed and served his Notice of Appeal on November 7, 2014.

Argument

I. The trial court erred in admitting expert testimony that no conclusion could be reached regarding whether Mr. Hernandez could be included or excluded as a contributor to the DNA analysis because the evidence was irrelevant and invited the jury to speculate about its meaning.

The trial court erred in admitting the expert testimony of Jennifer Bartman, the State's expert witness in the field of DNA analysis, that no conclusion could be reached regarding the inclusion or exclusion of Mr. Hernandez as a contributor to the mixture of DNA found on the cutting from the front of the minor's nightgown. Her testimony had no probative value whatsoever and could not have assisted the jury determine any fact in issue, so it should have been excluded as irrelevant pursuant to Rules 402 and 702 of the South Carolina Rules of Evidence. To the extent that the statistically insignificant DNA evidence could have had any probative value, that value was substantially outweighed by the risk of prejudice in this case because Ms. Bartman failed to explain the meaning or provide the statistical relevance of a non-exclusion result to the jury. As a result, the admission of her testimony invited the jury to serve as their own amateur experts using their preconceived, and likely incorrect, ideas of the meaning of DNA evidence that "could not exclude" Mr. Hernandez. The admission of Ms. Bartman's testimony was prejudicial, and a new trial is required to correct the error.

A. The DNA evidence was irrelevant and should not have been admitted under Rules 402 and 702 of the South Carolina Rules of Evidence.

Under the South Carolina Rules of Evidence, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. The evidence to which the expert will testify must be relevant, reliable, and helpful to the jury. *State*

v. Tennant, 383 S.C. 245, 255, 678 S.E.2d 812, 817 (Ct. App. 2009). This analysis by the trial court is part of its gatekeeping function "in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." *State v. Cain*, 413 S.C. 508, 520, 776 S.E.2d 374, 380 (Ct. App. 2015), *reh'g denied* (Sept. 2, 2015) (quotation omitted). "Generally, the admission of expert testimony is a matter within the sound discretion of the circuit court." *Id.*, 413 S.C. at 520, 776 S.E.2d at 380 (quotation omitted). This Court will not reverse a trial court's decision to admit improper expert testimony unless the decision constituted a prejudicial abuse of discretion. *Id.* "An abuse of discretion occurs when the circuit court's ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Id.* (quotation omitted).

Generally, South Carolina law recognizes that DNA evidence offered by an expert is reliable, although the admissibility of the DNA evidence may still be challenged on relevance or prejudice grounds. *State v. Ford*, 301 S.C. 485, 490, 392 S.E.2d 781, 784 (1990). "Relevant evidence is any 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." Rule 401, SCRE. Additionally, 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." Rule 403, SCRE.

The State offered the expert testimony of Ms. Bartman, a SLED forensic scientist, in the field of DNA analysis. (Tr. 297-98; R. 426-427.) In performing her DNA analysis, Ms. Bartman analyzed four pieces of evidence: a buccal swab from Mr. Hernandez; the minor's buccal, vaginal, and rectal swabs; a cutting from the minor's underwear; and a cutting from the chest

area of the minor's nightgown. (Tr. 300-01; R. 429-430.) Ms. Bartman performed STR and Y-STR analyses[1] on the DNA mixtures, and the results from all of the samples conclusively excluded Mr. Hernandez except for the nightgown chest cutting. (Tr. 322-23, 327; R. 451-452, 456.)

Ms. Bartman testified that the DNA profile developed from the nightgown chest cutting was a mixture of at least two individuals. (Tr. 310-11; R. 439-440.) Ms. Bartman testified that the minor could conclusively be included and not excluded as a contributor to the mixture. (Tr. 310; R. 439.) In the context of the minor's contribution to the DNA profile, Ms. Bartman testified that "[t]he probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately 1 in 1,600." (Tr. 311; R. 440.) However, Ms. Bartman testified that, for both the DNA profile and the partial YSTR profile developed from the nightgown chest cutting, Mr. Hernandez could neither be included nor excluded as a contributor to the mixture. (Tr. 311; R. 440.) She did not explain the statistical significance of that result.

The trial court erred in allowing Ms. Bartman to testify about the non-exclusion result on the nightgown chest cutting sample because it had no probative value whatsoever. The DNA results were not inconclusive because of a tainted sample or insufficient sample size; to the contrary, Ms. Bartman's DNA analysis was complete and reached a result—that no conclusions or inferences could be made. Thus, unlike a match, where the contributor can be included and not excluded, the non-exclusion result did not provide any information about Mr. Hernandez's contribution, and the DNA analysis inherently had no value. "Truly inconclusive results, in failing to either include or exclude the defendant, are wholly neutral," and they "are not relevant

[1] Numerous secondary sources, and some cases, discuss the methodologies and evidentiary significance of STR and Y-STR testing. *See, e.g.*, Hon. Ming W. Chin, et al. Forensic DNA Evidence: Science and the Law §§ 2:3, 7:1 (2015); *Harvey v. Horan*, 285 F.3d 298, 305 (4th Cir. 2002).

[] because they do not have a tendency to prove any particular fact that would be material to an issue in the case." *State v. Johnson*, 862 N.W.2d 757, 775-76 (Neb. 2015). Put simply, Ms. Bartman's testimony is evidence of nothing, and it was totally irrelevant.

The lack of relevance of the DNA analysis is compounded by the lack of evidence in the record about *why* Ms. Bartman could not reach a conclusion. Ms. Bartman described how the presence of the same number in the box for the individual and the evidence indicated a match for that particular locus. (Tr. 313; R. 442.) When prompted, however, Ms. Bartman never explained the *meaning* of the different potential results—inclusive, exclusive, non-exclusive, or incomplete. Instead, she only repeated her explanation of the methodology:

> Q. I guess the question is, it might just be semantics. Why can't you include him then. You can't exclude but you can't include him?
> A. Right. Like I mentioned, we look at the profile as a whole. We don't look at each location individually. Just because, several people can have a 14 repeat and a 15 repeat. That is not necessarily indicative of a person. And we look at these 15 different locations because these are the locations that have been shown to be the most unique between individuals. So, when we look at all of those different locations combined it gives us the best look at whether a person can be there or can be excluded.

(Tr. 314; R. 443.) When again prompted by the State to explain the meaning of the results rather than the methodology, Ms. Bartman only offered circular responses:

> Q. And then you say that about Hernandez as well, he cannot be excluded?
> A. No conclusive statement can be made regarding the inclusion or exclusion.
> Q. What does that mean?
> A. Like I said earlier, 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.

(Tr. 316; R. 445.)

Q. 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 threshold of confidence, I guess.

A. 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 to conclusively say that he cannot be excluded from that profile.

(Tr. 317; R. 446.) The chart of the results of the testing, but not the report finding that no conclusion could be made from the testing, was shown to the jury. (Tr. 309-10, Ex. 18; R. 438-439, 534.)

While the jury heard that it would have been a striking coincidence—1 in 1,600—for someone other than the minor to have caused the minor's DNA to appear in the profile, the jury was given no context about the meaning of the non-exclusion result for Mr. Hernandez. 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. For example, Mr. Hernandez may have been non-excludable because the results only indicated a broad class of potential contributors. Alternatively, the results may have suggested the contributor possessed some genomic characteristic that would only appear in the DNA of a few people worldwide—but not uniquely identifying Mr. Hernandez. If, *arguendo*, the results were below the State's required confidence interval, the jury had no way to know if Mr. Hernandez was nearly excludable (say, perhaps, only a 1-in-100 chance that the contribution came from him), nearly includable (only a 1-in-100 chance the contribution was *not* from him), or somewhere in between. However missing from the record is the State's proof of any such explanation. Ms. Bartman's opinion thus only provided half of the necessary information to the jury; she did not provide any analysis to explain the *meaning* of that conclusion or even inform the jury that no inferences could be

made from it. Without an explanation, the information that he could not be included or excluded as a contributor simply has no statistical application and no probative value.

In *Commonwealth of Massachusetts v. Mattei*, the Supreme Judicial Court of Massachusetts held that expert testimony regarding non-exclusion results should not be admitted without an accompanying statistical explanation of its meaning. 920 N.E.2d 845, 849 (Mass. 2010). The court noted that the same reasoning why courts require statistical relevance for "match" DNA test results applies equally to non-exclusion results; otherwise, the jury would have no way to evaluate the meaning of the result to assign any personal significance to it. *Id.*, 920 N.E.2d at 856. Other courts have agreed that non-exclusion results are not relevant unless accompanied by an explanation, whether statistical or otherwise, regarding the meaning of the non-exclusion. *See, e.g.*, *Johnson*, 862 N.W.2d at 775; *Duncan v. Com.*, 322 S.W.3d 81, 93 (Ky. 2010); *Deloney v. State*, 938 N.E.2d 724, 730 (Ind. Ct. App. 2010); *State v. Tester*, 968 A.2d 895, 906 (Vt. 2009); *People v. Coy*, 620 N.W.2d 888, 897 (Mich. App. 2000); *State v. Williams*, 574 N.W.2d 293, 298 (Iowa 1998). Without such an explanation, statistical or otherwise, the results are meaningless and of no probative value. Their admission in this case was error.

B. The error in admitting the irrelevant DNA evidence was prejudicial because it invited the jury to engage in amateur speculation about its meaning.

The error in admitting the non-exclusion DNA testimony was not harmless because it invited the jury to become amateur experts and speculate about the meaning of the data for themselves. To the extent that non-exclusion results can have any probative value without an explanation of their meaning, that value was substantially outweighed in this case by the prejudice to Mr. Hernandez of the jury being misled. As a result, this Court should remand the case for a new trial.

"To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012) (quotation omitted). "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. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quotation omitted). Error is only considered harmless if it could not reasonably have affected the outcome of the trial. *State v. Williams*, 380 S.C. 336, 344, 669 S.E.2d 640, 644 (Ct. App. 2008) (citing *State v. Bryant*, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006)). In such cases, the defendant's guilt must be "conclusively proven by competent evidence such that no other rational conclusion can be reached." *State v. Kirton*, 381 S.C. 7, 25, 671 S.E.2d 107, 115-16 (Ct. App. 2008) (quotation omitted). "The determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case." *Id.*, 381 S.C. at 25, 671 S.E.2d at 115.

Ms. Bartman's testimony that Mr. Hernandez could not be included nor excluded as a contributor to the DNA mixture prejudiced Mr. Hernandez because the potential existed for the jury to impermissibly infer that it had some significance. Stating that Mr. Hernandez could not be excluded suggests a link that could be more firmly established if more sampling was possible; as the Supreme Court of Nebraska noted, a jury could reasonably conclude that DNA results showing that the defendant could neither be included nor excluded makes that defendant a possible source of the DNA. *State v. Johnson*, 862 N.W.2d 757, 773 (Neb. 2015). However, that is a factually incorrect inference from a non-exclusion result. The only correct determination from a non-exclusion result is that it is "evidence of *nothing*." *Clark v. State*, 96 A.3d 901, 908 (Md. 2014) (emphasis added). A non-exclusion result implies no greater link

between Mr. Hernandez and the nightgown than *anyone* else. *See Com. v. Nesbitt*, 892 N.E.2d 299, 313 (Mass. 2008) (finding that testimony regarding inconclusive DNA evidence was prejudicial because it had no causal relevance but affirming because defendant did not object to the evidence). It has no statistical meaning or explanatory relevance *whatsoever*. *Johnson*, 862 N.W.2d at 773-74.

Error in admitting irrelevant evidence is particularly harmful when the evidence is DNA analysis. While DNA methodologies continue to increase in reliability, juries continue to both expect DNA to be presented and rationally trust its results—despite usually having no personal understanding of its meaning. As the Colorado Court of Appeals noted:

> DNA is different from other identifying evidence. If a witness testified that she could not exclude the defendant as a suspect because the defendant, like the suspect, had brown hair, a juror would know to give almost no weight to that testimony. Jurors are presumed to have some knowledge of the frequency of this characteristic within the general population. But because a juror is unable to observe a person's DNA, "the juror has no idea of the frequency of a particular DNA profile." *Mattei* at 858. And, "[c]ertainly, a judge's or juror's untutored impression of how unusual a DNA profile is could be very wrong." [*State v. Tester*, 968 A.2d 895, 907 (Vt. 2009)] (quoting National Research Council, *The Evaluation of Forensic DNA Evidence* 193 (1996)).

People v. Marks, ___ P.3d ___, 2015 WL 7769092, at *7 (Colo. App. Dec. 3, 2015). "[J]urors place great emphasis on DNA evidence—so much so that the evidence has long enjoyed a status of 'mythic infallibility' for juries." *Id.* at *8 (quoting *Virgin Islands v. Byers*, 941 F.Supp. 513, 526 (D.V.I. 1996)). Unless the expert testifies regarding the significance of the non-exclusion results, then the jury will be invited to become amateur experts and guess what that significance is. *See Com. v. Mattei*, 920 N.E.2d 845, 856 (Mass. 2010) ("Jurors are routinely presented with exceedingly infinitesimal random match probabilities. . . . If the jury are not provided with similar statistical evidence where the DNA test result is a "nonexclusion," there is a real risk that

jurors will be misled into thinking that these DNA test results are similarly significant and that the nonexclusion evidence is similarly conclusive as to the "matched" contributor's identity, when in fact the actual meaning of such results can vary substantially."). Doing so is not weighing the evidence—it is impermissibly speculating.

Because Ms. Bartman did not explain why Mr. Hernandez could not be excluded but not included or providing the statistical context of such a result, the trial court improperly "invite[d] the jury to speculate about the probability of a match" by allowing her testimony. *Marks*, ___ P.3d at ___, 2015 WL 7769092, at *7. As a result, there is a "significant possibility" that the "jury might have attributed the potential DNA match preemptive or undue weight." *People v. Coy*, 243 620 N.W.2d 888, 899 (Mich. App. 2000). The admission of the non-exclusion evidence improperly suggested that it was stronger than it actually was.

The State further exacerbated the harm to Mr. Hernandez and the jury's confusion about the permissible inferences to be taken from the non-exclusion DNA evidence in its closing argument:

> DNA, it can be included or excluded. I guess the jargon or the terms SLED uses sometimes frustrate me. He can't be included and he can't be excluded. What are we to take away, I don't really fully know but when I look at this chart and I look at Mr. Hernandez and I look at that nightgown I see a whole bunch of numbers that match up. And I just don't understand why a male's DNA is on her nightgown and I just don't understand that this acid phosphate is present. And they are going to tell you, well, what about the little boy. Acid phosphate, there is male DNA in there but who is it from. And what are we do with all of these numbers that match up.

(Tr. 368-69; R. 497-498.) Merely matching some numbers—or even a "whole bunch" of numbers, as the State argued—is meaningless when any two humans have nearly entirely identical genomic compositions. The State thus specifically encouraged the jury to continue

speculating about the ultimate conclusion from the DNA analysis even after its own expert declined to do so. *See Com. v. Mattei*, 920 N.E.2d 845, 858 (Mass. 2010) (finding prejudicial error where prosecutor relied in closing on non-exclusion DNA evidence without statistical explanation and suggested jury rely on DNA evidence); *Duncan v. Com.*, 322 S.W.3d 81, 93 (Ky. 2010) (stating that, if the prosecutor relies on a non-exclusion result with no other evidence of its significance, it may not "invite the jury to speculate that the match is actually more significant than the expert testified"). The admission of the irrelevant DNA evidence only created the potential for the jury to act as amateur experts and speculate about why it was inconclusive, fabricating the missing physical evidentiary link to Mr. Hernandez.

Further, the error could not have been harmless because the competent evidence in the record, without the jury's speculation about the meaning of the DNA evidence, does not conclusively prove guilt such that no other conclusion could have rationally been reached. The non-exclusion of Mr. Hernandez from the nightgown DNA sample was the only piece of direct, tangible evidence suggesting to the jury a link between Mr. Hernandez to the minor on June 29, 2013, the only night that any witness other than the minor testified that an assault occurred. All of the other DNA samples tested from June 29, 2013 conclusively excluded Mr. Hernandez and no spermatozoa from Mr. Hernandez were identified on any sample. (Tr. 321-23, 327; R. 450-452, 456.) Ms. Bartman's testimony regarding her DNA analysis should have been excluded as irrelevant, and the failure to exclude the evidence was not harmless error because it had the potential to mislead the jury. A new trial is warranted.

II. The trial court erred in admitting the investigator's testimony regarding what the interpreter said the defendant told him in Spanish because the testimony was hearsay not subject to any exception.

The trial court also erred in admitting the hearsay testimony by Investigator Goodman about his interview of Mr. Hernandez on July 1, 2013. Inv. Goodman testified regarding the alleged admissions made by Mr. Hernandez to Cpl. Alvarado in Spanish—as interpreted to him by Cpl. Alvarado in English—even though he was unable to understand Spanish or any of Mr. Hernandez's statements. His testimony about what Cpt. Alvarado told him that Mr. Hernandez said was hearsay with no exception available to make the communications admissible, and its admission was error.

The South Carolina Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Hearsay testimony is inadmissible unless excepted by the South Carolina Rules of Evidence, by Supreme Court Rule, or by statute. Rule 802, SCRE. However, a witness may testify regarding an out-of-court statement made to him by the defendant as a party admission not subject to the hearsay rule. Rule 801(d)(2), SCRE.

The State asked Inv. Goodman to testify regarding what Mr. Hernandez said in the interrogation, as told to Inv. Goodman by Cpl. Alvarado:

> Q. All right. So what happens when he gets to your office?
> A. He comes in. I read him his rights and we fill out a form. He's read his rights from our English version and at the same time it's being translated on a Spanish form that he's signing off on the entire time. He waived those rights. I picked up from his conversation 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 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 her or her laying, him laying down and she's 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.

Q. Okay. Okay. So he is admitting to touching her private parts but not to penetration?

A. That's right.

Q. And so what -- you said something about 2012. What did he say about the year 2012?

A. He said that's when the inappropriate touching started around that time.

(Tr. 174-75; R. 303-304.) However, Inv. Goodman could not testify directly about what Mr. Hernandez said because he did not speak Spanish. (Tr. 169; R. 298.) During the interview, he was wholly reliant on what Cpl. Alvarado had told him that Mr. Hernandez had said, and in court, he could only repeat what Cpt. Alvarado told him that Mr. Hernandez had said. Thus, his testimony did not include any admissions made by Mr. Hernandez—only out-of-court statements made by Cpl. Alvarado about what Mr. Hernandez admitted, being offered for the truth of the matter asserted therein. Interpretation is not recognized by Rule 802, SCRE, or the South Carolina Supreme Court as admissible hearsay testimony, so Inv. Goodman's testimony was inadmissible. *See, e.g.*, *State v. Morales*, 269 P.3d 263, 271 (Wash. 2012) (en banc) (finding that testimony by officer that a Spanish-speaking interpreter had read warning to defendant was inadmissible hearsay because officer could not testify based on his own understanding and testimony was offered for truth of the matter asserted); *People v. Wing Choi Lo*, 570 N.Y.S.2d 776, 777 (N.Y. Sup. Ct. 1991) ("The testimony of the detective as to what the interpreter stated the defendant told him, in a language the detective did not understand, was hearsay." (citation omitted)); *People v. Gomez*, 491 N.E.2d 68, 73 (Ill. App. 1986) ("[W]e note that a person

conversing with a third person through an interpreter is not qualified to testify to the other person's statements because he knows them only through the hearsay of the interpreter who, ordinarily is the only person who may testify to the third person's words.").

Some courts have recently recognized that interpreters serve only as a "language conduit" between the defendant and the interviewer such that an agency relationship, and testimonial identity, arises between the defendant and the interpreter pursuant to Rule 801(d)(2)(C) or (D). *See, e.g.*, *United States v. Ushakow*, 474 F.2d 1244, 1245 (9th Cir. 1973). However, the language conduit theory fails to recognize that interpretation involves more than the one-to-one translation of words; it involves the translation of concepts. Even if the words originated with Mr. Hernandez, Cpl. Alvarado provided the understanding of the "contextual, pragmatic meaning" of the words and attempted to reproduce the concepts in English to Inv. Goodman. *See United States v. Charles*, 722 F.3d 1319, 1324 (11th Cir. 2013) (holding that interpreter's statements in interrogation were testimonial for purposes of Confrontation Clause). Moreover, whereas Mr. Hernandez speaks a Guatemalan dialect of Spanish, Cpl. Alvarado speaks Bolivian Spanish, and he admitted that Spanish words can have different meanings in different dialects, including between Guatemalan and Bolivian. (Tr. 235; R. 364.) As a result, Cpl. Alvarado's interpretation did not have the same guarantees of reliability underlying the hearsay exceptions in Rule 803, SCRE.

Even if the Court were to find that Cpl. Alvarado merely served as a language conduit, Inv. Goodman's testimony should still not be admissible. The cases finding that the interpreter is merely a language conduit apply a four-factor test to determine whether the interviewer's testimony should be admissible:

(1) which party supplied the interpreter,
(2) whether the interpreter had any motive to mislead or distort,

(3) the interpreter's qualifications and language skill, and
(4) whether actions taken subsequent to the conversation were consistent with the statements as translated.

United States v. Romo-Chavez, 681 F.3d 955, 959 (9th Cir. 2012). Even if the Court were to apply such a test, each of these factors would weigh against the reliability of Cpl. Alvarado's translation such that it cannot be presumed that he was merely a language conduit.

The State provided Cpl. Alvarado, a police officer, as the interpreter. Although the fact that he is a government employee and police officer "does not, by itself, necessarily prevent his translations from being admissible" or allow a presumption that he would intentionally misinterpret the statements, it makes the first two factors weigh against the State. *Id.* Although Cpl. Alvarado testified that he was fluent in Spanish, he had no certifications in Spanish translations and had not spoken it on a daily basis in almost a decade, so the third factor also weighs against the reliability of the testimony. (Tr. 235; R. 364.) Finally, although Mr. Hernandez subsequently drafted a written statement, Cpl. Alvarado noted that the written statement was inconsistent, as it did not include the words private parts or inappropriate touching. (Tr. 249; R. 378.) Cpl. Alvarado was acting as an interrogator, not a mere neutral translator, and he was not Mr. Hernandez's agent in the interview such that Inv. Goodman's testimony restating Cpl. Alvarado's interpretation was not hearsay.

The erroneous admission of Inv. Goodman's testimony regarding the July 1, 2013 interview was not harmless because it was the first time the jury had heard the statements made by Mr. Hernandez in the interrogation. Although Cpl. Alvarado subsequently testified about the same conversation, his testimony provided significantly less detail:

> During the interview, Mr. Hernandez made the statements 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.

(Tr. 232; R. 361.) Because Inv. Goodman had already testified in detail about the interrogation at that time, the damaging testimony had already been heard. The admission of Inv. Goodman's testimony was erroneous and requires reversal.

III. The trial court erred in admitting expert testimony corroborating the minor's details of the alleged assault in a forensic interview because it improperly bolstered the minor's testimony.

Finally, the trial court erred in allowing the expert testimony of Donna Debrew, the forensic nurse that examined the minor on the evening of June 29, 2013, which included the details of the minor's version of events as told to her during the forensic nursing interview. (Tr. 260; R. 389.) Ms. Debrew's testimony improperly bolstered the minor's subsequent testimony and should not have been permitted.

Ms. Debrew testified that she became involved when law enforcement requested that she perform a forensic examination on the minor after the minor was transported to Palmetto Health. (Tr. 265; R. 394.) Ms. Debrew testified about the information that law enforcement told her before the examination:

> 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.

(Tr. 265; R. 394.) Ms. Debrew then testified about what the minor told her during the interview portion of the sexual assault examination of the minor:

Q. What was your understanding of the type of assault?

A. She explained to me that she was assaulted by the landlord and I think she called him the pastor. I'm trying to find the right page.
Q. I guess, when I'm asking the nature of the assault, was it touching, was it digital penetration, was it?
A. He penetrated her -- with the questions that we ask, we get very specific what is touched 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.
Q. Okay.
A. And when I questioned her, did he put his penis in your bottom where you poop and she said yes.

(Tr. 268-69; R. 397-398.) On cross-examination, after the State had opened the door to Ms. Debrew corroborating the minor's testimony, Ms. Debrew testified further regarding her report of the minor's statements from the interview:

> 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 is 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."

(Tr. 274-75; R. 403-404.)

Ms. Debrew's testimony constituted improper bolstering of the minor's testimony. Under South Carolina law, evidence of prior consistent statements is not admissible unless the witness has been impeached. *State v. Barrett*, 299 S.C. 485, 486, 386 S.E.2d 242, 243 (1989). The purpose of this rule is to maintain "the assessment of witness credibility . . . within the exclusive province of the jury." *State v. Taylor*, 404 S.C. 506, 514-15, 745 S.E.2d 124, 128 (Ct. App. 2013) (quotation omitted). In criminal sexual conduct cases, however, witnesses other than

the alleged victim may testify regarding the alleged victim's complaints as corroborative evidence of the assault. *Barrett*, 299 S.C. at 486-87, 386 S.E.2d at 243. The corroborative witness's testimony must be limited to the time and place of the assault and "may not include particulars or details." *Id.*; *see also* Rule 801(d), SCRE. "Testimony from other witnesses regarding the victim's identification of the perpetrator does not fall within this hearsay exception." *Dawkins v. State*, 346 S.C. 151, 156, 551 S.E.2d 260, 262-63 (2001).

The details of the minor's statements in the out-of-court interview—the age of the alleged assailant, his identity, the type of touching or penetration, and the alleged events constituting the assault—are exactly the types of "particulars or details" that improperly vouch for the credibility of the minor's testimony. Even though she did not expressly state whether she believed the minor or not, Ms. Debrew still improperly bolstered the minor's testimony because she necessarily relied on and incorporated the minor's out-of-court statements for their truth. *See State v. McKerley*, 397 S.C. 461, 465, 725 S.E.2d 139, 142 (Ct. App. 2012) (finding that testimony of forensic interviewer improperly bolstered testimony of children despite interviewer never testifying that he believed children).

Under South Carolina law, Ms. Debrew's improper bolstering cannot be considered to be harmless. "Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless." *State v. Jennings*, 394 S.C. 473, 478, 716 S.E.2d 91, 93-94 (2011) (quoting *State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978)). "Improper corroboration testimony that is *merely cumulative to the victim's testimony*, however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." *Jennings*, 394 S.C. at 478-79, 716 S.E.2d at 94 (emphasis in original) (quoting *Jolly v. State*, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994)). Ms. Debrew's corroboration of the

minor's statements was particularly powerful—and particularly prejudicial—because she was employed as a sexual assault nurse examiner and qualified as an expert in the field of forensic nursing for assessment of sexual assaults. (Tr. 260-64; R. 389-393.) In testifying, Ms. Debrew lent her own credibility to the version of events later offered by the minor, whose credibility was not in question as she had not yet taken the stand. *See State v. Barrett*, 299 S.C. 485, 487, 386 S.E.2d 242, 243 (1989) (noting that bolstering error was exacerbated because the victim's credibility was not subject to impeachment because she had not yet taken the stand). The trial court erred in allowing Ms. Debrew to improperly bolster the victim's testimony, and a new trial must be granted to correct this error.

Conclusion

Based on the above, the Court should reverse Mr. Hernandez's conviction and remand for a new trial.

Respectfully submitted,

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June 7, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of General Sessions
Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2013-GS-36-00500
Appellate Case No. 2014-002376

The State, ... Respondent,

v.

Mario Valerio-Gonzalez Hernandez, ... Appellant.

CERTIFICATE OF COUNSEL

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

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
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Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2013-GS-36-00500
Appellate Case No. 2014-002376

The State, ... Respondent,

v.

Mario Valerio-Gonzalez Hernandez, ... Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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June 7, 2016

Hand Delivered

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The South Carolina Court of Appeals
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RE: The State, Respondent, v. Mario Hernandez, Appellant
Appellate Case No. 2014-002376
Our File No. 38769.01529

Dear Ms. Kitchings:

Enclosed please find an original and sixteen copies of Appellant's Brief, Appellant's Reply Brief, and Record on Appeal in the above-referenced matter. Please file the originals and return file-stamped copies to me via our courier.

By copy of this letter to opposing counsel, we are hereby serving them with a copy of Appellant's Brief, and Appellant's Reply Brief in this matter.

Very truly yours,

Graham R. Billings

Enclosures
cc: V. Henry Gunter, Jr., Esquire – with enclosures
David M. Stumbo, Esquire – with enclosures
Robert M. Dudek, Esquire