STATE OF SOUTH CAROLINA
In The Supreme Court

On Writ of Certiorari to the Court of Appeals
Appeal from Newberry County
Court of General Sessions

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 2017-UP-324 (S.C. Ct. App. filed 8/2/17)
Appellate Case No. 2017-002206

THE STATE,

RESPONDENT,

v.

MARIO VALERIO GONZALEZ HERNANDEZ,

PETITIONER.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

Post Office Box 516
Greenwood, SC 29648
(864) 942-8800

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

STATEMENT OF ISSUES ON APPEAL

I.

The Court of Appeals correctly found Petitioner's argument concerning the trial judge's admission of DNA evidence establishing the presence of male DNA on Victim's nightgown and that Petitioner could not be included nor excluded as a contributor was not preserved for appellate review. Error preservation concerns aside, the expert testimony regarding the DNA test results was properly admitted because it was relevant and its probative value was not substantially outweighed by its prejudicial effect.

II.

Petitioner's argument concerning Investigator Goodman's testimony about his interview at the police station is not preserved for appellate review. Even if Petitioner's argument was preserved, the trial judge properly admitted Investigator Goodman's testimony where his statements were not hearsay because Corporal Alvarado was merely acting as a conduit for Petitioner. Furthermore, any alleged error is harmless, as Investigator Goodman's testimony was cumulative to Corporal Alvarado's testimony about the interview with Petitioner.

STATEMENT OF THE CASE

Petitioner was indicted during the August 2013 term of the Newberry County Grand jury for one count of first-degree criminal sexual conduct with a minor (2013-GS-36-0498) and one count of second-degree criminal sexual conduct with a minor (2013-GS-36-0500). Petitioner proceeded to a jury trial from October 27-29, 2014, in Newberry, South Carolina. At the conclusion of trial, he was found guilty of second-degree criminal sexual conduct with a minor. He was sentenced by the Honorable Eugene C. Griffith, Jr. to imprisonment for a period of sixteen years.

On August 2, 2017, the South Carolina Court of Appeals unanimously affirmed Petitioner's conviction and sentence. State v. Hernandez, Op. No. 2017-UP-263 (S.C. Ct. App. filed August 2, 2017). Petitioner subsequently submitted a petition for rehearing, which was denied on September 22, 2017. Petitioner subsequently submitted a Petition for Writ of Certiorari. On March 28, 2018, this Court granted certiorari. Petitioner timely submitted his Brief of Petitioner. This Brief of Respondent follows.

STATEMENT OF FACTS

Sometime in 2009, Mother and her children moved into the home of Pastor Mario Hernandez, the petitioner in this case. App. p. 162. Mother has one daughter, Victim, and one son, S.M.. S.M. was born in 2007 and was two years old at the time Mother moved in to Petitioner's home. App. pp. 184-185; App. pp. 162-163. Victim was born on May 7, 2001. App. p. 163. On June 29, 2013, Mother entered Victim's bedroom and turned on the light to discover Victim lying on the floor without underwear on. App. pp. 170-171. When Mother entered the room, Victim got up quickly and went into the bathroom. App. p. 171. Petitioner was also in the room and got up from the floor very quickly. App. p. 171. Mother testified when she entered the room, Petitioner was on top of Victim. App. p. 175. Mother noticed Petitioner's penis was exposed. App. p. 175.

When Victim came out of the bathroom, Mother asked her what was happening. App. p. 171. Victim began crying and told Mother that Petitioner abused her. App. p. 171. Mother testified Petitioner told her he had touched and had relations with Victim. App. p. 172. Mother told Petitioner she was going to call the police. App. p. 172. Petitioner began crying and threatened to kill himself. App. p. 172. Petitioner took away Mother's cell phone, causing Victim to run to a neighbor's house to call the police. App. p. 172.

Around twenty minutes later, the police arrived. App. p. 177. Mother called Liz Rivera, a neighbor who lives a few blocks away, to help interpret when the police arrived. App. p. 178. Mother does not speak much English. App. p. 178. Rivera is self-employed as an interpreter. App. p. 234. Andrew Rowe, the first responding officer, testified he was met by Mother and Rivera when he arrived at the home. App. p. 215. Rivera interpreted for Mother. App. p. 217. When he arrived at the scene, Mother and Rivera told Rowe Petitioner locked himself in the

home and had made statements he wanted to kill himself. App. p. 217. After a few minutes, Petitioner exited the home. App. p. 218.

Once Petitioner was outside of the home, investigators placed him into handcuffs for an investigative detention. App. p. 219. Rivera assisted investigators in interpreting for Petitioner. App. p. 219 After having his rights explained to him by Rivera, Petitioner agreed to speak with investigators. App. p. 221. Petitioner admitted to inappropriately touching Victim on several occasions. App. p. 224. Specifically, Petitioner stated, "She walks around the house, has been walking around the house in provocative clothing which enticed him. He said that he was a pastor, but he was also a man. And he responded to that enticement as any man would but denied actual sexual intercourse with the juvenile." App. pp. 224-225. Following these statements, law enforcement took Petitioner into custody. App. p. 226.

Investigator Kevin Goodman spoke with Petitioner at his office at the Sheriff's Department around noon on July 1st. App. p. 302. Petitioner was transported to Goodman's office by Corporal Boris Alvarado. App. p. 306. Alvarado is fluent in Spanish and often assists in investigating cases involving Spanish-speaking individuals. App. p. 359. Spanish is Alvarado's native language, as he grew up in Bolivia. App. p. 358. Alvarado testified that while Petitioner is from Guatemala, he did not have any difficulty understanding the Guatemalan dialect. App. p. 362. Petitioner provided both oral and written statements to Alvarado and Goodman. App. p. 362. While Petitioner made his oral statements, Alvarado interpreted for Goodman. App. p. 363. Alvarado stated:

> During the interview, Mr. Hernandez made the statement that around December 2012 is when the touching had started. Also, it was also said that during that time, it was more confidence built into it. And there was inappropriate touching in the private parts. And also it was said to, that there was no intercourse or penetration. But it was, and he also said that at all times he had his clothes on.

App. p. 364.

Petitioner's written statement read:

> 9/2010, they came to, I live in my house. There was, unintelligible, I too play with the child, the female child. They played. Okay. They went to go live in Atlanta in December 2011 and they returned July 2012. . . There began a game with the little girl when a man and part of the boy. . . The man and the father of the boy went. From then on, there was a confidence with the child, the female child. She played a lot. She touched my buttocks or my butt. She bit my cheeks. Even, unintelligible, in the night was doing tickling on the, repeat please? Was doing tickling on the shoulders, the ribs and the legs. All of this was given with some, with the mother or in front her, there was no sexual act. Saturday 30 was getting my clothes and went to leave some clothes, went into the room to leave my clothes. Of the mother, I asked her first and told her in, unintelligible, in her room or in the room. And when she, the female child, was in the bathroom and the door open, another thing, too, when I lay down or when I laid myself down on the sofa the female girl always threw herself on top of me. Again, in front of her mother and now she accuses me that, that I have raped her child, her female child, but I have not done that to her.

App. pp. 375-376.

Victim testified at trial. App. pp. 466-491. Victim described sex as, "when a male puts his part in the female's part." App. pp. 477-478. Victim stated Petitioner began sexually abusing her when her family moved into Petitioner's home. App. p. 478. Victim was eight or nine years old at the time the abuse began. App. p. 478. Victim disclosed that she never told her mother when the abuse began because Petitioner told her that her mother would not believe her. App. p. 479. Mother, a diabetic, was hospitalized on several occasions. App. p. 479. When Mother was at the hospital, Petitioner would sexually abuse Victim. App. p. 480.

Victim testified she remembered what happened on the evening of June 29, 2013. App. p. 470. Victim was lying in bed with her pajamas on when she heard Petitioner come into her room. App. p. 474. Petitioner ripped the covers off the bed and threw Victim on the floor. App. p. 475. Petitioner then crawled on top of Victim and raped her. App. p. 475. At the time of the assault, Mother was in S.M.'s room. App. p. 481. Mother eventually walked into Victim's bedroom,

turned on the lights, and saw Petitioner on top of Victim. App. p. 481. Victim stated that she was scared so she ran into the bathroom. App. p. 481. When Victim emerged from the bathroom, she told Mother that Petitioner assaulted her. App. p. 483. When the police arrived, Victim spoke with them and fully described Petitioner's abuse. App. pp. 484-485. Victim also travelled to the hospital where she was physically examined. App. p. 485.

Donna Debrew, a forensic nurse examiner at Palmetto Health Richland, examined Victim in the early morning hours of June 30, 2013. App. pp. 392, 396-397. At the time of the examination, Victim was complaining of vaginal discomfort. App. p. 399. Victim disclosed to Debrew she had been sexually assaulted. App. p. 399. Debrew noticed bruising and discoloration of Victim's hymen. App. p. 401. Debrew testified her findings during the physical examination were consistent with some sort of trauma. App. p. 405.

ARGUMENT

I.

The Court of Appeals correctly found Petitioner's argument concerning the trial judge's admission of DNA evidence establishing the presence of male DNA on Victim's nightgown and that Petitioner could not be included nor excluded as a contributor was not preserved for appellate review. Error preservation concerns notwithstanding, the expert testimony regarding the DNA test results was properly admitted because it was relevant and its probative value was not substantially outweighed by its prejudicial effect.

Relevant Facts

During his opening statement, Defense Counsel argued:

> So, evidence, don't be fooled, please by the word. It is only as good as it is trustworthy. Did the police take a few shortcuts here. They seized things from [Petitioner's] house without a warrant, things that we could probably keep out if we wanted to. The police failed to follow the law such so we could do that perhaps. They handcuffed [Petitioner], all the alleged victims and witnesses are outside and yet they go in the house without a warrant and they take what they want. The photographs, clothes, a blanket. We won't object when that evidence comes in because whatever evidence there is helps us. . . . [Petitioner] gives them, voluntarily without a warning, gives them a swab of his cheek, saliva inside, a buccal swab. And you will hear that happen. Now, we are not going to object to any of that. We may object if they bring in an expert from SLED who says anything other than what is in the report which is inconclusive. We tested, we tried all of our test and the best we can say is, we don't know. Now, the test ought to do what their name employs, they should pass or fail, they should win or lose or they should tell you something about the information they are seeking. These tests are inconclusive and if the State tries to put up a chart that shows a bunch of numbers it is not going to change the fact that the experts say inconclusive. So we would object to some chart that has only going to be met to try to confuse people. There is going to be very little detail, there is going to be items of evidence that they took such as a blanket that were analyzed. They say these rapes happened for four years on this blanket, they take the blanket and then they don't analyze it. They take very limited brief statements about this four-year ongoing pattern. There is little or no investigation and when the reports and accusations come, you will see I think, from unreliable sources.

App. pp. 157-59.[1]

---

[1] In contrast, the solicitor's mention of the DNA evidence in his opening statement was slight, stating only, "There is some, a little bit of forensic evidence from the bodily fluid sample taken and analyzed by the State Law enforcement They did the male DNA profile so you will hear testimony from the DNA analyst So we have got

During Defense Counsel's cross-examination of Investigator Goodman, he extensively interrogated him regarding the State's collection of DNA evidence. In trying to assert the crime scene was contaminated, Defense Counsel asked Investigator Goodman whether all the investigators walking through the scene left DNA as they were walking through the house. App pp. 325-26. Defense Counsel also asked why the crime scene was not analyzed for DNA. App. p. 337. Defense Counsel inquired whether a blanket from the crime scene went to SLED for DNA testing. App. p. 337. Defense Counsel also asked whether Petitioner was cooperative in supplying a DNA sample. App. p. 350. Defense Counsel subsequently asked whether Victim and S.M. would have different, "Y-DNA stuff." App pp. 350-51.

During a recess prior to Donna Debrew's testimony, Defense Counsel offered an objection to the State's DNA evidence, stating:

> Your Honor, I understand that this afternoon the State intends to call a DNA expert from SLED and we don't contest their qualifications. The results, Your Honor, will be as I understand from their providing the discovery that, that they performed various tests. And on some of the items they saw signs that they, that prompted them to submit it to the DNA analyst who would be testifying. And that person, ultimately, can neither included nor exclude the defendant. The results are "inconclusive". And, Your Honor, I just got this citation overnight. And but, basically, other courts have held, Your Honor, that if the DNA profile developed from the crime scene evidence, if it's inconclusive then it is therefore evidence of nothing.

App. p. 384.

The trial judge responded, "Well, here's what the State is trying to do. I know exactly what they're doing. If they don't call the DNA experts who ran the test, then you're going to say well they didn't even run the test and they don't want to be caught in that box." App. pp. 384-385. The trial judge added, "The State has not mentioned yet one single thing about DNA and y'all have brought it up every chance you got is you collect evidence for DNA testing." App. p.

---

independent evidence, why would a male DNA profile be developed on a young girl." App. p. 148-49. The solicitor made no arguments concerning an inconclusive DNA result.

385. The trial judge added, "If you hadn't keep bringing it up, I'm probably with you," App. p. 385. Defense Counsel responded:

> In any event, Your Honor, **at the appropriate time** I'd like to object to the Court, I'd like to ask the Court to not allow the State to introduce the DNA report and a chart of an inconclusive sample. Because it invited, the jury becomes amateur analysts by making their own comparison especially when the State highlights particular consistencies between the evidence profile and the defendant's profile that are scientifically inconclusive.

App. p. 386. The trial judge then asked the solicitor what he intended to do with the DNA report. App. p. 386. The solicitor responded the cutting from the nightgown revealed a presence of male DNA. App. p. 386. Importantly, during argument by both the solicitor and Defense Counsel, the trial judge noted, "[t]his is a motion *in limine*." App p. 387. Defense Counsel later argued:

> 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.

App. p. 390.

The trial judge ruled:

> 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.

App. p. 391. Defense Counsel responded, "I understand your ruling and at this point my only objection remaining would be I just don't want them to put in a chart that I will submit doesn't assist the trier of fact and understanding it." App. p. 391. Defense Counsel elaborated "So it's not the testimony I object to but the chart." App. p. 391. Defense Counsel, in discussing the results of the DNA test, repeatedly assured the jury he was not going to object to its admission, seemingly implying the results helped Petitioner's case because it was inconclusive.[2]

After Donna Debrew's testimony, the State subsequently called Jennifer Bartman, a forensic scientist who performs DNA analysis in the SLED DNA case work department. App. p. 428. At trial, Bartman was qualified as an expert in DNA analysis. App. p. 430. Bartman performed DNA analysis on four pieces of evidence recovered at the scene: buccal, vaginal, and rectal swabs from Victim obtained during the sexual assault examination by Debrew; a buccal swab from Petitioner; a cutting from Victim's underwear; and a cutting from the chest area of Victim's nightgown. App. p. 431-432. Bartman performed two types of DNA testing on the items in this case, STR testing and YSTR testing. App. p. 435. With STR analysis, the analyst examines fifteen different locations on the DNA as well as a gender marker which indicates whether the DNA is male or female. App. p. 434. In YSTR analysis, the analyst focuses only on the male DNA that is present. App. p. 435. Bartman testified she performed the YSTR test on the nightgown because there was some male DNA present. App. p. 450. Bartman further testified the testing for acid phosphate was positive. The presence of acid phosphate is indicative of semen. App. p. 450.

Bartman explained the YSTR profile developed from the cutting from Victim's nightgown is a mixture of two individuals and, "No conclusive statement can be made regarding the inclusion or exclusion of Petitioner as a contributor to this mixture." App. p. 443. Bartman

[2] Petitioner subsequently objected to the admission of the non-exclusion DNA results App. p 384.

later elaborated, "we can either include someone, we can exclude someone or there can just not be enough information to make a determination whether he can be included or excluded from a profile." App. p. 448. The solicitor later asked Bartman, "Now we are all looking at it and we see a lot of these numbers that are matching one another. Why can't you make a conclusion, just not reaching your level of confidence I guess." Bartman responded:

> Because it is a mixture. We typically look at mixtures more cautiously, it is as cut and dry as it is them, or it is not them. So, in this case there are some numbers that are around the parenthesis, so there are some lower level DNA there which you can see. This one and some of the other ones. So there is just enough, there is not conclusively say that he cannot be excluded from that profile.

App. p. 449.

During Bartman's testimony, Defense Counsel objected to the chart of the DNA profiles being made an exhibit on the grounds that it did not tell the trier of fact anything. App. p. 438. The trial judge responded, "I agree with you if she is just giving the numbers. If she is giving the results and she said, not included or excluded" App. p. 439. Defense Counsel responded "Well, I don't have a problem with that-I have a problem with the --." App. p. 439. Defense Counsel continued to elaborate on his desire to have the chart excluded from evidence. App. p. 439. The chart was ultimately not entered into evidence. App. p. 441. Significantly, Defense Counsel did not offer any objection regarding Bartman's testimony that Appellant could not be included nor excluded as a contributor to the DNA mixture. See App pp. 436-42.

Discussion

Petitioner asserts the Court of Appeals erred in affirming the trial judge's admission of DNA evidence establishing the presence of male DNA on Victim's nightgown and that Petitioner could not be included nor excluded as a contributor because the evidence was irrelevant and invited the jury to speculate about its meaning. Petitioner's argument lacks merit.

Initially, the Court of Appeals properly found Petitioner's argument was not preserved for appellate review because he failed to offer a contemporaneous objection. Also, as was noted by the trial judge, Petitioner opened the door to the admission of the DNA evidence after exhaustively discussing the physical evidence and testing results while criticizing law enforcement during his opening statement. Furthermore, the DNA evidence was certainly relevant in the case and the high probative value of the evidence was not substantially outweighed by the risk of unfair prejudice. Finally, any alleged error is harmless because the State presented overwhelming evidence of Petitioner's guilt.

Standard of Review

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing an evidentiary ruling, the appellate court gives great deference to the trial judge because the reception or exclusion of evidence is a matter left largely to the sound discretion of a trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) ("[D]eference is due to the trial court's admission of the evidence."). An appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006) ("The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice."). "An abuse

of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

Importantly, "[a] trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593-94 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." Id. at 358, 543 S.E.2d at 594.

Error Preservation

As a threshold matter, the Court of Appeals properly found Petitioner's argument is not preserved for appellate review where he failed to offer a contemporaneous objection on the correct grounds. As was correctly noted by the Court of Appeals, Defense Counsel sought a preliminary, *in limine* ruling concerning the DNA test results. Defense Counsel stated, "Your Honor, at the appropriate time I'd like to object to the Court, I'd like to ask the Court to not allow the State to introduce the DNA report and a chart of an inconclusive sample." App. p. 386. The trial judge also noted, "This is a motion in limine." App. p. 387.[3] However, when the evidence was actually admitted, Defense Counsel objected only to the admission of the chart of

[3] Petitioner seems to assert the motion to exclude the DNA results in this case was not a motion *in limine* because it was not a pretrial motion. See Brief of Petitioner p. 14. This is simply not correct While many motions *in limine* are made pretrial, a motion *in limine* can be made any time prior to the introduction of evidence in order to receive a preliminary ruling on the matter. See State v Floyd, 295 S.C 518, 520, 369 S.E.2d 842, 843 (1988) (The purpose of a motion *in limine* is to prevent disclosure of potentially prejudicial matter to the jury.), Kelly v. New West Federal Savings, 56 Cal. Rptr 2d 803, 808 (Cal. Ct. App. 1996)("Motions *in limine* are a commonly used tool of trial advocacy and management in both civil and criminal cases. Such motions are generally brought at the beginning of trial, although they may also be brought during trial when evidentiary issues are anticipated by the parties") (internal quotations and citations omitted).

the DNA results. Defense Counsel's failure to contemporaneously object renders this issue unpreserved for appellate review. See State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) ("[M]aking a motion *in limine* to exclude evidence. . . . does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced."). Because there was an intervening witness between the motion *in limine* and the admission of the DNA test results, Defense Counsel was required to make a contemporaneous objection in order to preserve the issue. Instead, Defense Counsel objected only to the admission of the chart of the DNA test results and, when the trial judge mentioned the test results themselves, stated "Well, I don't have a problem with that-I have a problem with the --," before continuing to expound upon his desire to have the chart excluded from evidence. App. p. 439.

Not only did Defense Counsel fail to offer an objection on the same grounds raised on appeal, Defense Counsel's statement that he "did not have a problem" with the results of the DNA test coming in amounted to a waiver of any issue with the admission of the results of the DNA test. See State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) ("Dicapua's sole objection to the videotape came in the form of a motion in limine to suppress the videotape because of its lack of audio. Once the State moved to enter the videotape into evidence and publish it to the jury, however, Dicapua's counsel specifically stated he had 'no objection.' We find this amounted to a waiver of any issue Dicapua had with the videotape."). See also State v. Brown, 402 S.C. 119, 125, 740 S.E.2d 493, 496 (2013) (finding an appellate argument involving a jury instruction to be unpreserved because defense counsel explicitly stated he had no objection to the trial judge's instruction). Defense Counsel therefore waived any

objections to the DNA results themselves when he objected contemporaneously and only offered an objection to the admission of the chart of the DNA results.

Defense Counsel Opened the Door to the Admission of the DNA Evidence

First, the trial judge properly pinpointed a critical portion of the issue as, "the State has not mentioned yet one single thing about DNA and y'all have brought it up every change you got is you collect evidence for DNA testing." App. p. 385. The trial judge added, "If you hadn't keep bringing it up, I'm probably with you." App. p. 385. The trial judge correctly recognized that Defense Counsel, through his opening statement and his lengthy questioning regarding DNA evidence during the testimony of Investigator Goodman, opened the door to the admission of the DNA results.

An appellant cannot complain of prejudice from evidence he has brought before the jury. State v. Brown, 344 S.C. 70, 543 S.E.2d 552 (2001). A party will be unsuccessful in opposing the admission of evidence if that party was the one who opened the door. State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991). "It is widely recognized that a party who raises a subject in an opening statement 'opens the door' to admission of evidence on that same subject by the opposing party." People v. Davis, 312 P.3d 193, 196 (Colo. App. 2010). See also United States v. Croft, 124 F.3d 1109, 1120 (9th Cir. 1997) (permitting the bolstering of testimony of a witness who was branded a 'liar' in opening statement).

In his opening statement, Defense Counsel offered various critiques to the State's investigation, most notably that the State "took shortcuts" and there was "little or no investigation" with respect to various facets of DNA testing. Defense Counsel also included a lengthy discussion of the results of the DNA testing of Victim's nightgown, referring to them as the "inconclusive results" repeatedly. During his cross-examination of Investigator Goodman,

Defense Counsel continued his assault on the State's investigation regarding DNA testing, asking questions about the collection of DNA evidence, whether certain items were tested, and whether Victim and her brother had different, "Y-DNA stuff."

Due to Defense Counsel's repeated allusions to an inadequate investigation by law enforcement and mentions of the inconclusive results of the DNA test, it became incumbent upon the State to produce that evidence to: 1) rebut Defense Counsel's assertions that the State investigation was poor, and 2) provide the results of the DNA test so the jury heard the full context of the evidence, including the fact that there was male DNA present on Victim's nightgown, the sample was positive for acid phosphate, and Petitioner could neither be included nor excluded as a contributor. After Defense Counsel repeatedly mentioned the DNA results, the jury would undoubtedly infer the State was hiding unfavorable evidence if the results of Petitioner's DNA test were not ultimately admitted.

In his brief, Petitioner concedes, "inconclusive results can become relevant if the defendant challenges the thoroughness of the investigation or otherwise raises the issue of whether the DNA test was performed at all." Br. of Appellant p. 8. Petitioner avers he, "never made such an argument and never opened the door to the DNA evidence." Br. of Appellant p. 8. Petitioner's argument ignores the reality of Defense Counsel's conduct at trial. From the beginning of trial, Defense Counsel criticized the State's investigation and raised the specter of DNA tests that were either not performed at all, or DNA tests that were inconclusive. It was thus necessary for the State to present evidence that, while not every item was tested for DNA, some items were tested, and the testing revealed the presence of male DNA, the sample was positive for acid phosphate, and Petitioner could neither be included nor excluded as a contributor.

The DNA Evidence was Highly Relevant and the Probative Value was not Substantially Outweighed by Unfair Prejudice

Second, outside of the fact that Defense Counsel opened the door to the admission of the DNA evidence, thus making the admission of the evidence necessary because Defense Counsel made it relevant, the evidence was independently relevant and the probative value of the DNA result was not substantially outweighed by the risk of unfair prejudice.

All relevant evidence is admissible, and only relevant evidence should be admitted at trial. Douglas, 369 S.C. at 430, 632 S.E.2d at 848; see Rule 402, SCRE ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible."). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

However, even if relevant, evidence must be excluded from trial if its probative value is **substantially outweighed** by the danger of unfair prejudice. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); see Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). The determination of the probative value of evidence relative to its potential prejudicial effect must be based on the entire record and the result generally hinges on the facts of each particular case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

Probative value is the measure of the importance of a piece of evidence's tendency to prove or disprove some fact or issue relevant to the outcome of a case. State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012), rev'd on other grounds, 409 S.C. 524, 763 S.E.2d 22 (2014). Unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000). Significantly though, unfair prejudice does **not** mean damage to a defendant's case that results from the legitimate probative force of a piece of evidence. State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998). That is true because all evidence introduced by the State in a criminal trial is meant to be prejudicial to the defendant. Id. It is only unfair prejudice that must be avoided. Id.

In the present case, the trial judge properly found the DNA evidence admissible, as it was certainly relevant. The DNA evidence demonstrated that male DNA was found on the Victim's nightgown, the DNA tested positive for acid phosphate, an indicator that semen was present, and Petitioner could not be excluded as a contributor.[4] This evidence is absolutely relevant in a CSC prosecution, especially where Petitioner was the only adult male living in the home, Mother testified she walked into Victim's room and saw Petitioner on top of Victim with his penis exposed, and Victim testified Petitioner forced her onto the floor and sexually abused her. The evidence was also relevant to demonstrate law enforcement had fully investigated the case by conducting DNA testing. Law enforcement witnesses testified several items were taken for DNA testing, thereby making the results of that test a relevant matter that needed to be presented to the jury.

[4] Perhaps the most probative aspects of the sample were the presence of Y-DNA and that the sample tested positive for acid phosphate. The State would note that admitting evidence that the Victim's nightgown tested positive for male DNA and that the sample was positive for acid phosphate, a substance found in semen, without providing accompanying statistical context would have resulted in more prejudice to Petitioner The statistical result, thus helped Petitioner rather than prejudiced him.

Additionally, the DNA evidence's significant probative value was not outweighed by the risk of unfair prejudice whatsoever, much less substantially outweighed. All the prejudice stemming from the admission of the DNA evidence was a result of the legitimate probative force of the evidence. "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." Gilchrist, 329 S.C. at 630, 496 S.E.2d at 429. While the DNA evidence was certainly indicative of Petitioner's guilt, it did not suggest a decision on an improper basis.

Any Alleged Error in Petitioner's Case is Harmless

Even if the trial court somehow erred in admitting the DNA evidence, any error would be harmless in light of the overwhelming evidence of Petitioner's guilt. Error is harmless when it could not reasonably have affected the result of the trial. State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990). The key factor for determining whether a trial error constitutes reversible error is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012) (citations and internal quotations are omitted). The alleged error in this case did not contribute to the jury's verdict whatsoever, as the jury was presented with overwhelming evidence of Petitioner's guilt. The jury heard unrebutted testimony from Victim who described years of sexual abuse at the hands of Petitioner. The jury also heard Mother recount walking into her daughter's room and discovering Petitioner on top of Victim with his penis exposed. Petitioner also made multiple statements to investigators where he admitted that he touched Victim inappropriately. Furthermore, the jury heard testimony from Donna Debrew that Victim's injuries were consistent with trauma and Victim's hymen was bruised and discolored when she

was examined the evening of Petitioner's arrest. The jury, therefore, was presented with overwhelming evidence proving Petitioner committed criminal sexual conduct in the second degree.

Error is further harmless where, even if this Court were to agree with Petitioner that a non-exclusion result is "evidence of nothing," Petitioner could not conceivably be prejudiced by the admission of evidence that did not establish anything. In Clark v. State, 96 A.3d 901 (Md. Ct. Spec. App. 2014), a case Petitioner cited at the Court of Appeals but interestingly did not cite in his brief to this Court, the Maryland Court of Special Appeals examined a case similar to the current case. The Clark Court examined a case where DNA analysis of a handgun yielded a mixed DNA profile from at least two contributors and the defendant could neither be included nor excluded as a possible contributor. Id. at 906. The Maryland Court of Special Appeals noted, "the inconclusive DNA test result on the gun may well have been relevant to show that the State performed a DNA test at all." Id. at 907. The Court ultimately concluded that even if the evidence was irrelevant, its admission could only be harmless, stating, "the DNA results, therefore, were evidence of nothing vis-à-vis the appellant's criminal agency." Id. at 908. The Clark Court also rejected the same prejudice argument raised by Petitioner, noting that the appellant's argument that the jury might have placed undue weight on the fact the appellant could not be excluded as a contributor was illogical because the jury was also told the appellant could not be included as a contributor. Id. Any error is thus harmless. Petitioner's conviction and sentence should be affirmed.

II.

Petitioner's argument concerning Investigator Goodman's testimony about his interview at the police station is not preserved for appellate review. Even if Petitioner's argument was preserved, the trial judge properly admitted Investigator Goodman's testimony where his statements were not hearsay because Corporal Alvarado was merely acting as a conduit for Petitioner. Furthermore, any alleged error is harmless, as Investigator Goodman's testimony was cumulative to Corporal Alvarado's testimony about the interview with Petitioner.

Relevant Facts

As discussed in Respondent's Statement of Facts, Petitioner made oral and written statements to Investigator Goodman and Corporal Alvarado at the police station. App. p. 360. Alvarado interpreted Petitioner's oral statements for Investigator Goodman. At trial, Investigator Goodman testified:

> I picked up from his conversations on the incident night about the inappropriate touching. And I asked him when had that started, and he said around December 2012. We talked about the inappropriate touching and he said, you know, they would touch each other on their private parts and their clothes would always be on. The mama was present. He spoke of her sitting on top of him while sitting on the couch. But I took that to be her sitting on his lap or something, not necessarily him laying down on top of her or her laying, him laying down and she's on top of him, but sitting on his lap. Those kind of things, sitting on his lap. Inappropriate touching, the clothes would always be on. We talked about the night in question, June 29th, June 30th and he said that he was in her room sitting on the bed. She was in the bathroom. Their clothes were on. The light was on and mom came in and nothing happened and he didn't put his penis inside of her. That's all he would say.

App. p. 307.

During trial, Corporal Alvarado testified:

> During the interview, Mr. Hernandez made the statement that around December 2012 is when the touching had started. Also, it was also said that during that time, it was more confidence built into it. And there was inappropriate touching in the private parts. And also it was said to, that there was no intercourse or penetration. But it was, and he also said that at all times he had his clothes on. And some of that stuff that I can recollect from.

App. p. 364.

During a pretrial hearing, Defense Counsel stated, "Judge, if we may briefly discuss the oral statements made to Officer Alvarado." App. p. 127. Defense Counsel argued:

> In Goodman's Office, Your Honor, again this was coming through Alvarado who said he hadn't used Spanish in 14 years since the year 2000; that he didn't know a simple word such as merry-go-round. It's a kid's word. Your Honor, I just think the oral translation of the private parts things that he says that my client said are not retorted in any form, not able to disprove that other than questioning him, I think that those things are outside the scope of the handwritten declaration that Your Honor said can come in.

App. p. 127.

The trial judge ruled:

> Well, I think that Alvarado is qualified to interpret Spanish because it's his native language, his first language. He grew up in Bolivia. Learned English when he got to New York. Certainly it's subject to cross examination. He can translate the Spanish that he understands. I don't think he would be allowed to translate the Spanish prose. I think that's kind of outside the scope of his expertise, but I think clearly he's demonstrated to me a comfort zone in speaking Spanish as well as translating it to, I'm sorry, interpreting it to English so he would be allowed to repeat the Spanish spoken by Mr. Hernandez back to Officer Goodman. I don't want him, Officer Goodman to be allowed to say his version of what was said in Spanish that he could not understand. So Goodman can't say anything that was told by Hernandez. He can say I was present. He looked lucid. He looked comfortable. He didn't appear threatened. He can describe his observations, but two people downstream translating Spanish to English, English to Goodman's English, no, I'm not going to allow that.

App. pp. 257-258.

The trial judge clarified, "Goodman can't tell what Alvarado said to him." App. p. 258. At trial, the issue of exactly what Investigator Goodman could testify to arose again. App. pp. 258-259. The State sought to proffer Investigator Goodman's testimony as to the contents of Petitioner's oral statement. App. p. 264. The trial judge stated, "Sure, let's do that." App. p. 264. Following the proffer of Investigator Goodman's testimony, the trial judge found, "I think under

402 and 403 and completeness that he be allowed to testify to what Alvarado said and then to transmit - - the translation of the written statement, I think you get it all." App. p. 291. Defense Counsel responded, "All or nothing." The trial judge then stated, "Or it's going to really confuse the jury because the testimony has been inconsistent thus far and this albeit, his version of what he was told through a translator and through a victim is yet again consistently inconsistent. I think you get it all. I think he's got to be able to say it all and you get to cross-examine just like you have." App. pp. 291-292. Defense Counsel responded, "I just don'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." App. p. 292. The trial judge then stated:

> 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's 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.

App. p. 292.

The following morning, the trial judge asked the parties whether they wanted to put something on the record. App. p. 293. Defense Counsel stated "I just wanted to understand about the cross-examination and you have been very patient with me. It is my understanding is that the ruling is, I can cross-examine him on the deficiencies on his investigation. Whatever and that somehow opens the door for these statement that were not otherwise recorded." App. p. 293.The trial judge responded:

> After I heard the proffer it seems to me that the completeness of the interviews of the victim, the victim's mother, and the defendant all are so intermixed with the translation issue and the credibility of the translators or interpreters, whichever the proper were we educated on, that everything should come just so the jury gets a complete story of the multitude of facts that they are to consider. I don't think it would be fair to the jury to preclude that. I have heard too much and too many variations to exclude it.

App. pp. 293-294.

The trial judge elaborated:

> After I have heard it I think they get to have it. But if I change my mind, I don't think it is unduly prejudicial to your client. I think it is more probative to the jury to hear the whole story and if they do then you have got full reign to cross-examine at your discretion, whatever issues you want. I am not going to limit you on certain thing. I think I changed my mind, particularly this, first we were talking and the proffer was about the statement of the defendant and after I heard the statements and the variations of the victim and the victim's mother. That is when I believe under the probative value of what he was told by your client is probative toward all the issues that are subject to the jury's evaluation.

App. p. 295. Defense Counsel then noted, "And so it is kind of a ruling on completeness and res gestae. There is a complete understanding of that." App. p. 295. The trial judge responded, "And probative prejudicial, the jury needs to hear everything. The negative remarks as far as the fact finders, I don't think this puts any more prejudice towards him by the version that the detective heard. To me it is all very similar but I think the jury needs to hear it all." App. p. 295.

Discussion

Petitioner asserts the trial court erred in admitting Investigator Goodman's testimony about his interview with him on July 1, 2013, where Corporal Alvarado translated Petitioner's statements for him. Petitioner contends Investigator Goodman's testimony was inadmissible hearsay not subject to any exception. This argument is without merit, as Corporal Alvarado served only as a language conduit between Goodman and Petitioner. Furthermore, as was found by the Court of Appeals[5], any alleged error is harmless as Goodman's testimony was merely cumulative to Alvarado's testimony of the exact same course of events. Finally, the jury was presented with overwhelming evidence of Petitioner's guilt.

[5] The Court of Appeals declined to address the merits of Petitioner's argument, finding, "even assuming arguendo that the trial court erred in admitting Investigator Goodman's testimony regarding what the interpreter was told by [Petitioner] in Spanish, we find any such error is harmless beyond a reasonable doubt." App. p. 642.

Initially, this Court need not reach the merits of Petitioner's argument, as it is not preserved for appellate review. If an error is not presented to and ruled upon by the trial judge, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). The appellate court will not consider any issues or arguments that were not presented to or passed upon by the trial judge, and an appellant is limited on appeal solely to the grounds raised during trial. State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970); see State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."). Petitioner's objection to the evidence, and the trial judge's ruling, seem to focus on the rule of completeness, relevance, and the probative value and prejudicial effect of the evidence. There was no objection raised, and no ruling by the trial judge, as to whether Investigator Goodman's testimony constituted inadmissible hearsay. As such, Petitioner's argument is not preserved for appellate review.

Even if Petitioner's argument was preserved, the trial court properly admitted Investigator Goodman's testimony, as Corporal Alvarado's statements did not constitute inadmissible hearsay. Corporal Alvarado was merely acting as a language conduit between Petitioner and Investigator Goodman. As Petitioner concedes in his brief, a number of courts have recognized that interpreters serve only as a language conduit between the defendant and the interpreter. See e.g. United States v. Vidacak, 533 F.3d 344 (4th Cir. 2009); United States v. Shibin, 722 F.3d 233 (4th Cir. 2013); United States v. Ushakow, 474 F.2d 1244 (9th Cir. 1973); United States v. Nazemian, 958 F.2d 522 (9th Cir. 2000); United States v. Martinez-Gaytan, 213 F.3d. 890 (5th Cir. 2000); Correa v. Superior Court, 27 Cal. 4th 444, 40 P.3d 739 (Cal. 2002), Lopez v. State, 281 Ga. App. 623, 636 S.E.2d 770 (Ga. Ct. App. 2006).

In United States. v. Vidacak, 553 F.3d 344 (4th Cir. 2009), the Fourth Circuit found translated statements of the defendant during an interview with law enforcement were not inadmissible hearsay. The Court ruled the translations did not create double hearsay because the translator was merely a "language conduit" and not a declarant under the hearsay rule. Id. at 352. The Court noted some courts have carved out a narrow exception that is applied "where the particular facts of a case cast significant doubt upon the accuracy of a translated confession." Id. The Court further noted four factors have been identified by courts to determine whether this exception applies: 1) which party supplied the interpreter; 2) whether the interpreter had a motive to mislead or distort; 3) the interpreter's qualifications and language skills; and 4) whether actions taken subsequent to the conversation were consistent with the statements translated. Id.

In weighing the aforementioned four factors, the situation at hand is analogous to that in United States v. Romo-Chavez, 681 F.3d 955 (9th Cir. 2012). In Romo-Chavez, ICE Special Agent Simboli questioned Romo-Chavez. Id. at 958. Simboli required a translator to facilitate conversation with Romo-Chavez, so Customs and Border Protection Officer David Hernandez acted as a translator to facilitate conversation between Romo-Chavez and Simboli. Id. Simboli testified he recognized proper nouns such as "Phoenix" and "Dillard's," but otherwise depended on Officer Hernandez's translation. Id. In weighing the factors, the Court found the first factor weighed slightly in favor of Romo-Chavez. Id. at 959. The Court stated, however, "though never dispositive, this factor would have greater weight if Officer Hernandez had 'acted as both a translator and a federal law enforcement officer,' by 'ask[ing] the types of questions he 'normally would ask' in his capacity' as a government agent." Id. at 359-60. The Court noted Officer Hernandez did not initiate any of the questions with Romo-Chavez. Id. at 360. The Court found the second factor weighed in favor of the government, as the district court found Officer

Hernandez had no motive to distort the translation. Id. The Court declined to adopt a presumption that a public servant is inherently biased. Id. The Court also found the third factor weighs in favor of the government. Id. The Court emphasized Officer Hernandez grew up in El Paso speaking Spanish, studied it in school, spoke it at home with his wife, and conducted interviews in Spanish on a regular basis. Id. The Court found the fourth factor was not relevant in the case, as Officer Hernandez took no further action after the translation. Id. After weighing the factors together, the Court concluded the district court did not err in concluding Officer Hernandez served merely as a language conduit for Romo–Chavez. Id. at 961.

Here, as in Romo-Chavez, the four factors establish the narrow exception to the conduit rule does not apply. Regarding the first factor, as in Romo-Chavez, the fact that the State supplied the interpreter should not weigh too heavily against the State. Corporal Alvarado was acting only as an interpreter and not acting as an investigator, as he asked no questions of his own and simply translated Investigator Goodman's statements to Petitioner and vice-versa. As to the second factor, there is absolutely no evidence in the record that Alvarado had any intent to mislead or distort. As noted in Romo-Chavez, there is no presumption that a law enforcement officer is inherently biased. Furthermore, the statement itself belies the contention that Alvarado intended to exaggerate Petitioner's culpability, as logic dictates he would have created a much more damaging admission than the one relayed. As to the third factor, Alvarado was adequately qualified to translate in Spanish for Petitioner and Investigator Goodman. Alvarado's native language is Spanish, as he was born in Bolivia. Due to his Spanish fluency, Alvarado often assists the department in cases involving Spanish-speaking individuals. Furthermore, Alvarado testified he clearly understood the Guatemalan dialect spoken by Petitioner. As to the fourth factor, Petitioner's subsequent written statement is fairly consistent with his oral statements.

While the written statement does not include the words "private parts" or "inappropriate touching," the statement discussed Victim's confidence, Victim touching Petitioner's buttocks, tickling him, and biting his cheek, Victim throwing herself on top of him, and how he played with Victim. This statement is consistent with Petitioner's oral statements which contained references to Victim's confidence and admissions that inappropriate touching occurred. The weighing of the four factors does not reveal a situation where the particular facts of a case cast significant doubt upon the accuracy of a translated confession. Goodman's statements were thus admissible, as Alvarado was acting merely as a language conduit.

Furthermore, any alleged error in this case is harmless, as Investigator Goodman's testimony was merely cumulative to the testimony of Corporal Alvarado. When other properly admitted testimony reveals essentially the same information, the jury's exposure to improper evidence is harmless. State v. Brown, 344 S.C. 70, 75, 543 S.E.2d 552, 554-55 (2001). Alvarado's testimony concerning Petitioner's oral statements was indisputably admissible under Rule 801(d)(2), SCRE, as an admission by party-opponent. Petitioner argues Alvarado's testimony provided slightly less detail than Goodman's, however the substance of the two statements is essentially identical. In both Goodman's and Alvarado's accounts of Petitioner's statement, Petitioner admits inappropriate touching of Victim's private parts, Petitioner stated the touching began in December of 2012, Petitioner asserts he and Victim's clothes stayed on during the touching, and there was never any penetration. The substance of Alvarado's and Goodman's statements is thus nearly identical. Therefore, Goodman's testimony was merely cumulative to the admissible testimony of Alvarado. Also, as was noted in the opinion of the Court of Appeals, the evidence that Petitioner admitted to inappropriately touching Victim but denied having

sexual intercourse with her was already admitted through the testimony of Liz Rivera and Officer Rowe. See App. pp. 642-43.

Also, error is further harmless because the jury was abundantly aware of the fact that Investigator Goodman did not speak Spanish and was testifying solely based on Corporal Alvarado's translations, which minimized any prejudice that could have resulted from the testimony.[6] See State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006) (finding the improper admission of hearsay evidence to be harmless where the hearsay evidence was impeached by the jury's exposure to the fact the evidence was not based on any first-hand knowledge). Because Investigator Goodman testified at trial and as a result of his testimony the jury was completely aware of the hearsay nature of the statements, any potential prejudice was substantially diminished.

As discussed in Respondent's Issue I, any alleged error is also harmless due to the overwhelming evidence of Petitioner's guilt. Petitioner's conviction and sentence should be affirmed.

[6] In addition to Investigator Goodman's testimony, which made it clear he did not speak Spanish and Corporal Alvarado was translating for him, Defense Counsel cross-examined Investigator Goodman on the point. Defense Counsel asked Investigator Goodman, "Are you aware what dialect [Petitioner] speaks," and "do you speak any Spanish at all?" App. p. 329. Investigator Goodman replied, "I can count to ten." App. p. 329. Investigator Goodman was very candid about his lack of Spanish fluency, making it apparent to the jury that his testimony was based solely on Corporal Alvarado relaying Petitioner's statements to him.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

BY: _____
V. Henry Gunter, Jr.
Bar # 102259

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

June 18, 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

On Writ of Certiorari to the Court of Appeals
Appeal from Newberry County
Court of General Sessions

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 2017-UP-324 (S.C. Ct. App. filed 8/2/17)
Appellate Case No. 2017-002206

THE STATE,

RESPONDENT,

v.

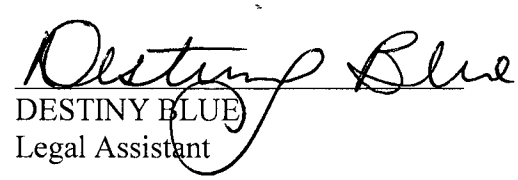
MARIO VALERIO GONZALEZ HERNANDEZ,

PETITIONER.

PROOF OF SERVICE

I, Destiny Blue, certify that I have served the Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Graham R. Billings, Esquire, 1320 Main Street, Columbia, South Carolina 29201 & Robert M. Dudek, Esquire, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.
This 18th day of June, 2018.



DESTINY BLUE
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727