STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable Larry B. Hyman, Jr., Circuit Court Judge
Appellate Case No. 2010-178286

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

MARK ELLIOTT,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant was indicted in Horry County in July 2009 for kidnapping, criminal sexual conduct in the first degree, criminal sexual conduct with a minor in the second degree, failure to stop for a blue light, and resisting arrest. On November 15-19, 2010, he proceeded to trial before the Honorable Larry B. Hyman, Jr. Judge Hyman directed a verdict of not guilty regarding the resisting arrest charge, and the jury found Appellant guilty of kidnapping and not guilty of the three remaining charges. Judge Hyman imposed a sentence of thirty years. A timely notice of appeal was served and filed.

ARGUMENT

I. The trial judge correctly admitted into evidence Appellant's statements to police where Appellant was properly Mirandized after being taken into custody and there was no reason to believe Appellant's statements were made involuntarily.

Background

Appellant attempted to rob the fourteen-year-old victim and her two male friends around 3:30 am on June 29, 2009 outside of the beach house where the victim was staying with another friend. (R. p. 246-58; p. 454-77). At the time, the victim and her friends believed Appellant had a gun or some other type of weapon. (R. p. 248, lines 10-11; p. 475, lines 19-25). After realizing that the victim and her friends did not have a significant amount of cash, Appellant told the victim to get in his car with him. (R. p. 478). The victim, feeling threatened, did so, and Appellant drove her to an isolated location where he sexually assaulted her. (R. p. 478-89). Subsequently, he let the victim go and she thereafter enlisted the assistance of an early-morning jogger, who allowed her to use his phone to call her friends. (R. p. 489-97). The victim learned that her friends had already called the police and had been looking for her. (R. p. 252-58; p. 498, lines 7-17).

Meanwhile, law enforcement issued a "be on the lookout" ("BOLO") warning for the person and vehicle matching the description given by the victim's friends. (R. p. 101, lines 2-12; p. 303-304). Shortly thereafter, a little before 4:30 am, officers observed a matching vehicle and driver in the area and pulled the vehicle over at a gas station. (R. p. 101, line 13 – p. 102, line 10). Upon exiting the vehicle, Appellant immediately began fleeing. (R. p. 102, lines 4-5). Officers chased him and ultimately apprehended him in the parking lot of a nearby restaurant. (R. p. 102, lines 11-13). Appellant was not

cooperative with the officers' orders, and one officer had to deploy a taser upon Appellant to ensure his compliance. (R. p. 118-19; see p. 310-13). After finally subduing Appellant, officers placed him face-down on the pavement and handcuffed him. (R. p. 115-19). The probes from the taser had not yet been removed from Appellant's back at that point. (R. p. 119, lines 1-3). Within a few minutes, and prior to any questioning other than asking Appellant's name, Sergeant Causey of the North Myrtle Beach police read Appellant his Miranda rights from his department-issued card. (R. p. 104-108). At that time, there were two other county officers standing near Appellant to deter any further escape attempts. (See R. p. 115-19). Sergeant Causey's reading of the Miranda rights to Appellant was captured on video by a patrol car camera. (R. p. 111-13; see State's Exhibit # 4).

Appellant clearly stated that he understood his rights, and he stated that he was willing to talk to officers. (R. p. 104-110). Despite having been tased and handcuffed, Appellant seemed coherent and did not appear to be mentally or physically impaired such that he could not comprehend what was going on. (R. p. 109-110). None of the officers threatened or coerced Appellant to get him to waive his rights. (R. p. 108-114). Appellant never requested an attorney and never indicated that he was no longer willing to talk. (R. p. 113-120). In fact, no one, including Sergeant Causey, asked Appellant any questions right away. (R. p. 109-111; p. 116-19). Appellant was not actually questioned until after the taser probes were removed from his back and EMS had checked him over. (R. p. 122-23). When officers did ask Appellant questions while he was still on the ground, the questions were primarily aimed at locating the missing victim. (R. p. 111, lines 7-10; p. 403, lines 11-18; see State's Exhibit #4). After Sergeant Causey placed

Appellant in the backseat of the patrol car, he again reminded Appellant of his rights and asked Appellant if he remembered them. (R. p. 122, lines 11-14). Appellant began to recite his Miranda rights and then stated that he did still understand them. (R. p. 122, lines 15-17).

Appellant was already in the backseat of the patrol car when Officer Baldasarre arrived on the scene. (R. p. 126). Sergeant Causey informed Officer Baldasarre that he had already read Appellant his Miranda rights. (R. p. 127, lines 3-12). Baldasarre then went to the patrol car to talk to Appellant. (R. p. 127, lines 16-20). After introducing himself, Baldasarre asked if Appellant's rights had been read to him and if he understood them. (R. p. 127-28). Appellant responded affirmatively and indicated that he was willing to speak with Baldasarre. (R. p. 127-28). Baldasarre did not threaten or coerce Appellant into waiving his rights and did not promise him anything to get him to answer questions. (R. p. 128-31). Baldasarre stated that Appellant was coherent, appeared to understand what was going on, and provided direct and responsive answers to the questions he subsequently asked him. (R. p. 128-30). Appellant never indicated that he was in pain or discomfort and never indicated that he needed any sort of medical attention. (R. p. 130, lines 1-6). Appellant never stated that he wanted an attorney or indicated that he had any questions about his rights. (R. p. 129, lines 5-7).

After asking some initial general questions about what had taken place that evening, Baldasarre again inquired whether Appellant understood his rights to ensure that Appellant knew that he could terminate the questioning at any time. (R. p. 129, lines 10-14). Appellant maintained that he understood and wanted to cooperate. (R. p. 129, lines 15-16; p. 139, lines 7-19). At that point, Baldasarre advised Appellant that he was being

accused of kidnapping. (R. p. 129, lines 17-19; p. 138-39). Baldasarre and Appellant then began to discuss the allegations in greater detail. (See R. p. 139-140). Baldasarre testified that Appellant was polite and that the interview seemed more like a conversation. (R. p. 128, line 18 – p. 129, line 4). For the majority of the interview, only Appellant and Baldasarre were present. (R. p. 133, line 25 – p. 134, line 7; p. 147, lines 19-20; p. 148, lines 9-14). No other officers were "bearing down" over Appellant or the vehicle, although there were at least five patrol cars in general vicinity of the parking lot. (See R. p. 134, lines 8-12; p. 135-36). Baldasarre's interview with Appellant lasted a total of about twenty minutes, although Baldasarre was not with Appellant continuously because he was occasionally called away to attend to other matters during that time frame. (See R. p. 140, lines 3-15).

Officer Senter interviewed Appellant during the time that Officer Baldasarre had to step away. (See R. p. 147, lines 19-20; p. 148, lines 9-14). Prior to questioning Appellant, Officer Senter talked with Sergeant Causey and learned that Appellant had been given his Miranda rights and was willing to talk. (R. p. 143, lines 18-25). Officer Senter stated that when he talked with Appellant, Appellant appeared coherent and did not appear mentally or physically impaired at all. (R. p. 144, lines 1-11). Appellant did not indicate he was in any pain and Senter did not observe any actions on the part of Appellant indicative of experiencing pain. (R. p. 145, lines 19-21; p. 149, lines 16-22). In fact, Appellant seemed to be "normal and healthy." (R. p. 149, lines 16-17). Appellant never requested an attorney and never told Senter that he no longer wished to answer questions. (R. p. 144, lines 12-14). The answers Appellant provided were responsive to the questions asked. (R. p. 144, lines 23-25). Senter never threatened or

coerced Appellant to get him to talk and never observed any other officer threatening or coercing Appellant. (R. p. 145, lines 13-18).

After listening to the testimony of the officers as described above[1] and viewing the patrol car tape from the night in question, the trial judge heard arguments from both parties regarding admission of the statements Appellant made to police on the morning of his apprehension. (See R. p. 153, lines 8 – p. 155, line 15). The State argued that all statements of Appellant should be admitted, because Appellant was promptly read his Miranda rights, did not request any medical care or indicate that he was in any pain, clearly knew and understood what was going on, and was not under any coercion. (See R. p. 153, line 16 – p. 154, line 8). In contrast, the defense argued that all of Appellant's incriminating statements were "made in a coerced setting." (R. p. 154, lines 17-19). Defense counsel argued that Appellant was not told about the nature of the investigation or what he was suspected of until "the third interrogation." (R. p. 154, lines 20-22). Counsel also pointed out that Appellant had "just been tased," was in handcuffs, and was face-down in the parking lot by the roadside when Miranda was given. (R. p. 154, line 23 – p. 155, line 2). Defense counsel argued that, "I do not believe that the totality of the circumstances was one in which he could've knowingly waived those rights." (R. p. 155, lines 11-13). In response to defense counsel's argument, the State pointed out that under State v. Crawley,[2] the fact that a defendant is not informed of the subject matter of the investigation prior to signing a Miranda waiver does not affect the voluntariness of a confession. (R. p. 155-56).

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[1] Appellant did not testify at the Jackson v. Denno hearing.

[2] 349 S.C. 459, 562 S.E.2d 683 (Ct. App. 2002). The transcript mistakenly lists the case as "State v. Crosby." (See R. p. 155, line 21).

The trial judge found that, "[t]here's no question that Miranda was given, and necessarily given, because the circumstances were such that this defendant, and any other reasonable defendant, would have certainly believed himself to be in custody at the time he was questioned." (R. p. 156, lines 19-24). The judge stated that he had considered Appellant's demeanor during questioning, his responses, and the officers' "unrefuted testimony" that there were no problems with Appellant's understanding of what they said to him. (R. p. 157, lines 2-7). The judge noted that Appellant was reminded of his Miranda rights "at least two more times" after the rights were initially given and was asked if he still understood them or had any questions about them. (R. p. 157, lines 7-11). The judge further noted that there was no testimony that he heard concerning any mental or intellectual deficits on the part of Appellant that would suggest that what he observed on the patrol car tape was not a true picture of Appellant's ability to understand and waive his Miranda rights. (R. p. 157, lines 17-23). The judge concluded that "I don't think there's any question that this defendant made a knowing and intelligent waiver of his Miranda rights." (R. p. 157, lines 12-14).

Regarding the voluntariness of the statements made, the judge pointed out that a necessary predicate to finding that a statement is involuntary is coercive police activity. (R. p. 158, lines 2-5). The judge ruled that, after reviewing the tape as a whole, and considering such things as the length and continuity of interrogation, the attitude of the officers toward Appellant and the way they spoke to Appellant, and the fact that Appellant was informed several times in the interrogation that he was being charged with, at least, kidnapping, that under the totality of the circumstances he found no coercive police activity. (R. p. 158, lines 6-17). The judge stated that, "in fact, [I] find just the

opposite in this situation." (R. p. 158, lines 18-19). The judge pointed out that any defendant who is arrested and placed into custody is "probably going to be placed under some significant amount of stress." (R. p. 158, lines 20-23). But, the court found, "the stress level that I detected from listening to this defendant and watching him," and looking at the situation he was in and taking into account what the officers said to him, "I do not believe that there is any question that his statements on that video were voluntarily made, knowingly – after a knowing and intelligent waiver of his Fifth and Sixth Amendment rights." (R. p. 158, line 24 – p. 159, line 8). Thus, the court allowed the statements made by Appellant the morning of the incident into evidence before the jury. (R. p. 159, line 9).

After the court admitted these statements, another Jackson v. Denno hearing was held regarding a videotaped statement Appellant made during a subsequent interview at the police station. (See R. p. 159 – 181). Detective Abercrombie testified that at about 3:00 pm on the afternoon following Appellant's apprehension, he conducted an interview with Appellant in the interview room at the police department. (R. p. 167, lines 16-18; p. 171, lines 8-12). He stated that the interview lasted approximately forty-five to forty-eight minutes. (R. p. 167, lines 19-21). Prior to beginning the interview, Detective Abercrombie advised Appellant of his Miranda rights and Appellant signed a Miranda waiver form. (R. p. 167-69). Detective Abercrombie stated that Appellant was advised of the allegations against him at some point during the interview. (R. p. 174, lines 4-13).

The tape of the interview was then played for the court. (See R. p. 175, lines 5-8; see State's Exhibit # 15). Thereafter, the court heard arguments from the parties. The State argued that the statements Appellant made in the interview were admissible. The

solicitor pointed out that Appellant's Miranda rights were read at the outset; that Appellant acknowledged his rights and waived them via a Miranda rights form; that Appellant was extremely cooperative throughout the interview; that the detective answered any questions Appellant had during the interview; and that Appellant was even allowed to use the phone during the interview. (See R. p. 175, lines 12-23). The defense argued that Appellant's statements were not made after a knowing and intelligent waiver. (R. p. 176, lines 6-8). Defense counsel pointed out that, although the Miranda rights were read to Appellant prior to the interview, the Miranda waiver form was not actually signed until after the questioning. (R. p. 176, line 12 – p. 177, line 4). Counsel also argued that Appellant was not told about the subject matter of the questioning until well into the interrogation. (R. p. 176, lines 9-11). Counsel agreed with the trial judge that the officer's actions were not coercive or threatening in any way, but argued that Appellant was led to believe "he was not being charged with anything." (R. p. 179, lines 2-11).

The trial judge stated that he believed that the video clearly showed that, looking at the totality of the circumstances, there was no coercive conduct on the part of the police. (R. p. 180, lines 16-20). The judge stated there was no question Appellant waived his Miranda rights, as he had done the night before. (R. p. 180, lines 21-24). The judge stated that he believed Appellant understood his Miranda rights since there was nothing in the record to suggest that Appellant was unable to understand his rights. (R. p. 180, line 25 – p. 181, line 2). The judge concluded that Appellant made a knowing and intelligent waiver of his Miranda rights, and that the statements were made in a "very cordial atmosphere" and were not coerced. (R. p. 181, lines 7-16). Therefore, the judge

permitted the statements Appellant made in the interview with Detective Abercrombie to be admitted before the jury. (R. p. 181, lines 17-18).

Applicable Law

A defendant's statement is not admissible unless it was taken in compliance with the mandates of Miranda and was made voluntarily. State v. Compton, 366 S.C. 671, 680, 623 S.E.2d 661, 666 (Ct. App. 2005); State v. Middleton, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986). The main purpose of Miranda is to ensure that an accused is advised of and understands his right to remain silent and his right to counsel; both these rights protect the privilege against compulsory self-incrimination. State v. Moses, 390 S.C. 502, 511, 702 S.E.2d 395, 400 (Ct. App. 2010). A defendant's statement must be voluntary because if a defendant's "will is overborne and his capacity for self-determination critically impaired," use of the resulting involuntary statement offends due process. State v. Kennedy, 325 S.C. 295, 305, 479 S.E.2d 838, 843 (Ct. App. 2002).

"The test for determining the admissibility of a statement taken in compliance with Miranda is whether it was knowingly, intelligently, and voluntarily given under the totality of the circumstances." State v. Peake, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987) (citation omitted). Before admitting an alleged statement of a defendant, the trial court must examine the totality of the circumstances and determine whether the State has proven by a preponderance of the evidence that the statement was given voluntarily. State v. Miller, 375 S.C. 370, 383, 652 S.E.2d 444, 450 (2007) (citations omitted). Important factors for consideration include the defendant's education, youth, low intelligence, receipt of Miranda warnings, repeated and prolonged nature of the questioning, and physical abuse. State v. Kennedy, *supra*.

"When reviewing a trial judge's ruling concerning voluntariness, the appellate court does not reevaluate the facts based upon its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence." State v. Miller, *supra*, at 378-79, 652 S.E.2d at 448 (citation omitted). The conclusion of the trial judge as to the voluntariness of a statement will not be reversed unless so manifestly erroneous as to show an abuse of discretion amounting to an error of law. State v. Kennedy, *supra*.

Argument

In Appellant's case, the trial judge properly ruled that all of Appellant's statements to police were admissible. Appellant's Miranda rights were, quite properly, read to him mere minutes after he was taken into custody. The officer reading Appellant his rights was not demanding or overbearing. Although when Appellant's rights were read there were several officers in the vicinity, these officers were not hovering over Appellant in order to coerce him to waive his rights.[3] Further, although Appellant had been tased[4] and was handcuffed on the pavement, he appeared coherent and did not seem to have any difficulty understanding his rights. (See R. p. 862, line 23 – p. 864, line 15). He never complained of any pain or discomfort as a result of being tased, and the patrol car video clearly reflects that Appellant was not physically or mentally incapacitated after the taser shocks. (See State's Exhibit # 4). There was no evidence of physical or mental

[3] All three of the officers in the vicinity had just been involved in the chase of Appellant after he initially fled from police. (See State's Exhibit # 4). One of these officers had to deploy the taser on Appellant in order to subdue him, while the other officer handcuffed him. (R. p. 103-104; p. 119, lines 9-13). The officers were clearly present to ensure there were no further escape attempts by Appellant. Meanwhile, the third officer, Sergeant Causey, was the officer who actually read Appellant his rights. (See R. p. 104-108).

[4] On appeal, Appellant asserts that he was tased "a total of three times with 50,000 volts of electricity with each cycle." (See Brief of Appellant, p. 7). Testimony to this effect was not elicited in the Jackson v. Denno hearing and therefore the amount of electricity used to shock Appellant was not a point considered by the trial judge in his analysis. (See R. p. 98-159). See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("Issues not raised and ruled upon in the trial court will not be considered on appeal.").

abuse or mistreatment by the officers. Moreover, Appellant was not actually questioned until after the taser probes were removed from his back and EMS had checked him over. Later, when Appellant was interviewed in the patrol car, there was only one officer present at any given time talking with him. No other officers were bearing down over the vehicle or over Appellant.

During questioning, Appellant had no difficulty communicating with law enforcement,[5] appeared to understand what was going on, and did not seem to be in any pain or discomfort. Appellant appeared to understand the questions asked and his answers were responsive to the questions. None of the officers ever threatened or coerced Appellant, and no one made any promises to Appellant. Further, Appellant was reminded of his rights several times during the various interviews and was fully Mirandized again before his later interview with Detective Abercrombie. In addition, neither of the interviews was oppressively long – the interview in the patrol car was approximately twenty minutes long while the interview with Detective Abercrombie at the police station was less than fifty minutes long. At all times after his apprehension, Appellant maintained that he wanted to speak with police and fully cooperate with police.

Although Appellant was not, at the outset, informed of the particular nature of the potential charges against him, he was told of the allegations a few minutes into the interview in the patrol car. (See State's Exhibit 4). Moreover, it was clear from the moment Appellant was apprehended and taken into custody that the police were trying to locate a female victim and that Appellant was a suspect in relation to her disappearance.

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[5] At the time Appellant was apprehended, he was nearly thirty-six years old. The videos reflect that Appellant is articulate and able to read and write. (See State's Exhibits # 4 & # 15). In addition, Appellant had previous experience with the legal system since he had several prior convictions, including first-degree burglary, second-degree sexual offense, second-degree kidnapping, and common law robbery. (R. p. 907-908).

In any event, as the solicitor pointed out at the Jackson v. Denno hearing, the fact that a defendant is not immediately informed of the particular subject matter of the interview does not affect the voluntariness of his subsequent statements. State v. Crawley, 349 S.C. 459, 463-64, 562 S.E.2d 683, 685-86 (Ct. App. 2002); see also State v. Kennedy, *supra*, at 307, 479 S.E.2d at 844 (the fact that the defendant did not understand the charges against him did not render his statements involuntary as long as he understood his Miranda rights).

Significantly, Appellant did not testify at the Jackson v. Denno hearing. Therefore, the officers' testimony indicating that Appellant understood his rights, knowingly waived them, and was not coerced into providing a statement was unrefuted. See State v. Dye, 384 S.C. 42, 48-49, 81 S.E.2d 23, 27 (Ct. App. 2009) (citation omitted) (because no competing testimony was introduced to contradict the officer's statements, the circuit court was free to accept the officer's version of events in making its voluntariness determination); State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001) (pointing out that the appellant did not testify at the Jackson v. Denno hearing and his attorney's questions did not constitute evidence; therefore, there was no evidence in the record to contradict the officers' version of events). Thus, there was no testimony or evidence suggesting that Appellant's will was overborne or his capacity for self-determination critically impaired. See State v. Kennedy, *supra*.

Appellant apparently seeks a *per se* rule that whenever a suspect flees from police and blatantly disregards police orders - and therefore must be tased and handcuffed in order to ensure his compliance - any statements he makes subsequently, after prompt Miranda warnings, must be suppressed. Respondent submits that such a *per se* rule

would fly in the face of well-established case law requiring an assessment of the totality of the circumstances in each individual case to determine if the particular defendant's will was *actually* overborne. Thus, the presence of potentially coercive circumstances (here, circumstances actually created by Appellant's conduct) during the initial reading of the Miranda rights is not dispositive where, as here, there is no testimony or evidence suggesting that Appellant's will was actually overborne by these circumstances. As the trial judge aptly pointed out, all defendants who are arrested and taken into custody will suffer a significant amount of stress. However, in this case, despite this stress, Appellant's will was not overborne, and the totality of the circumstances left no question that all of the statements Appellant made on the morning of his apprehension were voluntary and were given pursuant to a knowing and intelligent waiver of his Miranda rights.[6] Further, the interview tape makes clear that the statements Appellant made during his subsequent interview with Detective Abercrombie at the police station were also made voluntarily after a valid waiver of his Miranda rights.[7] (See State's Exhibit #

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[6] In any event, the statements initially made by Appellant on the scene in response to questions aimed at attempting to locate the still-missing victim were arguably admissible, regardless of a valid Miranda waiver, under the principles espoused in New York v. Quarles, 467 U.S. 649 (1984) and/or the "rescue doctrine." (See R. p.111, lines 7-10; p. 403, lines 11-18; see State's Exhibit # 4). See, e.g., Underwood v. State, 252 P.3d 221, 235-36 (Okla.Crim.App. 2011) ("The rescue doctrine is a recognition that the exigencies of some situations—such as the imminent need to save human life—should forgive, or at least delay, strict compliance with Miranda. It is a natural and logical extension of the "public safety exception" to the Miranda rule, recognized by the United States Supreme Court in New York v. Quarles, 467 U.S. 649, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984)."); see also People v. Davis, 208 P.3d 78, 120-24 (Cal. 2009); State v. Londo, 158 P.3d 201, 203-205 (Ariz.App.Div. 1, 2006); State v. Provost, 490 NW2d 93 (Minn. 1992); State v. Orso,789 SW2d 177 (Mo App 1990); State v. Drennan, 101 P.3d 1218 (Kan. 2004); State v. Lockhart, 830 A.2d 433 (Me. 2003); Com. v. Sepulveda, 855 A.2d 783 (Pa. 2004).

[7] Contrary to Appellant's argument at pages 17-18 of his brief, Seibert and Navy are not applicable since Appellant's initial statements were made after a knowing and intelligent waiver of Miranda and were voluntarily given. Further, Seibert and Navy are factually distinguishable because in those cases, the police deliberately failed to give Miranda warnings during the initial round of questioning with the intent to elicit a confession. See Missouri v. Seibert, 542 U.S. 600, 610-11 (2004); State v. Navy, 386 S.C. 294, 303, 688 S.E.2d 838, 842 (2010). Here, Miranda warnings were promptly given after Appellant was taken into custody. In any event, Appellant never brought these cases to the attention of the trial judge and never

15). Therefore, the trial judge's admission of all of Appellant's statements should be upheld.

II. Assuming the issue was preserved, the statements made by the victim to the nurse were properly admitted under the medical diagnosis or treatment exception; but, in any event, the statements were admissible as prior consistent statements, were merely cumulative to three other prior consistent statements admitted into evidence, and were not prejudicial to Appellant because their admission could not reasonably have affected the verdict.

Issue Preservation

Appellant now argues that the trial court erred in admitting hearsay statements of the victim through the testimony of a nurse because the statements related to the kidnapping rather than the sexual assault for which, he contends, the victim was "being treated." Respondent submits that this issue is not preserved for review since, as discussed in detail below, this argument was not raised or ruled upon by the trial court. See, e.g., State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) ("For an issue to be properly preserved it has to be raised to and ruled on by the trial court.") (emphasis added) (citation omitted); see also State v. Adams, 332 S.C. 139, 144-145, 504 S.E.2d 124, 126-27 (Ct. App. 1998) (argument not preserved for appeal where precise issue not presented to the trial court) (citations omitted); State v. Caldwell, 378 S.C. 268, 283, 662 S.E.2d 474, 482 (Ct. App. 2008) (a party may not argue one ground at trial and another on appeal); State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial.").

During the nurse's testimony, the solicitor asked for a "motion outside the jury" and the jury was excused. (R. p. 744, lines 1-9). The solicitor then advised the court that

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argued that the statements made in Appellant's subsequent taped interview were tainted because of earlier violations. (See R. p. 175-80).

the State wished to introduce, under the medical diagnosis and treatment exception to the hearsay rule, testimony from the nurse regarding what the victim told her in the hospital. (R. p. 744, lines 10-16). The solicitor stated that the defense was apparently under the impression that if such testimony came in, it would open the door to testimony that the victim told the nurse she had sex with her boyfriend that night. (R. p. 745). The solicitor argued that such testimony was not admissible under the rape shield law. (R. p. 745, lines 7-10). In response, defense counsel argued that the solicitor "is not allowed to ask this witness about part of what a person told her but not allow the entirety of the discussion between the parties." (R. p. 745, lines 16-22). Defense counsel further argued that the victim's statements to the nurse about bruising from having sex with her boyfriend also had to do with medical treatment and diagnosis and should therefore also be allowed in under this hearsay exception. (R. p. 746, lines 17-22). Defense counsel noted that the testimony from the nurse regarding the victim's summary of events is "something the victim's already testified to; something that Detective Abercrombie's already testified to." (R. p. 747, lines 5-8).

After the judge indicated that he would allow the nurse's testimony pursuant to the medical diagnosis and treatment exception, defense counsel inquired if he would be permitted to ask the nurse about the other statements made for the purpose of diagnosis and treatment, since it went to the "medical history." (R. p. 748, lines 4-15). The judge ruled that the additional testimony sought by the defense was not permitted because of the rape shield statute. (R. p. 748, line 18 – p. 749, line 12). Defense counsel persisted: "Well, what the Court is indicating is that it is going to allow the State to do is publish part of a document, thus prohibiting the jury from having the full benefit of the entire

statement made." (R. p. 749, lines 13-21). Defense counsel continued to argue that it was misleading to the jury and improper for the State to put in this "obviously cumulative testimony" since it was not the victim's complete statement made for the purposes of medical diagnosis and treatment. (See R. p. 750, lines 8-24). After the court finally ruled, "[w]ell, I'm not going to let it in. I think it's protected by the rape shield," defense counsel stated, "[a]ll right. Note the objection for the record, Your Honor." (R. p. 751, lines 1-7).

Appellant never argued to the trial judge that the testimony being offered from the nurse did not qualify as non-hearsay pursuant to the medical diagnosis and treatment exception. In fact, defense counsel apparently agreed that such testimony *did qualify* under that exception and that other testimony also qualifying under that exception should come in as well. (See R. p. 746, lines 17-22; p. 748, lines 4-15; p. 750, lines 8-24). At best, counsel's objection was premised upon the rule of completeness. See Rule 106, SCRE. Thus, although Appellant objected to the court disallowing testimony about the victim having sex with her boyfriend the same night, Appellant never argued that the nurse's testimony did not qualify under the medical diagnosis and treatment exception and never made the specific argument now presented on appeal. (See R. p. 744-51). Therefore, this issue is not preserved for review. See State v. Stahlnecker, *supra*; I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.") (citation omitted).

Argument

Assuming the issue had been preserved for review, the trial judge properly ruled that the nurse's testimony was admissible under the medical diagnosis and treatment exception. When the jury returned to the courtroom after the defense's "completeness" objection, the nurse testified that, when preparing to perform a rape kit on a victim, it was standard protocol to ask for a summary of what happened to the victim in order to determine whether or not the victim needs to be treated for any other kind of physical problems and to determine how to treat the victim. (R. p. 743, lines 1-6; p. 752, lines 7-10). She stated that this information would be documented in the medical records. (R. p. 743, lines 7-8). The nurse testified that in this case victim told her that around 3:15 or 3:30 am, she and two boys were sitting outside of the house where they were staying when a guy drove by in a car. (R. p. 752, lines 11-22). The victim explained that the guy got out of the car and told them to take everything out of their pockets and then told the victim to get in the car; she did so and then he drove off with her. (R. p. 752, line 23 – p. 753, line 3). The nurse testified that there was no one in the room with the victim when she provided this summary of events and that she did not have access to a phone or to anyone else at that time. (R. p. 753, lines 13-25).

Rule 803(4), SCRE, provides, in pertinent part, that "[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." Here, the nurse's testimony established that it was standard medical protocol to obtain a summary of events from the victim in order to determine whether or not and how to treat

the victim for *any physical problems* – not just the rape – that she may have suffered as a result of the incident. Appellant's assertion that the victim was being treated only for rape, therefore, is inaccurate. Consequently, Appellant's argument should be rejected.

In any event, even if the trial judge erred in admitting the nurse's testimony under the medical diagnosis and treatment exception, the nurse's testimony was nevertheless admissible as a prior consistent statement. Appellant consented to the playing of the deposition of Lance O'Bryant, the early-morning jogger who provided assistance to the victim. (R. p. 566-67; see State's Exhibit # 11). In this deposition, Mr. O'Bryant testified that the victim told him she had been kidnapped, that someone stopped her and her friends and asked for directions, that the person, whom she thought had a gun, told her friends to get on the ground and for her to get in the car. (R. p. 556, line 10 – p. 557, line 1). The court ruled that this testimony regarding the victim's statements to Mr. O'Bryant were admissible as prior consistent statements in light of Appellant's insinuation that the victim colluded with her boyfriend and fabricated the story. (R. p. 556-64).

Appellant did not appeal the trial judge's ruling regarding the admission of the prior consistent statement introduced through the deposition of Lance O'Bryant. Therefore, the Court's ruling that prior consistent statements of the victim were admissible at trial is now the law of the case. See, e.g., Ex parte Morris, 367 S.C. 56, 65, 624 S.E.2d 649, 653-54 (2006) (citations omitted) (an unappealed ruling, whether right or wrong, is the law of the case and requires affirmance). The victim's statements to the nurse were, therefore, admissible as prior consistent statements. (See R. p. 556-64).

Further, as Appellant acknowledged at trial, the victim's statements to the nurse were nearly identical, and merely cumulative, to three prior consistent statements of the victim already admitted into evidence.[8] (See R. p. 747, lines 5-8 & lines 22-23). The first prior consistent statement was the one introduced through the deposition of Lance O'Bryant, as discussed above. The second prior consistent statement of the victim came from Officer Downey. Downey testified, without objection, that after he located the victim and picked her up, she told him that she and her two male friends were in front of the house where she was staying when a car pulled up and the gentleman in the car started speaking to them, asking where he was. (R. p. 577, lines 2-11). Shortly thereafter the man got out of the car and told them all to empty their pockets, which they did, and then the man told the two boys to walk away and told the victim to get in the car with him. (R. p. 577, line 19 – p. 578, line 6). The third prior consistent statement was introduced through Detective Abercrombie. Abercrombie testified, also without objection, that he interviewed the victim at the hospital around lunchtime the next day, and she told him that she and her two male friends were standing out in front of the house where she was staying when a black male drove up and began asking for directions. (R. p. 607, lines 2-22). The black male subsequently exited his vehicle and told all three of them to get on the ground and told them to hand over their money. (R. p. 608, lines 1-6). After they emptied their pockets, the black male told the victim's two friends to walk away but told the victim to get into the vehicle with him. (R. p. 608, lines 7-19).

Although the three prior consistent statements contained varying degrees of detail, the victim's statements to the nurse were nearly identical, and therefore merely

[8] Of course, these three prior consistent statements were also cumulative to the victim's own trial testimony and to the trial testimony of the victim's friend. (See R. p. 246-50; p. 474-78).

cumulative, to these three prior consistent statements. Therefore, the admission of the victim's statements to the nurse could not reasonably have affected the verdict. See In re Care and Treatment of Harvey, 355 S.C. 53, 63, 584 S.E.2d 893, 897 (2003) ("Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it "'could not reasonably have affected the result of the trial.'") (citation omitted).

Appellant's argument under Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010), and State v. Whisonant, 335 S.C. 148, 515 S.E.2d 768 (Ct. App. 1999), both dealing with Rule 801(d)(1)(D), SCRE, is misplaced because neither case addressed the medical diagnosis or treatment exception or the issue of prior consistent statements under Rule 801(d)(1)(B). Moreover, in Smith and Whisonant, the corroborating testimony found to be impermissible pertained directly to the *sexual assault allegations*, and the testimony was corroborative of the *victim's* testimony. In this case, the prior consistent statements at issue had nothing to do with the sexual assault allegations; therefore, the statements could not have improperly corroborated the victim's sexual assault allegations.[9] Furthermore, the statements at issue in this case were not cumulative *only* to the victim's testimony, but were cumulative to *three other prior consistent statements* already in evidence. Smith and Whisonant are simply not applicable. Accordingly, since Appellant could not possibly have been prejudiced by the alleged erroneous admission of the nurse's testimony, reversal is not warranted. See In re Care and Treatment of Harvey, *supra*, at 62, 584 S.E.2d at 897.

[9] In that vein, Appellant was in fact *acquitted* of the sexual assault charges. (R. p. 897, line 25 – p. 898, line 7).

CONCLUSION

For the reasons discussed above, Respondent requests that this Court affirm Appellant's conviction and sentence.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

September 10, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable Larry B. Hyman, Jr., Circuit Court Judge
Appellate Case No. 2010-178286

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

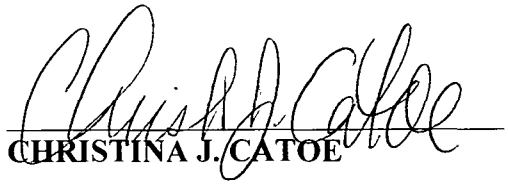
v.

MARK ELLIOTT,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's August 13, 2007 **Order on Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings**.



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AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **BREEN R. STEVENS**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **10th day** of **September, 2012.**

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SWORN to before me this 10th day of September, 2012.

Donna D'Alessio

Notary Public for South Carolina.
My Commission Expires: 3/21/2018