

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARK ELLIOTT,

APPELLANT

Appellate Case No. 2010-178286

FINAL REPLY BRIEF OF APPELLANT

BREEN RICHARD STEVENS
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SC Court of Appeals

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Rule 801, SCRE4

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ARGUMENT IN REPLY

The State contends that Appellant's first issue regarding the admissibility of the Complaining Witness' hearsay statements to Nurse Douglas is not preserved because the issue was not raised or ruled upon by the trial court. Brief of Respondent, p. 18. Appellant respectfully submits that the issue is preserved.

"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." 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). However, "[e]rror preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review. Instead, a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue." State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 596-97 (2010) (internal citation omitted).

In the present case, the trial court specifically framed the matter before it during the in camera hearing initiated by the State regarding Nurse Douglas' testimony: "What we're talking about is whether or not statements made to her, or to the witness by the victim, are hearsay." R. 748, ll. 22-24. One of the arguments advanced by defense counsel against the State during this hearing was that the State was attempting to ask Nurse Douglas "about something the victim already testified to; something that Detective Abercrombie's already testified to—" R. 747, ll. 6-8; R. 747, ll. 22-23. The trial court acknowledged Counsel's argument regarding the cumulative nature of the hearsay statement in question when it stated, "I understand it. And I'm going to let her testify to that; okay." R. 747, ln. 24—R. 748, ln. 1. Thus, while Appellant acknowledges that

defense counsel marshaled other arguments regarding the rape shield statute and the rule of completeness to allow cross-examination on the entire statement of the Complaining Witness in the event the trial court admitted the hearsay statements, Appellant asserts that defense counsel also protested that the hearsay statements in question were cumulative to prior testimony, including that of the Complaining Witness. R. 747, ll. 6-8; R. 747, ll. 22-23; R. 750, ll. 19-24. Under these circumstances—where pursuant to Rule 803(4), SCRE, the is State seeking admission of a Complaining Witness’ hearsay statement to a nurse when a rape kit was performed—defense counsel’s argument regarding the cumulative nature of the hearsay statements should be construed as one of improper corroboration testimony that is merely cumulative to the victim’s testimony. See, e.g. State v. Burroughs, 328 S.C. 489, 501-04, 492 S.E.2d 408, 414-15 (Ct. App. 1997).

Simply stated, the primary issue as understood by the trial court was admissibility of the Complaining Witness’ hearsay statements to Nurse Douglas pursuant to Rule 803(4) of the South Carolina Rules of Evidence; the trial court unequivocally ruled upon this issue over defense counsel’s arguments, which consisted *inter alia* of counsel’s argument that the hearsay statements were cumulative to other testimony, including the Complaining Witness’s. See Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 632 (2010) (interpreting and applying time and place limitations of Rule 801(d)(1), SCRE); State v. Whisonant, 335 S.C. 148, 156, 515 S.E.2d 768, 772 (Ct. App. 1999) (“Improper corroboration testimony *that is merely cumulative to the victim’s testimony*, . . . cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.”) (emphasis added); Burroughs, 328 S.C. at 501-04, 492 S.E.2d at 414-15; see also Brannon, 388 S.C. at 502, 697 S.E.2d at 596-97. Further, the

trial court acknowledged this argument when it made its ruling regarding admissibility of the hearsay statement. See, e.g., Queen's Grant, 368 S.C. at 373, 628 S.E.2d at 919. Accordingly, Appellant submits the matter should be deemed preserved for this Court's consideration.

For the remaining arguments advanced by the State in its brief, Appellant respectfully stands upon his prior brief to the Court.

CONCLUSION

For the foregoing reason in reply to the Respondent's brief, as well as those advanced in Appellant's initial brief, Mark Elliott respectfully requests reversal of his conviction and remand for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Breen Richard Stevens", with a long horizontal flourish extending to the right.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of September, 2012.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

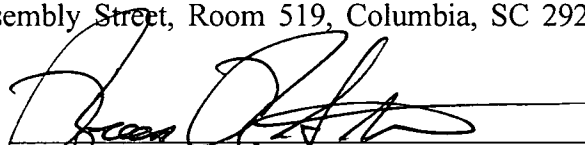
V.

MARK ELLIOTT,

APPELLANT

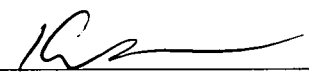
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Christina J. Catoe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 10th day of September, 2012.


Green Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 10th day of September, 2012.


_____(L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013.