ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Beaufort County
Hon. Carmen T. Mullen, Circuit Court Judge
Appellate Case Tracking No. 2016-001934

The State, Respondent,

v.

James Simmons, Jr., Petitioner.

Opinion No. 2016-UP-182 (S.C. Ct. App. filed April 20, 2016)

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Procedural History

Petitioner was indicted in Beaufort County for two counts of criminal sexual conduct with a minor in the first degree (2102-GS-07-1536 & -1537). (R. 379-380; 382-383). On June 18, 2013, Petitioner proceeded to trial before the Honorable Carmen T. Mullen and a jury. He was found guilty as charged and was sentenced to two concurrent terms of life imprisonment. (R. 355-356; 381; 384).

Petitioner filed a motion for new trial and a hearing on the motion was convened on October 31, 2013. The motion was denied at the conclusion of the hearing. (R. 369; 371-378).

Petitioner filed a Notice of Appeal, and after briefing, the Court of Appeals heard argument on March 9, 2016. By unpublished opinion dated April 20, 2016, the Court of Appeals affirmed Petitioner's convictions and sentences. Petitioner's Petition for Rehearing was denied on August 18, 2016, and Petitioner filed a Petition for Writ of Certiorari raising two issues.

This Court granted the Petition for Writ of Certiorari as to Petitioner's Issue I on May 30, 2017. Petitioner served and filed a Brief of Petitioner on July 6, 2017.

Factual Background

Petitioner is the father of Victim 1 and Victim 2 who are twin boys. The twins lived in a mobile home on family property on Saint Helena Island beginning when they were eight months old. They were initially cared for by Mamie Ruth Simmons and later by Petitioner's first cousin, Rose Simmons, after Mamie Ruth died. (R. 87; R. 84; R. 153). In 2008, when the Victims were approximately eight years of age, Petitioner moved to the family house located on the family property next door to Rose's mobile home. Later, Petitioner's sister, her husband, and their three children joined Petitioner in that home. (R. 62; 72; 89-90; 92-93; 101; 125; 153-154; 242; 243; 261-262; 273). Petitioner lived in the family home until approximately the summer of 2009 after

the Victims completed the third grade. (R. 94-95; 97). During the time that Petitioner lived in the family home, and either Petitioner's girlfriend, Mahogany, or the mother of the twins, Cynthia Goethe, lived with him for periods of time. (R. 97-98; 102; 249; 250; 263; 278-279). The Victims frequently visited with Petitioner in the family house, including staying overnight, bathing, eating and dressing there. (R. 88; 90; 91-92; 154; 280). When the Victims slept at the family house, they would either stay in Petitioner's bedroom with him or they would sleep with their little cousins. (R. 93).

Beginning in October 2009, Johnnie and Cynthia Simmons began to take a more active role in the Victims' lives because Rose was unable to care for them on a full-time basis due to their behavior problems at school. (R.72–73; 90-91; 94-96; 99-100; 143; 191-194; 209; 210). Johnnie and Cynthia Simmons first cared for the Victims on weekends, but beginning in May 2010, the Victims lived with them on a full time basis. Johnnie and Cynthia eventually adopted the Victims. (R. 95-96; 100; 185; 211-212; 65-68; 185-186; 198; 216).

After moving in with Johnnie and Cynthia, the Victims initially did well in school but began having behavior problems again at the new school after a few months. (R. 187-188). Cynthia and Johnnie questioned the Victims about their bad behavior at the new school, including looking over bathroom stalls at others and feeling the private area of another student. The Victims revealed that they were sexually assaulted when the Victims lived on the family property. (R.80; 191-196; 206-207; 213-214). Cynthia took the Victims to their pediatrician. (R. 193-194). She testified at trial that Victims were still wetting the bed between two to four times per week and that both initially experienced nightmares. (R. 195; 196). When she was caring for them on the weekends and encountered problems with bathing, she noticed once that Victim 1's anal area was completely red. (R. 188-190).

Victim 1 testified Petitioner used his hands to touch Victim 1's penis and butt several times, made Victim 1 touch Petitioner's penis, made Victim 1 put his penis in Petitioner's mouth, and Petitioner put his penis inside Victim 1's butt "more than once and twice." (R. 131-134; 146). Victim 1 was also made to perform oral sex on friends of his father. (R. 67; 84; 140-141; 146; 148). Victim 1 testified that the episodes occurred at night at Petitioner's house in Petitioner's bedroom when everyone was asleep, but that his brother witnessed things his father did to him. Victim 1 noted that Petitioner threatened him if he told anyone. (R. 132; 148).

Victim 2 described how Petitioner touched his penis with his hands more than once and always in Petitioner's bedroom, and threatened him if he told anyone. (R. 155-156; 157). During the interview with Hope Haven, Victim 2 reported that Petitioner's penis touched his butt. (R. 178). The Victims described in their interview that Petitioner penetrated their anuses with his penis and made them perform oral sex on him and he performed it on them. One of the boys was also made to perform oral sex on men the father brought over to the house. (R. 78).

The Victims were examined by their pediatrician and also by a pediatric nurse practitioner for Hope Haven, focusing on the body areas disclosed by the Victims as subject to abuse. Victim 1 disclosed multiple episodes of forced oral copulation and penile/anal penetration by Petitioner and exposure to pornography while living "over there." He also reported an itchy rash on his bottom, and soiling accidents. Their physical examinations of the Victims were normal which occurs in ninety-seven (97) percent of children who are sexually abused. (R. 225-230; 235). Victim 2 disclosed oral copulation and penile/anal contact and bed-wetting. The episodes of bed-wetting were described as a common behavioral symptom for abused children.

ARGUMENT

I. Petitioner's issue regarding the testimony of the child victims' pediatrician is clearly not preserved for review on appeal and never should have been addressed by the Court of Appeals. Further, even if the issue is somehow preserved, it is without merit and any possible error is entirely harmless in light of the cumulative testimony in the record.

The Court of Appeals correctly found the issue regarding whether Dr. Simmons', the pediatrician, testimony went outside the scope of statements necessary for medical purposes was not preserved and the Court should have ended its analysis at preservation. Further, the issue is without merit and any possible error in the admission of the testimony was entirely harmless given the cumulative evidence in the record.

Preservation

Dr. Simmons, the victims' pediatrician, testified as the first witness at trial and was qualified as an expert in the area of pediatric medicine. He detailed some of the medical history of the victims and then specifically addressed his involvement after the children's disclosure of sexual abuse. (R.22-29). The State then asked Dr. Simmons: "And Doctor, can you tell me what - - in talking to Victim 1 what he told you happened." Petitioner's counsel objected stating: "It's hearsay. It's objectionable under 803. And certainly, he could limit it to the child's disclosure of date and time, and that's it." The State responded: "Judge We'd say that this is under the hearsay exception, 803. Excuse me, let me pull it up." The trial judge then interposed: "For medical diagnosis?" The State agreed: "For medical - - purpose of medical diagnosis, exactly." The trial court's ruling, which was made prior to any testimony being heard regarding the statements by the victim, allowed the State to proceed as long as the testimony the State intended to introduce met the medical diagnosis exception. Petitioner's counsel did not refute this ruling, did not ask

the court to further limit the testimony, and did not maintain any testimony would be beyond the scope of the medical diagnosis exception under Rule 803(4), SCRE. In effect, Petitioner's counsel acquiesced to the correctness of the trial court's ruling that testimony could be admitted for purposes of medical diagnosis as an exception to hearsay.

Petitioner raised a general objection to hearsay, and when the court indicated an exception existed, he never contested the exception. Petitioner presented no argument to the trial court indicating that the testimony was not proper under Rule 803(4). Further, Petitioner did not raise any contemporaneous objections when the testimony was admitted at trial. Petitioner did not object during the introduction of any of the testimony he now contends was improper even under the medical diagnosis exception. He never provided the trial court with the opportunity to address whether the testimony by Dr. Simmons was properly admitted under the medical diagnosis exception of Rule 803(4). Additionally, he never allowed the trial court the opportunity to address the scope of the testimony and whether any limitations on the admittance of the testimony under the medical diagnosis exception would have been proper. The trial court should have been given the opportunity to address the issue prior to it being raised for the first time on appeal. Petitioner's failure to contemporaneously preserve this issue for appeal precludes review. See State v. Torrence, 305 S.C. 45, 66, 406 S.E.2d 315, 327 (1991) (eliminating *in favorem vitae* review in death penalty cases and holding: "A contemporaneous objection requirement enables trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition. This, in turn, allows potential errors to be prevented or cured."); Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (" 'Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful

appellate review.' " (quoting Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006))); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000) ("Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments."); State v. Morgan, 282 S.C. 409, 412, 319 S.E.2d 335, 337 (1984) ("Inasmuch as the trial judge had no opportunity to pass upon the issue, the question will not be considered on appeal."); State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001) (stating that an objection must be sufficiently specific to bring into focus the precise nature of the purported error so that it can be understood by the trial judge); State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989) (stating the defendant may not argue one ground on appeal and an alternate ground on appeal); Nicholson v. Nicholson, 378 S.C. 523, 537, 663 S.E.2d 74, 82 (Ct. App. 2008) ("Without an initial ruling by the trial judge, a reviewing court would have no foundation on which to evaluate whether an error has been committed.").

Once the issue was determined to be unpreserved for review, the Court of Appeals should have ended its analysis. Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[T]hese rules must also be applied consistently and not selectively. If our review of the record establishes that an issue is not preserved, then we should not reach it."); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("An issue that was not preserved for review should not be addressed by the Court of Appeals, and the court's opinion should be vacated to the extent it addressed an issue that was not preserved.").

In addition, Petitioner's post-trial motion for a new trial did not preserve any issue for review on appeal. "It is well settled that an issue may not be raised for the first time in a post-trial motion." S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301, 641

S.E.2d 903, 907 (2007); State v. Taylor, 399 S.C. 51, 64, 731 S.E.2d 596, 603 (Ct. App. 2012) (finding the raising of an issue for the first time in a post-trial motion "is insufficient to preserve the issue for our review because it was not raised at trial.").

Even if the post-trial motion could preserve the issue for review on appeal, the motion and subsequent argument were very general and did not allow the trial court the opportunity to address the specifics of the argument raised on appeal related to the appropriateness of the testimony under the medical diagnosis exception. The post-trial motion merely listed:

> **5. The Court erred in allowing Dr. James Simmons to testify as to hearsay statements by Victim 1 and Victim 2.**
>
> The Defendant objected to Dr. James Simmons, the pediatrician, being allowed by the Court to testify to hearsay statements made by Victim 1 and Victim 2 to him as being in violation of Rule 803(4), SCRE.

(R.374) (bold and underline in original). The statement of error does not allege what statements, if any, were improper. He presents no argument regarding why any statements exceeded the scope of Rule 803(4) and the medical diagnosis exception, and provided nothing further during the hearing on the motion. As a result, even if he could have preserved the issue by raising it in a post-trial motion, he failed to provide a sufficient basis on which the trial court could rule and this Court could determine the correctness of that ruling.

Accordingly, this Court should find the issue is clearly not preserved for review on appeal because the trial court was never afforded the opportunity to address the concerns Petitioner has raised in his Brief. See Allegro, Inc. v. Scully, 418 S.C. 24, 33, 791 S.E.2d 140, 145 (2016) ("Preservation rules are designed to provide an adequate platform for appellate review by ensuring the trial court has had the opportunity to rule on an issue prior to this Court

considering the matter."); Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004) (finding issue preservations is "a fundamental principle of appellate procedure").

Further, this Court should find the Court of Appeals did not need to address the merits of the issue because the issue was clearly unpreserved for review. This Court has made it abundantly clear that unpreserved issues should not be addressed. See Dunbar, 356 S.C. at 142, 587 S.E.2d at 694 ("An issue that was not preserved for review should not be addressed by the Court of Appeals, and the court's opinion should be vacated to the extent it addressed an issue that was not preserved."); Hendrix v. E. Distribution, Inc., 320 S.C. 218, 219, 464 S.E.2d 112, 113 (1995) (affirming in result only because this Court vacated the Court of Appeals' opinion to the extent it addressed an issue which was not preserved); Connolly v. People's Life Ins. Co. of S.C., 299 S.C. 348, 352, 384 S.E.2d 738, 740 (1989) ("We have held that the Court of Appeals may not decide an issue neither presented to the circuit court nor raised by proper exception on appeal. The Court of Appeals itself has recognized that issues either not raised to the trial court or by proper exception on appeal present no question for appellate determination."). Accordingly, this Court should affirm the result reached by the Court of Appeals, but find it should not have addressed the merits of the issue because the trial court was never presented the opportunity to address the issue of whether any testimony was appropriate under the medical diagnosis exception of Rule 803(4), SCRE.

Merits and Harmless Error

Even if this Court decides to address the merits of the issue, the testimony was appropriately admitted under the medical diagnosis exception of Rule 803(4), SCRE, and any error in its admission was entirely harmless in light of the cumulative evidence admitted without objection at trial. In criminal cases, the appellate court sits to review errors of law only. State v.

Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. "A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

Hearsay is not admissible unless it is pursuant to an exception provided by the South Carolina Rules of Evidence or other means. Rule 802, SCRE. A statement consistent with the victim's testimony in a criminal sexual conduct case is not hearsay when it is limited to the time and place of the incident. Rule 801(d)(1)(D), SCRE. Further, "[s]tatements made for 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" are admissible pursuant to the trial court's discretion. Rule 803(4), SCRE.

Dr. James Simmons, the victims' pediatrician, was called as the first witness at trial and was qualified as an expert in the area of pediatric medicine. He testified that he treated Victims from the ages of eight months until about one and one-half years before trial. He diagnosed Victims with attention deficit disorder when they were around the age of seven and prescribed medication for the condition. He also provided a diagnosis of possible opposition defiance

disorder but no other mental illness for either Victim. (R. 22- 24; 45). He referred at least one of the victims to therapy and knew the child had attended therapy. Dr. Simmons further recalled treating one of the victims for an irritated penis, uncontrollable bowels, and abdominal pain. (R. 25-26). He opined that an irritated penis, uncontrollable bowels and abdominal pain could be the result of sexual abuse. (R. 27). He outlined classic textbook symptoms of sexual abuse to include a general behavior change, inappropriate behavior in school and urinary or stool incontinence. (R. 27).

Dr. Simmons stated that he saw the Victims in September 2010 for sexual abuse. (R. 27-28). After the trial court allowed Dr. Simmons to testify to statements made by Victim 1 based on the medical diagnosis and treatment exception, the pediatrician testified Victim 1 reported that when he was in the custody of Rose Simmons, they were watching "porn" and Petitioner made "them suck his penis." Dr. Simmons testified Victim 1 reported a secret pact with Petitioner not to tell anyone. (R. 30). Upon receipt of this information, Dr. Simmons terminated the discussion so as not to imprint Victim 1 with ideas, and he contacted the appropriate authorities. (R. 31; 32).

Dr. Simmons also testified that he conducted a physical examination of Victims but found no physical signs of trauma, which he opined is common. Over objection, Dr. Simmons testified as an expert that the lack of physical findings it is not uncommon because the areas of the body in question heal quickly, the offender might not use anything that would leave marks or injury, or the abuse is chronic. (R. 33; 47). Law enforcement authorities were contacted. (R. 31-32; 47).

Petitioner cross-examined Dr. Simmons extensively on his medical records respecting the Victims and the family history taken. He testified that his records reflect that the Victims'

mother suffers from schizophrenia, and in 2011 he increased the medication prescribed for the Victims' treatment of attention deficit disorder. In April 2012, Dr. Simmons noted a possible oppositional defiant disorder which tends to accompany attention deficit disorder. (R. 34-35). In 2004, Victim 2 was seen for constipation. (R. 35). His records also reflect reports that Victim 2 was stealing medication from the school nurse and was seeing a therapist in May or June of 2011. His notes further reflect that in 2011, Victim 2 was not taking medication for attention deficit disorder and was having difficulty interacting with his peers but in late 2010, Victim 2 was not having difficulty sleeping or experiencing behavior problems. (R. 36-40). Dr. Simmons testified on cross-examination that Victim 1 reported that he "learned some faggot stuff." (R. 42). Dr. Simmons last treated the Victims on November 22, 2011. (R. 43).

The statements in question were made by Victim 1 to Dr. Simmons in the pediatrician's office for the purpose of obtaining treatment for physical and emotional trauma, as well as on-going behavioral symptoms experienced by the Victims. The pediatrician treated the Victims' physical and emotional manifestations for a number of years. In fact, it was the reoccurrence of behavior issues and acting out at school in a sexually related way that prompted the inquiry, disclosure, and examination by the pediatrician. The purpose of the report from Victim 1 was for medical diagnosis and to provide pertinent medical treatment and on-going care. The statements were critical to medical diagnosis because it enabled Dr. Simmons to know the areas of the Victims' bodies to examine. The statements also were critical to assess the source and cause of emotional and behavioral symptoms and to address the measure of intervention necessary to remove the possible threat of continued assaults and to assess the impact and extent of the abuse for diagnostic purposes – not only physical trauma but emotional trauma as well. See United States v. Peneaux, 432 F.3d 882 (8th Cir. 2005) (a doctor must be able to identify physical and

emotional problems that accompany child sexual abuse). The pornography and "pact" not to report the ongoing sexual abuse reflected grooming, betrayal of trust by a parent, and possible long-term emotional abuse that accompanied the physical assaults suffered by the Victims which would direct the type of emotional treatment, or behavioral treatment related to ODD, that might be necessary.

The descriptions offered by the victims were pertinent to Dr. Simmons ongoing pediatric care of the boys, including both physical and emotional/psychological well-being. As the Supreme Court of North Carolina has stated:

> First, a proper diagnosis of a child's psychological problems resulting from sexual abuse or rape will often depend on the identity of the abuser. Second, information that a child sexual abuser is a member of the patient's household is reasonably pertinent to a course of treatment that includes removing the child from the home.

State v. Aguallo, 350 S.E.2d 76, 80 (N.C. 1986) (citing United States v. Renville, 779 F.2d 430 (8th Cir. 1985); Moore, The Medical Diagnosis and Treatment Exception of the Hearsay Rule-The Use of the Child Protective Team in Child Sexual Abuse Prosecutions, 13 N.Ky.L.Rev. 51 (1986); S. Saltzburg & K. Reddin, Federal Rules of Evidence Manual § 803(4) (4th ed. 1986 & Supp.1986); McCormick on Evidence § 292, n. 14 (3d ed. 1984)); see also, State v. Geboy, 764 N.E.2d 451, 462 (Ohio App. 2001) ("The rule does not expressly limit its scope to statements regarding the declarant's physical or bodily condition. In fact, the rule has been interpreted as to include diagnosis and treatment of psychological injuries as well as physical ailments.").

Additionally, other states have recognized the need to know who the perpetrator was in developing a treatment plan. See e.g., Valmain v. State, 5 So. 3d 1079, 1084 (Miss. 2009) (finding "the identity of the child's sexual abuser was pertinent to treatment, therefore reasonably relied upon by the treating physician, although the perpetrator was not a member of the child's

household" and noting that "the paramount concern in treatment of sexual abuse is to ensure that a child is not returned to the environment that fostered, allowed, or permitted the abuse").

Petitioner references the case of State v. Burroughs, 328 S.C. 489, 492 S.E.2d 408 (Ct. App. 1997), to support his contention that the pediatrician's testimony was inadmissible. His reliance on Burroughs is ill-founded, as it is readily distinguishable from this case. In Burroughs, a statement that an alleged rapist "asked for a hug" was found outside the scope of the "medical diagnosis" exception because it was not "reasonably pertinent" to the victim's diagnosis or treatment. However, as Burroughs explained: "a statement that the victim had been raped or that the assailant had hurt the victim in a particular area would be pertinent to the diagnosis and treatment of the victim." Id. at 501, 492 S.E.2d at 414. In the instant case, Dr. Simmons testified regarding the physical contact to the boys which formed the basis of the examination he performed, including examining their anuses as was specifically addressed by Petitioner's cross-examination. (R. 41-42). The victims' statements regarding how and when they were abused, and the other grooming methods used by Petitioner, provided the doctor with specific areas to focus on, and specific conditions to search for when the pediatrician performed the diagnostic physical exam as well as for him to assess their mental condition.

Nevertheless, the Court of Appeals properly concluded any error in the admission of the testimony was harmless. See State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained."); State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (Ct. App. 1996) (stating that error is harmless beyond a reasonable doubt if it does not contribute to the verdict). Any error in admitting the pediatrician's testimony was harmless because it was merely cumulative to

either un-objected to testimony or testimony specifically elicited by Petitioner at trial. See State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (any error in admission of evidence cumulative to other un-objected to evidence is harmless); State v. Blackburn, 271 S.C. 324, 247 S.E.2d 443 (1978) (stating that admission of improper evidence in harmless when it is cumulative to other, unobjected-to testimony).

Petitioner maintains the cumulative nature of the testimony is the prejudice created and cites to Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994), for the *per se* rule. A majority of this Court has repudiated the *per se* rule, and has reaffirmed the admission of testimony, even testimony cumulative to a victim, can be harmless. State v. Jennings, 394 S.C. 473, 478–79, 716 S.E.2d 91, 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). In Jennings, Justices Kittredge and Hearn explained "a categorical rule is at odds with longstanding harmless error jurisprudence" and "the determinations are necessarily context dependent," thereby finding Jolly's rule "precluding a finding of harmless error goes too far." Id. at 482, 716 S.E.2d at 95-96 (2011). Former Chief Justice Toal also explained:

> I have come to believe that the Jolly case and its progeny go too far, and consequently, I believe we should take this opportunity to overrule Jolly. In my opinion, these cases create a rule of *per se* prejudice when testimony is cumulative to the victim's testimony. Such a rule is contrary to the traditional analysis of improperly admitted hearsay testimony, which requires a finding of prejudice.

Id. at 483, 716 S.E.2d at 96. The majority of the Court, therefore, found the analysis of whether the improper admission of otherwise cumulative testimony is harmless should be the same as any other improperly admitted testimony, and determined the statements should be subject to harmless error in which the appellant must show prejudice.

Any improperly admitted testimony in this case could not have prejudiced Petitioner due to the fact the same or similar testimony was admitted without objection and, on occasion, solicited by Petitioner. First, Beaufort County Sheriff's investigator Jeremiah Fraser was called as the second witness and testified, in pertinent part, based upon his investigation and interviews, Petitioner was identified as the suspect in the allegations of sexual abuse and that the sexual abuse occurred in the home on the family property on Saint Helena Island. (R. 54-55; 61-62). On **cross-examination by Petitioner**, Fraser testified that Petitioner sexually abused the Victim 1 by forcing him to perform oral sex on his friends and on each other. (R. 67-73; 84). On redirect examination Fraser recounted the Victims' description of Petitioner penetrating their anuses with his penis and making them engage in acts of oral sex. (R. 78).

A pediatric nurse practitioner who examined the Victims testified **without objection** Victim 1 disclosed multiple episodes of forced oral copulation, penile/anal penetration and "he disclosed a lot of being witness to pornography." (R.226). She stated Victim 1 identified Petitioner as the perpetrator of the sexual abuse. (R. 226; 228). Victim 2, while more guarded than Victim 1, also disclosed oral/genital and penile/anal contact to the nurse practitioner. (R. 230-231).

Significantly, **on cross-examination**, the pediatric nurse practitioner confirmed that she was given information that Victim 1 was being forced to perform oral sex on Petitioner and Petitioner's friends. (R. 235). She additionally confirmed sources reporting that Victims were forced to perform oral sex on Petitioner and each other and were forced to watch pornographic movies. (R. 236).

As a result of the significant cumulative testimony, much of which was specifically elicited by Petitioner in his cross-examination, Petitioner cannot complain of any prejudice from

the allegedly improper testimony by Dr. Simmons. Any error was clearly harmless and, in light of Jennings, this Court should not find that it is precluded from considering the harmless nature of the testimony.

Accordingly, the State submits the issue is not preserved for review on appeal and the Court of Appeals should not have addressed the merits. Even if preserved, the issue is without merit pursuant to Rule 803(4) given Dr. Simmons' need to treat both the physical and psychological aspects of the victims. Finally, even if preserved and even if error to admit Dr. Simmons' testimony, any error is entirely harmless in light of the significant cumulative testimony appearing in the Record.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court of Appeals opinion should be affirmed.

Respectfully submitted,

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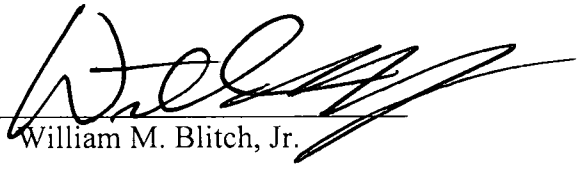
BY: 
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August 11, 2017

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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The State, Respondent,

v.

James Simmons, Jr., Petitioner.

PROOF OF SERVICE

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

Susan B. Hackett, Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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I further certify that all parties required by Rule to be served have been served.
This 11th day of August, 2017.

Anne Mueller

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