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.

FINAL REPLY BRIEF OF APPELLANT

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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.

A. Mr. Hernandez's argument that the DNA results are irrelevant is preserved.

The State first argues that Mr. Hernandez failed to preserve his argument that Ms. Bartman's testimony, that no definitive statement could be made regarding the inclusion or exclusion of Mr. Hernandez as a contributor to the DNA sampling from the nightgown chest cutting, lacks *statistical* relevance. The State does not claim that Mr. Hernandez's argument that they lack relevance generally is unpreserved. The State's preservation argument is hyper-specific and disregards the statistical nature of the DNA test that was performed.

Issue preservation requires that an issue be raised to and ruled upon by the trial judge. *Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014). The issue must be "sufficiently clear" so that it can be "reasonably understood" and ruled upon by the judge. *Id.* "Moreover, a party cannot argue one theory at trial and a different theory on appeal." *State v. Thomason*, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003).

Mr. Hernandez specifically raised the issue of lack of relevance of the DNA evidence, noting that the term of art "neither included nor excluded," out of context, invited the jury to speculate on Mr. Hernandez not being excludable:

> MR. MCCULLEN: . . . And so that, the bottom line I think is that the SLED person can say we tested all these things and the best we can say is we can't include him or exclude him. Well, then the problem from the defense standpoint with even that is what you're saying to the jury is, what the witness is saying to the jury is, he can't be excluded. And so that's why the proposed language is an inconclusive result. I have no problem with her saying here's what we tested, here's what was never submitted for testing, but it was an inconclusive result. Some of these samples say no semen, no semen, no semen. And that, in effect, is part of this evidence too.

> That Ms. Bartman will state whatever else is true, no semen was detected on anything, even the nightgown. So whatever three people's DNA is on that nightgown, it didn't come from semen. 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.

(Tr. 257-58; R. 386-387.) Moreover, Mr. Hernandez offered to the trial court two Maryland cases in which the defendant challenged "neither included nor excluded" DNA results on the grounds that they were statistically irrelevant. (Tr. 253; R. 382.)

The trial court understood the relevance issue and allowed the testimony:

> THE COURT: 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.

(Tr. 258-69; R. 387-398.)

The State asks this Court to use procedural error preservation principles "to create a trap" rather than adjudicating the merits of Mr. Hernandez's specific relevance argument.[1] *In re Nov. 4, 2008 Bluffton Town Council Election*, 385 S.C. 632, 641, 686 S.E.2d 683, 688 (2009). Certainly, the word statistical does not appear in Mr. Hernandez's objection at trial, but the objection is a challenge to the lack of statistical relevance of the DNA testing results. A DNA test is probabilistic. The concepts of relevance and statistical relevance are the same; even when the results positively show that an individual "cannot be excluded" as a contributor, in actuality, the result *only* shows the statistical likelihood of an individual having *not* contributed to the mixture. *See United States v. Hicks*, 103 F.3d 837, 845 (9th Cir. 1996) *overruled on other grounds by United States v. W.R. Grace*, 526 F.3d 499 (9th Cir. 2008) (explaining that PCR DNA testing is "not used as a method to establish a statistical 'match' between a sample and an individual, but, rather, is used as a technique to *exclude* certain individuals as possible contributors to a particular sample."). Thus, Ms. Bartman's testimony regarding the statistical significance of the results—that the probability of selecting a random unrelated individual as a contributor to the tested mixture was 1 in 1,600—was meaningless because she could not determine whether Mr. Hernandez was even such a contributor in the first instance. (Tr. 310-11; R. 439-440.) No definitive statement could be made regarding Mr. Hernandez because neither result, inclusion nor exclusion, reached SLED's required confidence threshold. (Tr. 314; R.

[1] Although the State did not make such a preservation challenge, the quotations excerpted in the State's Response Brief make it appear that Mr. Hernandez only preserved a challenge to the chart of the DNA results. (State's Response Brief at p. 10) The full colloquy shows that Mr. Hernandez preserved objections to both the testimony regarding the results and the chart. (Tr. 252-259; R. 381-388.) After the trial court ruled and allowed Ms. Bartman's testimony, Mr. Hernandez focused on the second objection relating to the chart as his "only objection remaining." (Tr. 259; R. 388.)

443.) Mr. Hernandez's objection to the relevance of the results of the DNA test on the chest cutting necessarily encompasses a challenge to the statistical relevance of the results.

Mr. Hernandez noted the danger in allowing Ms. Bartman to testify using terms of art signaling an irrelevant DNA test without providing context for those terms of art, and offered to stipulate to Ms. Bartman testifying that she reached an "inconclusive result." (Tr. 257; R. 386.) Whether the Court considers this relevance objection to be statistical or not, the same issue resulted: the jury was allowed to impermissibly speculate that Mr. Hernandez "could not be excluded" when they heard that he could neither be included nor excluded. This prejudice must be corrected.

B. The inconclusive DNA evidence is irrelevant.

The State argues that the DNA evidence was relevant for three reasons: Mr. Hernandez "could not be excluded as a contributor;" the nightgown tested positive for acid phosphate; and male DNA evidence was found on the minor's nightgown. (State's Response Brief at p. 15.) None of the State's arguments for relevance are persuasive.

First, in its Response Brief, the State asks the Court to accept the same misinterpretation of the DNA results as it invited the jury to speculate. It is categorically untrue that Mr. Hernandez "could not be excluded as a contributor." (State's Response Brief at 15.) To the contrary, no conclusive statement could be made regarding whether Mr. Hernandez could be included or excluded. (Tr. 316; R. 445.) The difference between these terms of art is crucial and fundamental to Mr. Hernandez's defense. The State's interchangeable use of the terms further highlights its attempts to invite the jury's confusion regarding the meaning of the results. (Tr. 369; R. 498.) No jury can be expected to understand the difference between a relevant "could

not be excluded" result and an irrelevant "neither included nor excluded" result if the State does not demonstrate that understanding or provide any context for the result.

An individual who "could not be excluded" from the mixture is a contributor, unless the DNA result was a false positive. For example, the minor "could not be excluded" as a contributor to the mixture developed from the nightgown sample, and in only 1 out of 1,600 cases would such a result be a false positive. (Tr. 310; R. 439.) Although such a challenge may have some Rule 402 relevance concerns in the appropriate case—for instance, if the false positive rate was one in three—that is not the challenge Mr. Hernandez raises in this case. The result for Mr. Hernandez was not that he "could not be excluded."

Instead, Ms. Bartman testified that no conclusive statement could be made regarding the inclusion or exclusion of Mr. Hernandez. (Tr. 257; R. 386.) This result is inherently meaningless. Importantly, a "neither included nor excluded" result is not meaningless because the sample was insufficient, unclear, or tainted; to the contrary, the sample was accurate and complete, but the analysis resulted in nothing conclusive. *See State v. Johnson*, 862 N.W.2d 757, 773 (Neb. 2015) (explaining the difference between an insufficient sample and sufficient sample without a conclusive result). The *only* permissible interpretation of a "neither included nor excluded" result is that it is "evidence of nothing." *Clark v. State*, 96 A.3d 901, 908 (Md. 2014).

A jury cannot be expected to understand the difference between these terms of art when the trial court admits the irrelevant testimony, the irrelevant testimony is given without context, and the State muddles them by suggesting that "a whole bunch of numbers match up" even though the State knows those numbers have no statistical relevance. (Tr. 369; R. 498.) The trial

court erred by failing to fulfill its gatekeeping function by keeping this irrelevant DNA evidence out.[2]

The State's other two reasons why the DNA results were relevant are equally unpersuasive and do not respond directly to the challenge being made. The State next argues the DNA results are relevant because testing for acid phosphatase was positive, and acid phosphatase is found in semen. (State's Response Brief at p. 15.) The positive result for acid phosphatase is a separate issue than the relevance of the "neither included nor excluded" DNA results. Regardless, the State's argument again asks the Court to make an incorrect inference based on the limited information it presents. Ms. Bartman immediately qualified her testimony that testing for acid phosphatase was positive by noting that acid phosphatase is found in other bodily fluids other than semen, including normal female vaginal fluid. (Tr. 318-20; R. 447-499.) Furthermore, no semen was indicated on the underwear sample. (Tr. 320; R. 449.) No spermatozoa were identified on the minor's vaginal or rectal smears. (Tr. 321; R. 450.) No semen was found in the examination of the minor. (Tr. 285; R. 414.) Ms. Bartman could not identify any evidence containing Mr. Hernandez's DNA. (Tr. 330; R. 459.) The positive result for acid phosphatase is not relevant and more probative than prejudicial because it suggested the presence of Mr. Hernandez's semen when semen was never found and when Mr. Hernandez's DNA could not be identified.

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[2] The trial court allowed the irrelevant testimony to be admitted out of a concern that, if the evidence was excluded, Mr. Hernandez would argue the State failed to do DNA testing. (Tr. 252-53; R. 381-382.) The trial court noted that, if Mr. Hernandez had not continually argued the State's incomplete investigation as a theme of its defense case, it was "probably with [him]" that the DNA evidence should be excluded. (Tr. 252-53; R. 381-382.) Although the trial court's concern was valid, the DNA results would only gain relevance in that context if Mr. Hernandez opened the door by challenging the thoroughness of the State's DNA testing investigation. No such challenge was made. The trial court's rationale for considering it relevant on that basis was thus pre-emptive.

The third reason that the State argues the DNA evidence is relevant is that it showed the presence of male DNA on the minor's nightgown. (State's Response Brief at p. 15.) Again, the fact that male DNA was discovered is a separate issue than the admission of the irrelevant DNA test results. However, the State's rationale is unpersuasive. The minor lived with Mr. Hernandez and her brother, both of whom would leave DNA evidence containing Y-chromosomes across the house.[3] The presence of male DNA in a place where two males lives does not in any way suggest criminal sexual conduct by either of those males. Moreover, no male DNA was found on either the vaginal or rectal swab sampled from the minor or from the underwear sample. (Tr. 326-27; R. 455-456.) The results of the DNA test from the chest cutting is not relevant.

C. The improper admission of the irrelevant DNA results was not harmless error.

Finally, the State argues that any error in the admission of the DNA test results is harmless because of the overwhelming evidence of Mr. Hernandez's guilt. Because there is not overwhelming evidence of guilt, and because the DNA evidence could have affected the jury's verdict by serving as the one piece of physical evidence that impermissibly invited speculation that Mr. Hernandez could not be excluded as a contributor to a sample, the Court should reverse and grant a new trial.

"An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result." *State v. Chavis*, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015) (citation omitted). "Whether an error is harmless depends on the circumstances of the particular case." *Id.* (citation omitted). "No definite rule of law governs this finding; rather, the materiality

[3] The State argues the Y-chromosome evidence is relevant because Mr. Hernandez "was the only ***adult*** male living in the home." (State's Response Brief at p. 15 (emphasis added).) Y-chromosomes are not only present in adult males, and S.M. could have contributed to the sample.

and prejudicial character of the error must be determined from its relationship to the entire case." *Id.*, 412 S.C. at 109-10, 771 S.E.2d at 340 (citation omitted).

The State claims that there is overwhelming evidence of Mr. Hernandez's guilt in the record, citing to three sets of testimony, the testimony of the State's forensic nurse, and the DNA evidence. (State's Response Brief at 16.) None of this evidence supports a finding of overwhelming evidence of guilt and instead only demonstrates the prejudice of the improperly-admitted DNA results.

In order to find Mr. Hernandez guilty of criminal sexual conduct, the jury had to find that Mr. Hernandez engaged in sexual battery with a victim who is between eleven and fourteen years old. S.C. Code Ann. § 16-3-655(B). Sexual battery is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." S.C. Code Ann. § 16-3-651.

The State first claims that there is overwhelming evidence of guilt because the minor "described years of sexual abuse." (*Id.*) However, the jury did not believe the minor's testimony regarding the alleged prior years of abuse because it found Mr. Hernandez not guilty of first degree criminal sexual conduct. (Tr. 393; R. 522.) The State next suggests the minor's mother's testimony that she discovered Mr. Hernandez on top of the minor "with his penis exposed" and Mr. Hernandez's translated statements that he "touched [the minor] inappropriately" were overwhelming evidence of guilt. (State's Response Brief at 16.) However, neither statement proves in any way that Mr. Hernandez engaged in sexual intercourse or intrusion with the minor between the ages of eleven to fourteen. Touching is not intercourse. "Inappropriate touching,"

even if it is presumed to have occurred, cannot support a conviction for criminal sexual conduct. None of this testimony provides overwhelming evidence of Mr. Hernandez's guilt.

The State also argues that overwhelming evidence exists that Mr. Hernandez engaged in sexual intercourse or battery with the minor because the State's forensic nurse testified that her findings in her examination of the minor were consistent with "some sort of trauma" because her hymen was discolored. (Tr. 271-73; R. 400-402.) However, Mr. Hernandez's DNA was not found on the swabs sampled from the minor's vagina, cheek, or rectum, and Ms. Debrew testified that her examination did not show any vaginal secretions or semen. (Tr. 284-85; R. 413-414.) Evidence of discoloration and "some sort of trauma" is not overwhelming evidence of Mr. Hernandez's guilt in engaging in sexual battery.

Finally, the State argues that the positive results for male DNA and acid phosphate on the minor's nightgown chest cutting also provide overwhelming evidence of guilt. Again, male DNA is not indicative of any sexual conduct, and the DNA could have come from Mr. Hernandez or S.M. at any time. Moreover, male DNA was not found in the minor's underwear. (Tr. 327; R. 456.) Similarly, the presence of acid phosphate is indicative of other bodily fluids, including vaginal fluid, and no semen or spermatozoa were found in the underwear cutting or the vaginal or rectal swabs. (Tr. 318-21; R. 447-450.) Moreover, all of the DNA samples tested from June 29, 2013 other than the nightgown chest cutting conclusively excluded Mr. Hernandez. (Tr. 321-23, 327; R. 450-452, 456.) Ms. Bartman was unable to identify a single piece of evidence that had Mr. Hernandez's DNA on it. (Tr. 330; R. 459.)

Thus, there is no cumulative, overwhelming evidence of Mr. Hernandez's guilt. Mr. Hernandez was not found guilty of inappropriately touching the minor or even having his penis exposed around the minor. The lack of physical evidence of sexual intercourse or sexual

battery—the absence of male DNA in the physical examination and the other DNA samples, the absence of semen or spermatozoa, and the determination that Mr. Hernandez could be excluded from all of the *other* DNA samples—weighed against a finding of guilt. The circumstantial nature of all of the other evidence before the jury only highlights the importance that the jury placed on the result of the DNA test from the chest cutting as the only physical evidence offered to prove beyond a reasonable doubt that Mr. Hernandez engaged in sexual intercourse or battery with the minor. However, as stated above, the inability to make a conclusive statement regarding the exclusion of Mr. Hernandez does not mean he could not be excluded. The evidence invited the jury to speculate exactly that and create the missing physical link in their minds.

Courts have noted that DNA evidence has "mythic infallibility" to a jury. *See People v. Marks*, ___ P.3d ___, 2015 WL 7769092, at *8 (Colo. App. Dec. 3, 2015) (quoting *Virgin Islands v. Byers*, 941 F.Supp. 513, 526 (D.V.I. 1996)). The failure to exclude this irrelevant evidence directly invited the jury to become amateur scientists—and to create the relevance of the DNA results in their own minds when the State's witness declined to do so. Thus, the admission of inherently irrelevant test results, even with cross-examination about its irrelevance, is prejudicial and not harmless because it could have reasonably affected the result of the trial. The Court should reverse the trial court's erroneous decision to allow admission of the irrelevant DNA test results and chart, and remand for a new trial.

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.

A. Mr. Hernandez's argument that Inv. Goodman's testimony should not have been admitted as hearsay is preserved.

Mr. Hernandez's objection to Inv. Goodman's hearsay testimony is preserved. Although the parties never used the term hearsay, the exact name of a legal doctrine is not necessary for an

objection on that basis to be preserved. *State v. Rivers*, 411 S.C. 551, 554, 769 S.E.2d 263, 265 (Ct. App. 2015). The trial court thoroughly and separately examined each of the three translation issues in the case, and it understood the objection to Inv. Goodman's testimony as encompassing hearsay issues:

> THE COURT: And then that, you know, where we're losing the translation and then the potential embellishment of reducing it to writing and refreshing my memory of what was translated back to me, that's where I'm kind of losing your argument is questions asked by Alvarado in Spanish, repeated in Spanish back to Alvarado's response. Alvarado translates in his version[] of Spanish back to Goodman and Goodman is taking notes. That's getting a step away.

(Tr. 130; R. 259.) The trial court demonstrated his understanding of the hearsay objection by explaining it to Inv. Goodman:

> THE COURT: And he was there with you working with the suspect and he didn't translate it back to you, and so that's where the lawyers are exploring as to exactly what you knew as opposed to what Mr. Hernandez was saying to Corporal Alvarado. And you kind of, are out of the loop a little bit because you don't speak Spanish.
>
> MR. GOODMAN: Right.
>
> THE COURT: So that's what we're trying to explore to make certain that you don't violate any of my rules yesterday volunteering something that you shouldn't.
>
> MR. GOODMAN: Right.

(Tr. 146; R. 275.) The trial court ultimately allowed Inv. Goodman to testify fully regarding Cpl. Alvarado's statements, noting completeness concerns. (Tr. 163; R. 292.) However, in so ruling, the trial court responded directly to a trustworthiness concern raised by Mr. Hernandez:

> MR. MCMULLEN: Well, just -- and I just didn'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.

> THE COURT: 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'd 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.

(Tr. 160; R. 289.) Such concerns about reliability for trustworthiness are the basis of the rule against hearsay, *see State v. LaCoste*, 347 S.C. 153, 170, 553 S.E.2d 464, 474 (Ct. App. 2001), and the trial court understood Mr. Hernandez's trustworthiness objection. As a result, Mr. Hernandez's argument that Inv. Goodman's testimony should not have been admitted is preserved.

B. Inv. Goodman's testimony was hearsay and not cumulative.

The State argues that Inv. Goodman's testimony was not hearsay on the grounds that Cpl. Alvarado was serving as a "language conduit" and not a declarant. The "language conduit" theory is not applicable and has not been accepted by this Court. Inv. Goodman's testimony was hearsay not subject to any exception, and its admission was erroneous.

As noted by the District Court for the Southern District of New York, cases finding that an interpreter "is no more than a language conduit" have one or more of the following circumstances, which indicate the trustworthiness of the interpretation:

> (1) the interpreter had no motive to mislead and there was no reason to question the accuracy of the translation,
> (2) the interpreter was the declarant's agent or co-conspirator,
> (3) the defendant was bilingual, was present when the out-of-court statement was made, and failed to object to the translation at the time, and
> (4) the defendant's statement was not offered for its truth.

United States v. Ghailani, 761 F. Supp. 2d 114, 119-20 (S.D.N.Y. 2011). None of these circumstances are present here. Inv. Goodman's statements about what Cpl. Alvarez told him

that Mr. Hernandez admitted are offered for their truth. There are reasons to question Cpl. Alvarado's ability to translate; there is evidence that he had not spoken Spanish on a daily basis in fourteen years and that certain words in Guatemalan Spanish are different than in Bolivian Spanish. (Oct. 27, 2014 Tr. 123; Tr. 235; R. 124, 364.) Cpl. Alvarado also Mirandized Mr. Hernandez as a law enforcement officer. (Tr. 228-29; R. ___); *see also United States v. Sanchez-Godinez*, 444 F.3d 957, 960-61 (8th Cir. 2006) ("Jauregui testified that he not only translated, he also 'Mirandized' Sanchez–Godinez and asked the types of questions he 'normally would ask' in his capacity as an ATF agent. Because Jauregui was not merely acting as a "language conduit," but rather initiated at least some of the questions posed in the interview, his out-of-court statements raise hearsay concerns."). Regardless, even if Cpl. Alvarado merely repeated what Mr. Hernandez said, the language conduit theory has not been accepted by this Court. *See Wright v. Hiester Const. Co.*, 389 S.C. 504, 522, 698 S.E.2d 822, 832 (Ct. App. 2010) (discussing language conduit theory). "[I]t does not follow that the second person's repetition of the first person's statement does not add another layer of hearsay." *State v. Rodriguez-Castillo*, 188 P.3d 268, 273 (Or. 2008).

Mr. Hernandez does not ask the Court to adopt a per se rule holding that law enforcement offers are motivated to mistranslate statements into confessions. Instead, the Court should only uphold its hearsay rules and recognize that Cpl. Alvarado's statements about what Mr. Hernandez confessed in Spanish should only be admissible through Cpl. Alvarado himself. *See Wright*, 389 S.C. at 522, 698 S.E.2d at 831 (recognizing concern about admission of interpreted statements where declarant did not have sufficient command of English and there were no other safeguards to ensure the accuracy of the interpretation).

Inv. Goodman's testimony about what Cpl. Alvarado told him in English is significantly more detailed than Cpl. Alvarado's testimony about what Mr. Hernandez told him in Spanish, so it is not "merely cumulative." *Campbell v. Jordan*, 382 S.C. 445, 453, 675 S.E.2d 801, 805 (Ct. App. 2009). Cpl. Alvarado did not testify that Mr. Hernandez said the minor would sit on his lap or that Mr. Hernandez made any statements about June 29, 2013. Inv. Goodman's translated testimony is also more expansive than the written statement given by Mr. Hernandez, which does not contain an admission to "inappropriate touching." (Tr. 246; R. 375.) Thus, Inv. Goodman's testimony was not cumulative and instead expanded the purported admissions made by Mr. Hernandez.

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, Mr. Hernandez's argument that Ms. Debrew's testimony improperly bolstered the minor's testimony is preserved and it is not invited or harmless error.

Mr. Hernandez's objection to Ms. Debrew's testimony is preserved. Ms. Debrew was only admitted as an expert for the collection of samples, not their analysis. (Tr. 264; R. 393.) The State asked Ms. Debrew whether she had an ultimate opinion "as to the allegations compared to [her] findings," and Mr. Hernandez objected. (Tr. 272; R. 401.) Ms. Debrew's finding of trauma relied on her forensic interview with the minor; her finding of discoloration only implied a conclusion of trauma *because* she believed and incorporated the interview with the minor describing the assault. As a result, her ultimate opinion necessarily incorporated the bolstered testimony of the minor.

The State argues that Ms. Debrew's testimony was admissible pursuant to Rule 803(4), SCRE, because the statements were made for the purpose of medical diagnosis. However,

testimony can improperly bolster regardless of whether it is hearsay. Ms. Debrew's testimony improperly bolstered because she testified to "particulars and details" of what the minor told her, including the relative age of the alleged assailant, his identity and job, the type of touching or penetration, and the alleged events constituting the assault. (Tr. 264-68; R. 393-397); *State v. Barrett*, 299 S.C. 485, 486, 386 S.E.2d 242, 243 (1989). Moreover, Ms. Debrew was not admitted as an expert for purposes of diagnosis, and she admitted that her examination was not performed for the purpose of diagnosis. (Tr. 264; R. 393.)

The error of admitting Ms. Debrew's improper bolstering testimony was not invited by defense counsel. *See State v. Washington*, 315 S.C. 108, 110, 432 S.E.2d 448, 449 (1992) ("Appellant may not now be heard to complain of the admission of evidence elicited by his own counsel."). Ms. Debrew's testimony about what the minor told her, and her ultimate opinion of trauma incorporating the minor's statements about the cause of her injuries was offered on direct examination. Thus, the testimony was not elicited by defense counsel.

The admission of Ms. Debrew's testimony cannot be harmless error. "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)).

Conclusion

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

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

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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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