

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM NEWBERRY COUNTY
Court of General Sessions
Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2013-GS-36-00500
Appellate Case No. 2014-002376

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S.C. SUPREME COURT

The State, ... Respondent,
v.
Mario Valerio-Gonzalez Hernandez, ... Petitioner.

APPENDIX
VOLUME TWO

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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1 A That's correct. And these are the only items that I
2 tested.

3 Q And you can't say it is not his DNA either though,
4 can you?

5 A That's correct.

6 Q Okay. Thank you.

7 THE COURT: You may step down. Call your next
8 witness.

9 MR. SCOTT: The State calls MINOR , she is
10 my last witness, Judge.

11 MINOR , being
12 first duly sworn, testified as follows:

13 DIRECT EXAMINATION

14 BY MR. SCOTT:

15 Q MINOR , state your name for the record?

16 A MINOR .

17 Q MINOR , where are you living now.

18 A North Carolina.

19 Q You are living up in North Carolina you said?

20 A Yes.

21 Q And Greensboro?

22 A Yes.

23 Q But you used to live down here in Newberry, right?

24 A Yes.

25 Q And [REDACTED], do you remember that address?

1 A Yes.

2 Q Do you remember living there in 2013, the year of
3 2013?

4 A Yes.

5 Q What grade are you in?

6 A Eighth grade.

7 Q And how old are you right now?

8 A 13.

9 Q June 29th of last year how old would you have been?

10 A 12, around there.

11 Q When is your birthday?

12 A [REDACTED].

13 Q This was June 29th, a month after that, you just
14 turned 12?

15 A Yes, sir.

16 Q And then you turned 13 this May?

17 A Yes, sir.

18 Q Now that house, [REDACTED], you said you
19 lived there. Did your mother live there?

20 A Yes, sir.

21 Q Your little brother?

22 A Yes.

23 Q Who else lived there June 29th, 2013?

24 A Mario Gonzales.

25 Q Who is he?

1 A A pastor.

2 Q You see him here?

3 A Yes.

4 Q Can you point to him, please.

5 A (The witness points to the defendant, Mario
6 Gonzales.)

7 Q It was just the four of you living there at that
8 time?

9 A Yes, sir.

10 Q Salo Martinez, who is that?

11 A I can't remember.

12 Q You don't know who that is?

13 A Well, I can't remember.

14 Q Does that name sound familiar?

15 A Yes.

16 Q Do you know who your little brother's father is?

17 A No, sir.

18 Q On June 29th it was just the four of you living
19 there, Mario Hernandez, you, your mother and your little
20 brother, Miguel?

21 A Yes, sir.

22 Q And were you going to school in Newberry at the time?

23 A Yes, sir.

24 Q Which room did you sleep in at that house?

25 A I slept, the room beside the door, the front door was

1 there and then the living room and then the side of the
2 living room that was the big bed, room for me.

3 Q Who slept in that room with you?

4 A Sometimes my mom.

5 Q This is a real bad drawing I did.

6 MR. PINILLA: I object to the drawing, it is not in
7 evidence.

8 MR. SCOTT: It is strictly demonstrative evidence.

9 THE COURT: I am going to allow it.

10 Q If that is the front door, you said your room was,
11 was it to the right or the left?

12 A To the right.

13 Q And I have written, what is your mother's name?

14 A Tomasa.

15 Q I wrote Tomasa and MINOR , you said sometimes you
16 would sleep in that room?

17 A I slept in the room there always.

18 Q Okay.

19 A All the time.

20 Q Did I get it right, I had Miguel to the left of the
21 front door in that room?

22 A No, the living room was like right here and then you
23 went right there and then it was right here--

24 THE COURT: We can't hear that.

25 MR. SCOTT: Speak up.

1 Q You were saying, I wrote Miguel who is your brother,
2 I have him to, if you walk in the front door, his room is
3 to the left?

4 A Yes, sir.

5 Q And then I had Mario Hernandez being in the back left
6 corner of the trailer?

7 A Yes, sir.

8 Q And did he have that room to himself?

9 A Yes, sir.

10 Q Did your brother, Miguel, have his room to himself?

11 A Yes, sir.

12 Q And you and your mother would share this room?

13 A Yes, sir.

14 Q And I have this picture, it is State's number 1.
15 That was the bed that you and your mother used, was that
16 your room?

17 A Yes, sir.

18 Q Do you remember, I am talking about June 29th of last
19 year, do you remember that day?

20 A Kind of.

21 Q You know why you are here in court today?

22 A Yes, sir.

23 Q Do you remember that night, what was kind of
24 happening in your house?

25 A Yes, sir.

1 Q Who was home?

2 A It was my brother, me, my mom and Mario.

3 Q And do you remember your brother going to his room to
4 go to bed?

5 A Yes, sir.

6 Q Where was your mother?

7 A She was in the room with my brother before, after she
8 told me to go take a shower.

9 Q That was a Saturday night or do you remember?

10 A I can't remember.

11 Q But you were going to take your shower, did you end
12 up taking a shower?

13 A Yes, sir.

14 Q And when you came out of the shower what do you
15 remember? You said Miguel, your brother, was in his
16 bedroom going to sleep?

17 A Yes, sir.

18 Q And where did you say your mother was?

19 A In the room with my brother.

20 Q Is that something that she normally does to help him
21 go to sleep?

22 A Normally.

23 Q Does your mother get headaches?

24 A Yes, sir.

25 Q She has diabetes?

1 A Yes, sir.

2 Q Do you remember whether her head was hurting that
3 night or not?

4 A Yes, sir.

5 Q Tell me why was she sleeping in your brother's room
6 that night?

7 A She said that her head hurt a lot and that she was
8 going to go lay down with my brother. And then she told
9 me to go take a shower and that is when I went to take a
10 shower.

11 Q You know why she wasn't laying in her bed?

12 A No, sir.

13 Q Does she normally lay with your brother to help him
14 go to sleep?

15 A Not normally.

16 Q You remember that night she was in Miguel's room?

17 A Yes, sir.

18 Q Do you remember what was Mario Hernandez doing that
19 night?

20 A I can't remember.

21 Q You said you did go take a shower?

22 A Yes, sir.

23 Q And was, I guess this was nighttime if Miguel was
24 going to bed, do you remember that?

25 A Yes sir, it was nighttime.

1 Q You don't remember what time it was, do you remember?

2 A No, sir.

3 Q What happened after you got out of the shower?

4 A I remember that I got out of the shower and then I,
5 like got changed and brushed my teeth and I laid down in
6 my bed.

7 Q That bed right there?

8 A Yes, sir.

9 Q Did you put your pajamas on, is that what you said?

10 A Yes, sir.

11 Q What is State's number 4?

12 A My nightgown.

13 Q This nightgown is something you wear to bed?

14 A Normally.

15 Q I got to ask you some embarrassing questions. You
16 can answer them and it is okay to be a little bit
17 embarrassed. But did you put your underwear on too?

18 A Yes, sir.

19 Q And then did you get in bed?

20 A Yes, sir.

21 Q And were your lights on or off?

22 A Off.

23 Q Were there any other lights on in the house?

24 A Door from the kitchen.

25 Q And was there anything going on in the living room?

1 A I can't remember.

2 Q You got in your bed with your pajamas and what was
3 the next thing you remember happening?

4 A I really can't remember.

5 Q Do you remember Mr. Hernandez coming into your room?

6 A Yes, sir.

7 Q Had you fallen asleep when he came in or do you
8 remember him walking into the door?

9 A I remember him, well, I think I was asleep but I
10 could hear like footsteps.

11 Q And what did he do when he came into your room?

12 A I can't remember.

13 Q Are you embarrassed today, are you nervous?

14 A Yes, sir.

15 Q Okay. Just take a deep breath and look at me and
16 talk to me, okay.

17 A Yes, sir.

18 Q Do you recognize that blanket on your bed?

19 A No, sir.

20 Q You don't recognize that blanket?

21 A No, sir.

22 Q Do you recognize that bed?

23 A Yes, sir.

24 Q Do you remember lying on the floor that night?

25 A Yes, sir.

1 Q Why were you lying on the floor?

2 A I don't remember the details.

3 Q Tell us what you remember, MINOR ?

4 A I remember that Mario walked in my bedroom and he
5 just like, I was sleeping and he woke me up. And I was
6 like, what is wrong. And then he just got like the cover
7 and just threw me to the ground.

8 Q And then what did he do?

9 A He raped me.

10 Q What does that mean?

11 A For like he got on top of me.

12 Q Did your underwear stay on?

13 A No, sir.

14 Q How did they come off?

15 A He took them off.

16 Q Did you want him to take them off?

17 A No, sir.

18 Q Did he take his pants down?

19 A Yes, sir.

20 Q MINOR , you know what sex is?

21 A Yes, sir.

22 Q It is okay to be embarrassed when you tell me this,
23 all right. What is sex?

24 A When you have, I don't know the fully meaning of it
25 but I just, like I just know when you have relationships

1 like sexual.

2 Q Okay. And do you know, do you know what a man's
3 private part is?

4 A Yes, sir.

5 Q Okay. And you know what a female's private part is?

6 A Yes, sir.

7 Q Did you see Mr. Hernandez's private part that night?

8 A I can't remember.

9 Q Had you ever seen it before?

10 A If I did I probably can't remember.

11 Q Why can't you remember?

12 A It was a long time ago.

13 Q What was he doing while he was laying on top of you?

14 A I can't remember. It was a long time ago.

15 Q Do you remember--

16 MR. MCMULLEN: May we approach, Your Honor.

17 THE COURT: Yes.

18 (Whereupon, a bench conference was held in the
19 presence of the jury but out of the hearing of the
20 jury.)

21 THE COURT: We are going to take a break, y'all go to
22 the jury room and we will have you right back. Don't talk
23 about the case.

24 (Whereupon, the jury was excused from open court for
25 a break.)

1 (Whereupon, a short break was taken.)

2 THE COURT: Let's bring the jury back in.

3 (Whereupon, the jury came into open court at
4 approximately 4:30 p.m.)

5 CONTINUE DIRECT EXAMINATION

6 BY MR. SCOTT:

7 Q Okay, MINOR, speak up so everyone can hear you.

8 You talked about being on the floor in your bedroom. Do
9 you remember when Mr. Hernandez came in?

10 A Yes, sir.

11 Q What do you remember?

12 A I remember that I was sleeping and he woke me up.

13 And I said, what was going on. And he didn't response, he
14 just got my arm and just like threw in the floor. After
15 he put the blanket and the, just the blanket in the floor.

16 Q And did you scream or anything?

17 A No, sir.

18 Q Do you know why you didn't scream?

19 A I don't know why.

20 Q Had you done this before?

21 A No, sir.

22 Q You had never had sex before?

23 A Well, yeah, but at force, not.

24 Q What is sex, you know what sex is?

25 A Yes, sir.

1 Q Tell me what it is, MINOR ?

2 A It is when a male puts his part in the female's part.

3 Q Inside the female's part?

4 A Yes, sir.

5 Q And have you ever done this?

6 A Not like, it is not the, like the only time, the
7 first time he done that to me.

8 Q When was the first time?

9 A When we moved in the house.

10 Q Do you know how old you were then?

11 A Around 8 or 9.

12 Q And what did he do to you when you were 8 or 9?

13 A I can't remember.

14 Q Has anyone ever, has any man ever put his part in
15 your part?

16 A Not before.

17 Q Has anyone done that to you before, has that happened
18 to you?

19 A No.

20 Q What do you mean it hasn't happened before?

21 A Like when, I mean it hasn't happened like when I was
22 1 or 2 or 3. It just started when I moved in.

23 Q What started?

24 A What started was he having sex with me.

25 Q And that was around 8 or 9, you said?

1 A Yes, sir.

2 Q And you said sex, that is putting a man's part inside
3 a girl's part?

4 A Yes, sir.

5 Q And did you tell your mother the first time it
6 happened?

7 A No, sir.

8 Q Why didn't you tell her?

9 A Because he threatened me.

10 Q How did he threaten you?

11 A Saying that she wasn't going to believe me.

12 Q Okay. Did you ever go to his church?

13 A Yes, sir.

14 Q What did he say about being a pastor?

15 A I don't know because my mom and him was talking and
16 that is when, I wasn't really listening to that.

17 Q Do you know, you said the first time is when you were
18 8 or 9. Do you know how many times that Mr. Hernandez had
19 sex with you after that?

20 A He did it constantly every time mom went to the
21 hospital..

22 Q And why would your mom go to the hospital?

23 A She had like a lot of headaches and her sugar was
24 down, like she had diabetes.

25 Q Okay. So she would have to go to the doctor a lot?

1 A Yes, sir.

2 Q And would, he would stay behind at the house when she
3 would go to the doctor?

4 A Yeah, like once he was done like dropping her off and
5 he will come back to the house and do what he did.

6 Q And where would that happen?

7 A That would happen sometimes in his bedroom or
8 sometimes in my bedroom.

9 Q And did it ever happen when your mom was home?

10 A No, sir.

11 Q You said it started when you were about 8 or 9?

12 A Yes, sir.

13 Q And in June of last year you were 12. So are you
14 saying he had been doing it for about four years?

15 A Yes, sir.

16 Q And you never told your mom about it?

17 A No, sir.

18 Q The night of June 29th when he put you on the floor,
19 you said he took your underwear off?

20 A Yes, sir.

21 Q What did he do with his pants or underwear?

22 A He like kept them on, half, like not the all the way
23 but just half.

24 Q Did you see his male part?

25 A No, sir.

ROA_0474

Appendix_0480

1 Q You didn't see it? Did he have sex with you that
2 night?

3 A Yes, sir.

4 Q And what does that mean?

5 A When the male part, the male part goes into a girl's
6 part.

7 Q He put his male part in your part?

8 A Yes, sir.

9 Q And what happened, where was your mother?

10 A She was in my brother's bedroom with my brother.

11 Q What did she do?

12 A Well, she asked him first what was going on and I was
13 in the bathroom. And then--

14 Q Now wait a minute. She was in the bedroom--

15 A With my brother.

16 Q And when Mr. Hernandez is laying on top of you, when
17 did she come into the room?

18 A When, she woke up to go to the bathroom in my
19 bedroom. So, like she walked to my bedroom and put on the
20 lights and then she saw what was going on. And I just ran
21 to the bathroom.

22 Q Why?

23 A Like I was scared.

24 Q What were you scared about?

25 A I just wasn't thinking, what was I going to do.

1 Q Did you think your mom was going to be mad at you?

2 A Probably.

3 Q Was Mr. Hernandez your mom's boyfriend?

4 A I really don't know.

5 Q Why did you think she was going to be mad at you?

6 A Because when I didn't tell her, I didn't tell her
7 anything of it. I thought she was going to be mad because
8 I never told her.

9 Q And little girls aren't suppose to do that?

10 A No.

11 Q What did you do in the bathroom?

12 A I just like, I put my underclothes, inner clothes
13 with my clothes on.

14 Q Inner clothes, is that like--

15 A --like my underwear.

16 Q You got dressed?

17 A Yes, sir.

18 Q Did you shut the door?

19 A Yes, sir.

20 Q Did you stay in there for a while?

21 A Yes, sir.

22 Q Could you hear what was going on outside?

23 A No, sir.

24 Q When did you come out?

25 A I came out when I was done like changing.

1 Q And what was going on when you came out?

2 A I just saw mom, I just saw my mom sitting on my bed
3 and Mario was on the other end of the bed. And my mom was
4 crying. That is when she asked me, what was going on.

5 Q What did you tell her?

6 A I didn't tell her until Mario left the room and then
7 I told her.

8 Q You told her what had happened?

9 A Yes, sir.

10 Q And did you tell her what you just told us in court?

11 A Yes, sir.

12 Q What was Mario doing when you saw him?

13 A Saw him what?

14 Q When you came out of the bathroom, what was Mario
15 Hernandez doing?

16 A He was telling my mom not to call the police.

17 Q Was he mad, was he sad, was he crying, was he
18 yelling, what was he doing?

19 A I really can't remember.

20 Q Do you remember when the police got there?

21 A Yes, sir.

22 Q Where were you when they got there?

23 A I was in Liz Rivera's car with my brother.

24 Q Who is Liz?

25 A The interpreter.

1 Q That is Liz right there?

2 A Yes, sir.

3 Q Do you remember when she got to the house?

4 A No, because I was like, I was at a neighbor's house.

5 Q What were you doing at the neighbor's house?

6 A I went to call the police.

7 Q Did your mother speak any English?

8 A Not fluently.

9 Q Okay. So you had to go call the police?

10 A Yes, sir.

11 Q Have you spoken English your whole life?

12 A Yes, sir.

13 Q And were you the one that was talking, well, Liz was

14 there. When the police got there did you talk to them

15 too?

16 A Not with Officer Rowe but with Officer, it was

17 another office. I really couldn't remember his name.

18 Q Kind of a big black guy?

19 A Officer Kevin.

20 Q Yes, is that who you are talking about?

21 A Yeah.

22 Q He showed up in the yard too?

23 A Yes, sir.

24 Q And did you get a chance to talk with him?

25 A Yes, sir.

ROA_0478

Appendix_0484

- 1 Q And what did you tell him?
- 2 A I told him what I said here in the court.
- 3 Q And did you remember taking a ride down to the
- 4 hospital that night?
- 5 A Yes, sir.
- 6 Q Do you remember having the exam?
- 7 A Yes, sir.
- 8 Q And do you remember talking to a nurse?
- 9 A Yes, sir.
- 10 Q Did you tell her what happened?
- 11 A Yes, sir.
- 12 Q And the exam wasn't very fun, was it?
- 13 A No, sir.
- 14 Q Okay. And when you went back to the [REDACTED]
- 15 address, did y'all have to move away from that?
- 16 A Not that exact day but we eventually had to move.
- 17 Q And how long have you been up in North Carolina? A
- 18 long time, not too long?
- 19 A Since August when we started school.
- 20 Q Do you like it up there?
- 21 A Yes, sir.
- 22 Q You said your birthday is [REDACTED], 2001?
- 23 A Yes, sir.
- 24 Q Where were you born?
- 25 A Atlanta, Georgia.

1 Q And where was your little brother born?

2 A Newberry, the hospital.

3 Q He was born in Newberry or Atlanta?

4 A Newberry.

5 Q So you two are American citizens, aren't you?

6 A Yes, sir.

7 Q Okay. Thank you. MINOR , they are going to ask you
8 some questions and just take a deep breath and answer
9 them. And don't be nervous, okay.

10 A Yes, sir.

11 CROSS-EXAMINATION

12 BY MR. PINILLA:

13 Q You have been living in North Carolina since August,
14 is that correct?

15 A Yes, sir.

16 Q Since you have been back here in Newberry where have
17 you been staying?

18 A At, in a hotel.

19 Q And who takes you to the hotel and to the courtroom?

20 A Liz Rivera.

21 Q Do you remember how long you lived at [REDACTED]
22 [REDACTED] ?

23 A No, sir.

24 Q Do you know when you moved in?

25 A No, sir.

1 Q Do you remember ever moving from that house where the
2 bedroom was to Atlanta?

3 A No, sir.

4 Q Did you ever go to school in Atlanta?

5 A Yes, sir.

6 Q Do you know how long you went to school in Atlanta?

7 A No, sir.

8 Q Do you remember how old you were when you went to
9 school in Atlanta?

10 A No, sir.

11 Q Do you remember what grade you were in when you went
12 to school in Atlanta?

13 A Sixth or seventh.

14 Q Sixth or seventh grade, you would be 11 or 12?

15 A Probably.

16 Q Now, did you ever tell your mom what was going on
17 back at [REDACTED] when you were in Atlanta?

18 A No, sir.

19 Q You never told her?

20 A No, sir.

21 Q Not once?

22 A No, sir.

23 Q Did you ever go to a counselor in Atlanta?

24 A No, sir.

25 Q Didn't see any therapist or anything?

1 A No, sir.

2 Q Did you ever get in trouble at school?

3 A Yes, sir.

4 Q What was that for?

5 A For hitting other people.

6 Q Hitting other people?

7 A Yes.

8 Q Did you ever lie in school?

9 A No, sir.

10 Q Have you ever told any lies?

11 A No, sir.

12 Q Do you know to call the police in case of an
13 emergency?

14 A Yes, sir.

15 Q Have you ever called the police before?

16 A Yes, sir.

17 Q Why did you call the police?

18 A I called the police, well once I called the police
19 because my mom was hitting me.

20 Q Your mom was hitting you?

21 A Yes.

22 Q You called the police?

23 A Yeah. I went to a neighbor's house and did call the
24 police.

25 Q So you would go to the neighbor's house sometimes?

1 A Yes, sir.

2 Q Why else would you call the police?

3 A I called the police when my mom told me to.

4 Q Did you ever call the police, do you remember calling
5 the police because you thought your mom was sick?

6 A If I can remember, probably I did.

7 Q Now, you said you called the police when your mom
8 would hit you, is that right?

9 A Yes, sir.

10 Q But you didn't call the police when something bad
11 happened with Mr. Hernandez or Mario?

12 A I called the police that day when my mom told me to.
13 But I called other times I didn't.

14 Q Okay. Do you remember who took you to Atlanta when
15 you moved there in the seventh grade?

16 A I think it was a taxi.

17 Q When you moved back from Atlanta do you remember
18 where you moved back to?

19 A I moved back to [REDACTED].

20 Q Did you ever tell your mom you didn't want to go
21 back?

22 A No, sir.

23 Q Did you, were you scared to go back?

24 A Yes, sir.

25 Q Why didn't you tell your mom?

1 A Because he had me threatened.

2 Q Even from Atlanta?

3 A No but I kept on remembering that if I told.

4 Q But you never told your mother in Atlanta though?

5 A No, sir.

6 Q Do you remember giving the police a written
7 statement?

8 A Yes, sir.

9 Q Do you remember saying that sometimes you lie?

10 A Yes, sir.

11 Q Why is that, MINOR ?

12 A Because, I really can't remember.

13 Q Okay. I beg the Court's indulgence. When you moved
14 to Atlanta do you remember who you lived with?

15 A My aunt.

16 Q Your aunt?

17 A Yes.

18 Q Did you ever tell your aunt what was going on with
19 you at [REDACTED]?

20 A No, sir.

21 Q Are you sure?

22 A Yes, sir.

23 Q I have to ask you some embarrassing questions and I
24 apologize. It will be really brief, okay.

25 A Okay.

1 Q Do you remember after what happened that night, you
2 went to the hospital to see a nurse?

3 A Yes, sir.

4 Q And the nurse asked you certain questions?

5 A Yes, sir.

6 Q Do you remember telling her that you yelled out for
7 your mother?

8 A If I did I can't remember.

9 Q Do you remember telling her that Mr. Hernandez put
10 his private part on your bottom?

11 A No, sir.

12 Q You never said that?

13 A No, sir.

14 Q No further questions.

15 THE COURT: Any redirect?

16 MR. SCOTT: Nothing further.

17 THE COURT: You can step down.

18 MR. SCOTT: Your Honor, the State rest.

19 THE COURT: All right, ladies and gentlemen, we are
20 done for the day. Can y'all be here early in the morning,
21 say 9:00. If we can do that. My expectation is that the
22 State is finished, the defense can decide tonight if they
23 are going to call some witnesses or not. We will start a
24 little earlier and we will get done tomorrow. So, you
25 still can't begin discussing the case until you hear what

1 is going to be presented and you get my instructions. So,
2 enjoy your evening, go buy your Halloween candy and see
3 you in the morning at 9:00.

4 (Whereupon, the jury is excused from open court for
5 the day.)

6 THE COURT: Y'all want to make your motions this
7 afternoon?

8 MR. MCMULLEN: Yes, sir.

9 THE COURT: All right.

10 MR. MCMULLEN: If it please the Court. Your Honor,
11 we are, as you know, are required to make a motion for a
12 directed verdict. And I would respectfully submit that
13 the jury has no choice but to, well, but the State has not
14 proved the elements of the offenses, at least not with
15 credible testimony. And so there hasn't been any physical
16 evidence connecting and so I would respectfully request a
17 directed verdict. And also renew all of my previous
18 motions.

19 THE COURT: All of your motions and the rulings are
20 consistently, were shown on the record renewed. And my
21 rulings consistently, whether they were granted or denied,
22 or republished. On your directed verdict, that is a
23 factual question. Both cases will go to the jury, your
24 motion for directed verdict is respectfully denied. I
25 will, I don't think it is a complicated case to write

1 instructions for. I guess I have had three or four since
2 July 4th. If y'all have something in particular y'all
3 want me to instruct let me see it early, in the morning.

4 MR. MCMULLEN: May I ask, we just, is the jury just
5 going to be asked to decide guilty or not guilty, guilty
6 or not guilty or is the State asking for lessor included.
7 Because the law, the CSC with a minor third is not a
8 lessor included offense of first or second.

9 MR. SCOTT: We were talking about that, I think Timmy
10 Rice got third as a lessor. And testimony, if they were
11 to believe his statement at the time where he says that
12 there was no penetration, I inappropriately touched her
13 but there was no penetration. There was testimony
14 regarding that. So, if they find there was no sexual
15 battery then I guess the argument would be they should
16 consider a CSC.

17 MR. MCMULLEN: Can I do a little research on that
18 overnight?

19 THE COURT: You may. It seems to me they would be
20 allowed to consider CSC third. But I may be wrong on
21 that.

22 MR. SCOTT: And then the only other thing, two other
23 things that really consent by the minor to sexual battery
24 are lewd act is not a defense. Something to that effect,
25 maybe age of consent in South Carolina, what that is.

1 What was that other, corroboration of a--

2 MR. DANIEL: 16-3-657, Your Honor, I think we have
3 used that before in these cases.

4 MR. SCOTT: That is the one where minor's--

5 THE COURT: I don't think that is, I have charged
6 them before but I don't think I need to charge it.

7 MR. SCOTT: There has been other corroborating
8 testimony.

9 THE COURT: The charge in the statute, I mean I can
10 charge all the statutes. In regard to this, the elements
11 are is what you got to prove. I don't have to prove what
12 you are going to prove. I don't have to instruct what you
13 are going to prove. I am not going to charge the
14 corroboration statute.

15 MR. SCOTT: That is all.

16 MR. MCMULLEN: I will look at the argument of the
17 lessor included.

18 THE COURT: We will do that early in the morning.

19 MR. MCMULLEN: Thank you.

20 THE COURT: Y'all get here about quarter till.

21 MR. SCOTT: We have got Ruby here, I don't really see
22 where we will need her tomorrow. So, I would ask, can we
23 go ahead and admonish his as far as his right, otherwise
24 we are going to have to bring her back tomorrow for that.
25 As far as his right to take the stand or not.

1 THE COURT: Sure. All right. If you will stand.
2 Ms. Stephens, you are still under oath. Will you
3 translate this for me, please.

4 (Whereupon, Ms. Ruby Stephens is the interpreter for
5 Mr. Mario Hernandez.)

6 THE COURT: Senor Hernandez, you have the right to
7 testify or not to testify in this trial on these two
8 indictments. If you wish to testify you may but it is
9 your decision, you do not have to testify and if you
10 choose to not testify I will instruct the jury that they
11 may not discuss your not testifying, I will tell the jury
12 they will have to decide your guilt or innocence on the
13 testimony the State has presented. I will also tell them
14 that they may not discuss at all your not testifying. Do
15 you understand your rights?

16 MR. HERNANDEZ: Yes.

17 THE COURT: Have you had enough time to discuss both,
18 with both of your lawyers these rights not to testify?

19 MR. HERNANDEZ: Yes, they will answer.

20 THE COURT: Okay. Now, but it is your decision to
21 testify or not and have you made that decision at this
22 time?

23 MR. HERNANDEZ: They answer for me.

24 THE COURT: No, no. It is his decision. That is
25 what the purpose of this conversation is. Senor, they can

1 provide advice and their opinion but it is his decision.

2 MR. HERNANDEZ: I will not testify.

3 THE COURT: All right, thank you very much. We are
4 done and off the record, see y'all in the morning about
5 quarter till.

6 (Whereupon, the trial will resume the next morning at
7 8:45 a.m.)

8 October 30, 2014.

9 THE COURT: All right, we are back on the record. My
10 gut feeling is charge first, second, don't charge third
11 unless you want it. That is how we did Timmy Rice's, he
12 asked for it and the State didn't care and consented to
13 it. That is how we did it.

14 MR. MCMULLEN: We would rather not. I think that one
15 argument is that the State, when they did codify it made
16 it, gives the ABHAN and all of that, they said this is
17 lessor included, this is lessor included and this one.

18 THE COURT: I think it was but it is not now.

19 MR. MCMULLEN: But the three cases kind of say that
20 there is an element test and that the third degree has an
21 element that the other two don't.

22 THE COURT: I don't like three complications of the
23 law that I understood quite well. Ms. Georgia, how many
24 do we lack?

25 BAILIFF: They are all here.

1 THE COURT: Are you ready to go?

2 MR. DANIEL: Do we need to look at the instructions,
3 Your Honor.

4 THE COURT: We have agreed on them.

5 MR. DANIEL: Okay.

6 THE COURT: We are not doing the lessor included.
7 First and second. Are you closing?

8 MR. DANIEL: No sir, Dale is here.

9 THE COURT: We are just doing first and second, I am
10 not calling CSC third or lessor included. I think we did
11 on Timmy Rice, I think we agreed to it. Charles agreed he
12 wanted it, kind of, because of the statement. If you
13 remember, these statements of ideas or urges.

14 MR. SCOTT: I do.

15 THE COURT: Bring the jury in.

16 (Whereupon, the jury came into open court at
17 approximately 9:04 a.m.)

18 THE COURT: All right, folks, we will try to start
19 promptly. Y'all heard yesterday that the State rested.
20 After y'all left I heard some matters on the record. The
21 defense has informed me, you are still consistent with
22 what you informed me yesterday as to your position going
23 forward right now?

24 MR. PINILLA: That is correct, Your Honor.

25 THE COURT: All right, the defense is not going to

1 put forth anything and they don't have to. In all
2 criminal prosecutions the burden of proof is on the State.
3 A defendant charged with a crime doesn't have to prove
4 anything or disprove anything. So, with that being the
5 case the State will summarize its case first, the defense
6 will summarize its case last and then I will give you my
7 instructions on the law. So, the fact that the defense
8 puts up nothing you can take away nothing from that.
9 Y'all have got to consider the guilt or innocence based
10 upon what you have been presented, not on what you haven't
11 been presented. So, that being said, Mr. Scott is going
12 to summarize for the State and then Mr. Pinilla is going
13 to summarize for Mr. Hernandez. All right, Mr. Scott.

14 MR. SCOTT: Thank you, Your Honor, may it please the
15 Court.

16 THE COURT: Yes, sir.

17 MR. SCOTT: There really are wolves in sheep's
18 clothing that say, it is impairable, I guess, with
19 different origins. Matthew 7:15, beware of false prophets
20 that come to you clothed in skins of sheep that are rabid
21 wolves.

22 MR. MCMULLEN: Your Honor, I don't think he is
23 suppose to be quoting from the Bible during his closing.

24 THE COURT: I have heard it many times.

25 MR. SCOTT: Beware of wolves in sheep's clothing.

1 They are emotional manipulators. That is what the wolf in
2 the sheep's clothing is. They prey on our sensibilities,
3 they prey on our consciousness and they prey on our
4 emotional sensitivity. That is what the wolf in the
5 sheep's clothing is. An emotional manipulator that will
6 use his status, use his position in his community to his
7 advantage to take advantage of the vulnerable people. Is
8 that not what happens to Tomasa, is that not what happened
9 to MINOR . Tomasa is a mother of two small children,
10 speaks no English, is living here in Newberry County.
11 Finds herself living with a pastor, a respected Pastor
12 Hernandez. He has some status in that community as a
13 pastor. I am not going to tell you that Tomasa didn't
14 have some idea of maybe what was going on during that four
15 years. And, Tomasa, I don't blame you and I know you feel
16 guilt but it is not your fault. Did she maybe choose to
17 look the other way, maybe she did. But here she is, no
18 means of her own, living under the roof with a pastor,
19 does she choose to look the other way. Yes, she probably
20 does. And we are not trying to award her mother of the
21 year. Maybe she had some suspicions of what was going on,
22 probably so. But we are not here to blame her, it is not
23 Tomasa who is on trial this week, it is Mr. Hernandez.
24 Because people like Tomasa are a perfect target for the
25 wolf in the sheep's clothing. He begins an affair with

ROA_0493

Appendix_0499

1 her, at some point he begins grooming the daughter who is
2 an even easier target. And so why didn't they disclose
3 it, why didn't the little girl tell the police. We know
4 why. Because this is an 8, 9, 10, 11, 12-year-old girl,
5 they are not going to believe you, they are not going to
6 believe you over me. I am a pastor. A 12-year-old girl
7 and she is constantly being told this. And when they
8 catch you lying you are going to get in trouble. So, that
9 goes on for four years and Tomasa can kid herself maybe to
10 some degree and look the other way for some time but
11 finally the night of June 29th of last year she couldn't
12 look the other way anymore. That is when she sees it,
13 there it is right in front of you, you can't turn away at
14 that point. You can look the other way when you are
15 bouncing her on his knee. You can look the other way when
16 maybe he grabs her butt or kisses her on the lips. But
17 when you see your 12-year-old daughter on the floor with a
18 man on top of her, you can't look the other way any
19 longer. And that was this watershed moment, I guess, we
20 are talking about here. And so what are we here for. We
21 talked about a CSC first and a CSC second case. This is
22 rape, that is the way we talk about it in legal terms,
23 criminal sexual conduct with a minor, first degree. That
24 is for every time he had sex with her before she reached
25 the age of 11. She talked about it from the time she was

ROA_0494

Appendix_0500

1 8 or 9. So every time he penetrated her before she was
2 11, that is what the CSC first charge is. And then, of
3 course, when she is 12 years old, that is when Tomasa
4 walks in and actually witnesses it herself. That is the
5 CSC second charge. Once she obtains the age of 11 it
6 becomes a CSC second. Those are the two charges you are
7 here to decide. As I mentioned earlier, I am Dale Scott,
8 I am the prosecutor. And on TV they talk about district
9 attorneys and this and that. In our State we are called
10 Solicitors. What I do is I have to take these cases that
11 law enforcement makes and I have to sometimes get in front
12 of a jury like you guys and describe the case and tell you
13 why this person is guilty of a crime. I have got to do it
14 beyond a reasonable doubt. So what that means and they
15 are going to tell their version what reasonable doubt is
16 and finally the Judge is going to tell you his description
17 of reasonable doubt, is the only one that really matters.
18 But I have got to prove this case to you that leaves you
19 firmly convinced. When it is all said and done you have
20 got to be firmly convinced. It doesn't mean you can't
21 have a little doubt here or there because you can. I
22 can't ever prove to you a case where you, one-hundred
23 percent. I fill confident this way or that way
24 one-hundred percent, I wasn't there. Isn't that really
25 the only way you can be one-hundred percent sure, is if

ROA_0495

Appendix_0501

1 you are there and you are watching the thing happen. That
2 is not what reasonable doubt is. I have to firmly
3 convince you of this man's guilt. And I think we have
4 done that over the last few days. All of the evidence you
5 have heard, here is what the defense has admitted. Tomasa
6 wanted a U Visa, they tried to tell you what a U Visa was.
7 That was the one defense. She wants a U-V, that has
8 something to do with immigration and status as an American
9 citizen, or something. It was fairly unclear to me. But
10 that is what the defense, that was the first kind of
11 rabbit they wanted to chase. Don't think about that man
12 laying on the floor on top of this 12-year-old girl.
13 Let's talk about the U Visa, okay. Here is the problem
14 with that. Miguel and MINOR are American citizens. Why
15 do they need a U Visa. That doesn't make any sense. Liz
16 was there, she is a very close family friend. So, she
17 shows up and all Liz was doing that night was translating
18 for Tomasa to the police. That is not their version of
19 it. Liz Rivera has some agenda where she has concocted
20 this thing and some how collude with Tomasa. Does that
21 make any sense. What is the end game for Liz Rivera. I
22 never understood that. Let's talk about June 29th, let's
23 not talk about that man on top of that little girl in the
24 bedroom. Let's talk about Liz Rivera. And what about
25 everything is lost in translation. I wish you could take

ROA_0496

Appendix_0502

1 away the translation, the Spanish, English portion of this
2 trial. That has been a layer of complication but is it
3 really that difficult to translate one language into
4 another. Everything is lost in translation, okay, we
5 can't believe one thing that happened that we talked about
6 this week because it was just lost in translation. That
7 was the other defense in this trial. And what about
8 MINOR is untruthful. MINOR is a liar. Let's go ahead
9 and pound the little girl. Let's beat up on the little
10 girl, she is a liar. Guys, does it make sense to you that
11 a year and a half ago that these people would have made up
12 this story, okay, and here we are a year and a half later,
13 they had to move out of their home, they had to go up to
14 North Carolina. They had to come down here on their own
15 dime, they had to sit up here and tell you some very
16 embarrassing, very difficult things. And what is the end
17 game, what have they gained from this. I don't understand
18 the motive for them lying about this. Nevermind that
19 Hernandez basically told officers that he is a man with
20 needs. Take that with whatever it is worth. Nevermind
21 that, these people have lied and they have made this whole
22 thing up. I have never understood what they have gained
23 from it though. But that is the defense. DNA, it can be
24 included or excluded. I guess the jargon or the terms
25 SLED uses sometimes frustrate me. He can't be included

ROA_0497

Appendix_0503

1 and he can't be excluded. What are we to take away, I
2 don't really fully know but when I look at this chart and
3 I look at Mr. Hernandez and I look at that nightgown I see
4 a whole bunch of numbers that match up. And I just don't
5 understand why a male's DNA is on her nightgown and I just
6 don't understand that this acid phosphate is present. And
7 they are going to tell you, well, what about the little
8 boy. Acid phosphate, there is male DNA in there but who
9 is it from. And what are we do with all of these numbers
10 that match up. And what are we suppose to do about the
11 nurse who came in here. That is her speciality, sexual
12 assault evaluation. We are just going to throw away her
13 testimony, when she says she examined the girl and her
14 findings were consistent with the allegations, consistent
15 with trauma. The mother saw it, the daughter admitted to
16 it, Mr. Hernandez got on his knees and cried and
17 apologized and begged them not to call the police. And
18 the police get there and he says, I am a pastor but I am
19 also a man, I have my needs too. These women walk around
20 in front of me dressed provocatively, what am I suppose to
21 do. That is what he tells the police. I can get on my
22 knees and beg you to find him guilty but ultimately all I
23 really can do is present the evidence that I am given and
24 have the testimony from that stand. Y'all remember
25 yesterday when MINOR was up there, I don't think it was

ROA_0498

Appendix_0504

1 clear to everyone in this courtroom that that was a scared
2 little girl, frightening little girl. I have questioned
3 hundreds of people from here, on this side of the stand
4 and I have lobbed questions at them and done it a bunch of
5 times. But I have never actually had to sit up there. I
6 am told it is terrifying, it is nerve racking. I don't
7 know if y'all recall, but we had a classroom of students
8 back there and MINOR mother. The Judge was kind
9 enough to, he recognized the situation, so we took a
10 break. And MINOR had a glass of water and she said to
11 me, Mr. Scott, can we ask my mother to leave the
12 courtroom. She came back in, I asked the classroom to
13 leave, her mother left. And that is when she was able to
14 tell you what happened. I hate these cases, we have got
15 to do it, she has got to tell her side of the story no
16 matter how uncomfortable it is. MINOR, I hope that you
17 can put this behind you, I hope you can grow to be a
18 functioning adult who can somehow put Mr. Hernandez in the
19 past. What he has done to you. I hope that you can. I
20 don't know, I don't think anybody can ever really fully
21 carve that out of your consciousness. It will affect you
22 no matter what. But that is what I hope for you, MINOR.
23 This is the last time I get to talk to you guys. The way
24 the law works is the defense gets up to argue to you last.
25 And it is kind of a helpless frustrating thing for

1 somebody like me as a prosecutor. Because I have got to
2 sit down and they are going to get up here and they are
3 going to throw a bunch of things at you that have nothing
4 really to do with June 29th, 2013 and have nothing really
5 to do with the allegations. They are probably going to
6 talk about the U Visa case and they are going to talk
7 about how MINOR is a liar again. They are going to talk
8 about Liz Rivera, they are going to talk about all of that
9 stuff. And I have got to sit here and as much as I want
10 to jump up after them and say, well, let me address all of
11 those things. I can't do it. This is the last time I get
12 talk with you and so I kind of sit here and say, well,
13 what else can I tell them, what else can we talk about. I
14 really think everything that needs to be said has been
15 said. You guys were picked for a reason. You remember
16 Monday when y'all first got a chance to see us and you
17 were sitting, we were up in council room. But we had our
18 sheets of paper and then we were looking at them and we
19 would look at you and say, well, we are going to pick this
20 person and we really don't want this other person. We
21 knew a thing or two about you. And you are picked for a
22 reason. And that is because we think you can be fair and
23 we think that you can be impartial and we think you are
24 reasoning and logical people who when they hear testimony
25 like this can come to the real, really the only conclusion

ROA_0500

Appendix_0506

1 a sensible person can and that is Mr. Hernandez is guilty
2 of these crimes. He is guilty of raping a child, he is
3 guilty of raping a child from the time she was 8 or 9 to
4 the time she was 12. It is not a pleasant thing, I am
5 sorry y'all got picked for this particular jury. You have
6 heard a lot of ugly things. But there really are wolves
7 in sheep's clothing, there are people that will hold
8 themselves out for the pastors but who are capable for
9 unspeakable things. You are looking at one right now.
10 You are looking at the wolf in sheep's clothing, the
11 emotional manipulation, Mr. Hernandez. After they get up
12 and they do their closing argument I ask that you just go
13 back to the jury room, talk with one another, ask yourself
14 what is reasonable, what makes sense, don't jump to
15 conclusions. Don't say, what if that, what if this. No,
16 just, what did you hear. Talk amongst yourselves,
17 recollect on what you heard and come back with the only
18 verdict, the only verdict that makes sense. That is
19 guilty and that is guilty on the CSC first with a minor
20 for every time he raped that girl before she was 11 years
21 old. And that is guilty on CSC second, that is every time
22 he raped that little girl after she was 11 to include June
23 29th, 2013. Thank you all for your service.

24 THE COURT: Mr. Pinilla.

25 MR. PINILLA: Ladies and gentlemen of the jury, let's

1 just jump right into what you heard over the last few
2 days. At the beginning of this trial the State told you
3 they were going to build you a house, piece by piece,
4 strong foundations, strong walls, strong roof to keep
5 leaks out. Let's start to talk about the foundation.
6 What is the foundation, an eyewitness, an eyewitness who
7 sits right over there, who sat up here in this chair and
8 perjured herself. She told you, my daughter told me that,
9 my daughter went to therapy in Atlanta. The therapist in
10 Atlanta told me to call the police in Atlanta but God told
11 me that Mr. Hernandez was hurting children. And I wanted
12 to move back in to that environment to catch him myself.
13 Mr. Hernandez is on trial for two charges. Two serious
14 charges. The charge of raping a child under the age of
15 11. But what real evidence did you hear about any rapes
16 happening before the age of 11. What did they tell you
17 besides the mother saying she heard this and the child
18 saying she heard this. Everything else had to do with
19 June 29th, 2013 when she was 12 years old. The warrants,
20 the indictments, they say 2011 to June 30th, 2013. Yet
21 the investigators knew for six, seven, possibly ten months
22 at that time, they were living in another state. They
23 were three and a half hours away. Yet they charge him for
24 the entire time. Now the State wants you to say, wants
25 you to think that we don't want to talk about June 29th.

ROA_0502

Appendix_0508

1 Well, let's talk about it. What did the little girl tell
2 us about June 29th. She said nothing, she said I don't
3 remember, I don't recall, I can't remember. I stood right
4 over here and I asked her simple questions. I wasn't
5 yelling at her, I didn't want to beat her up, she is a
6 victim but she is a victim of her mother. If there is a
7 wolf in sheep's clothing it is sitting right over there.
8 She said I don't remember. The Solicitor pointed at this
9 picture right here and he asked her, do you remember that
10 blanket. She said, I do not. I don't remember that
11 blanket but this was the blanket that was supposedly used
12 in this crime. What else did this little girl tell you.
13 She told you that she knew how to call 911. I said, when
14 have you called 911. She said when my mom hit me. I
15 said, did you call another time. She said, I think I did
16 when my mom was sick. Yet, over a four year period she
17 didn't pick up the phone one time when someone was
18 brutally assaulting her. Not once, not once. Mom hits
19 her one time, calls the police. Runs next door for help.
20 Four years, not one call to the police. She then told us
21 that she came out of the bathroom and she saw her mother
22 and Mr. Hernandez sitting on the bed talking. And she
23 couldn't recall if Mr. Hernandez was upset. The police
24 will tell you that Mr. Hernandez had no physical marks on
25 him. A mother had just supposedly seen her child being

ROA_0503

Appendix_0509

1 raped and Mr. Hernandez was not attacked in any fashion.
2 No scratches, no blood on him, nothing. Yet that is
3 supposedly our foundation, that is our roof. You heard
4 them both lie, you heard the daughter not corroborate the
5 mother's testimony. She said I never told my mom, I had
6 never went to therapy. What is she talking about then.
7 What mother calls a translator first instead of the
8 police. What mother says, get me a translator and then I
9 will worry about calling the police. It doesn't make
10 sense, do these stories make sense to you. Let's talk
11 about the experts. The experts, they were supposedly
12 suppose to shed some light with the State's case. What
13 did the forensic nurse tell us. Remember, forensic nurse,
14 she is just a collector, she is a collector of evidence.
15 She can't analyze it, she doesn't know what is going on.
16 What does she say that we know that she said from her
17 reports. She said, MINOR told me that Mr. Hernandez had
18 orally penetrated, vaginally penetrated and anally
19 penetrated me. All of that on June 29th, 2013, all that
20 from the time the mother had a premonition or she saw a
21 shadow. We don't know which way it happened, it is a
22 single wide trailer and she walked to the room and the
23 child had already been anally, orally and vaginally
24 penetrated. So she takes swabs. Okay. That will be
25 important later. What else does the forensic nurse tell

ROA_0504

Appendix_0510

1 us. MINOR told me that she yelled out for her mother!
2 Mother, mommy. MINOR , do you remember yelling out for
3 your mommy. I don't recall. MINOR , do you remember
4 telling the forensic nurse that you were anally
5 penetrated. I don't remember. How can you not remember
6 something so serious. Okay. What else did the forensic
7 nurse tell us. There was blood in the vagina. Well, that
8 is pretty serious. And then later down the road she says,
9 oh, yeah, this child has started her period. She started
10 menstruating. And that was the first and the last time
11 you ever have heard about any blood. Did they say we
12 found blood on the blanket, we found blood on the bed, we
13 found blood on the carpet, we found blood on Mr.
14 Hernandez's underwear, we found blood on his clothes. No
15 blood. First and last time. Remember, she had started
16 her menstruation. She also told us that the hymen was
17 bruised and discolored. It wasn't in her initial report,
18 initial report just said it was a regular shape. And now
19 conveniently she comes back to court. She said, oh, I
20 looked at the picture, I pulled my microscope out,
21 whatever she used and it was bruised. But she can't tell
22 us what caused that, she said, she just says that it was
23 bruised. And it wasn't in the initial report. Okay. And
24 now we move on to the SLED experts. The DNA experts. And
25 what do they tell you, they tell you nothing, absolutely

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Appendix_0511

1 nothing. She gets on here and shows this chart that is so
2 confusing, we can't include, we can't exclude, we can't
3 include. Well, what can you tell us. Well, there was no
4 sperm. She didn't want to say it, we had to pull it out
5 of her, there was no sperm. The cutting from that
6 nightgown is in the upper part. That is strange. What
7 could she tell us. She tested the buccal swab, she tested
8 the vaginal swab and she tested the anal swab. And what
9 did she say she found. No foreign DNA, nothing from Mr.
10 Hernandez, not touch DNA, not any kind of secretions,
11 nothing of his. We ask her about the panties, that whole
12 line of things. The whole line tested no foreign DNA.
13 Nothing and no blood. Tests don't lie, ladies and
14 gentlemen. He was there or he was not there. He is not
15 on trial for touching her, he is not on trial for tickling
16 her. Now, what they will tell you is that he admitted
17 these things. He said, I am a man. But you heard from
18 the investigators, two of the three people that testified
19 from Newberry Police Department had no idea what was
20 coming out of this man's mouth. Not one thing. Who did
21 they rely on. Liz. Who is Liz, just an acquaintance.
22 But I have known the child for four years, call me at
23 11:30 at night and I will be right over. Call me before
24 the police, it is all free charge. Not friends, just
25 acquaintances. Remember, all three police never recorded,

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Appendix_0512

1 not one recording. The lead investigator, Kevin Goodman,
2 he sat in that chair and he told you, I had a tape
3 recorder right in my drawer. It is right there, why can't
4 I pull it out and use it. They asked him if it is usual
5 to use a tape recorder. He said it depends. Some cases
6 you use it and some cases you don't. In a case where you
7 can't understand a word coming out of this man's mouth you
8 don't think it is important to record it. Officer
9 Alvarado gets on the stand. I understand, he is saying
10 give him a chance to right or wrong his statement. We are
11 not going to ask him about it because it is voluntary, it
12 is his words. That was on July 1st, ladies and gentlemen,
13 they got the warrant for the arrest on 6/30. Why give him
14 a chance to say what he needs to say if you already
15 decided he needs to be arrested. The interpreting thing
16 was a huge problem. You witnessed it first hand.
17 Alvarado read the statement, word for word, in Mario
18 Hernandez's handwriting and the interpreter did. And I
19 don't know if you noticed but several times she said,
20 unintelligible. That wasn't what Alvarado was saying, she
21 just didn't understand it. Alvarado even told us
22 different words in Spanish mean different things. But
23 what we did hear and what was consistent through all of
24 the police department's testimony is that Mr. Hernandez
25 had never said he had done anything. In his own words he

ROA_0507

Appendix_0513

1 said, no sexual acts. He said playing, he said tickling,
2 he never said touching, he never said inappropriate
3 touching. And remember, the State's case is penetrating.
4 He is not on trial for touching, he is not on trial for
5 tickling, he is not on trial for playing. It is
6 penetrating. Ladies and gentlemen, just ask yourself, is
7 that a kind of house that you would want to live in, is
8 that the kind of house that you would want to build. The
9 Solicitor said he should get on his knees and beg you. He
10 shouldn't have to get you, he should come in here with
11 some conclusive evidence, something that says this man did
12 it and here it is. He has got to prove that. The DNA
13 expert, we invited to come over to this box of goodies.
14 Pick one item that shows that Mr. Hernandez had done
15 something wrong. She said, I can't do it. I can't do it.
16 No physical evidence, the State has not proved its case.
17 No recordings and no physical evidence. And now we simply
18 ask you to have the courage to go in that room and talk
19 about this case and have the courage to come back and find
20 that Mr. Hernandez is not guilty of these serious crimes
21 because there is no evidence it happened before she was
22 11. On behalf of Mr. Hernandez and myself and Mr.
23 McMullen, thank you for your time, your service and your
24 dedication.

25 THE COURT: Ms. Ringer, and members of the jury, the

1 State of South Carolina charges, Mario Hernandez, with two
2 crimes. First, first degree criminal sexual conduct with
3 a minor. And secondly, with criminal sexual conduct with
4 a minor second degree. You, of course, bear in mind that
5 Mr. Hernandez has pled not guilty and by that plea he
6 denies all the charges alleged in both indictments. The
7 indictments are right here, y'all will have those in the
8 jury room.

9 Mr. Hernandez comes into court clothed with a
10 presumption of innocence. The presumption of innocence
11 continues throughout the case and entitles him to a
12 verdict of not guilty unless and until it is dispelled by
13 the evidence satisfying you, the jury, beyond a reasonable
14 doubt of his guilt of these offenses charged. The State
15 must prove each and every element of the alleged crimes
16 beyond a reasonable doubt.

17 Now, in South Carolina, the same Constitution of law
18 which makes you, the jury, the finders of facts, which I
19 explained to you earlier before the trial started, makes
20 me the Judge, the sole and exclusive instructor of the
21 law. We discussed that briefly. Y'all must accept as a
22 jury, fourteen, correct, the law which I am now
23 instructing it to you and apply it to the evidence which
24 you have heard and find and reach a unanimous verdict.

25 Now, if I should make an error in my instructions or

1 in my presiding in the case, there is another time, there
2 is another place where that error can be corrected if
3 necessary. For the purpose of the case today y'all must
4 accept the law as I am instructing it to you. So, I will
5 tell you that neither you nor I should be considered about
6 what the law ought to be, what you heard it might have
7 been but concern yourselves as I am instructing you the
8 law as I currently understand it as the instructor.

9 Now, in all criminal prosecutions, in South Carolina
10 and across the Country the State has the burden of proof.
11 A defendant has no burden whatsoever, as he is presumed
12 innocent. According to our Constitution the State must
13 prove its case to the standard of proof called beyond a
14 reasonable doubt before a finding of guilt may occur.
15 Now, if the State fails to meet that burden then the
16 defendant would be entitled to a verdict of not guilty or
17 an acquittal.

18 Now, under our Constitution and laws, you twelve,
19 once you begin deliberations I will remove the alternants,
20 are the sole finders of facts for this case. I am not
21 allowed to suggest in any way what I may think about the
22 guilt or innocence of Mr. Hernandez. It has been my
23 responsibility to rule on the issues of law as they come
24 up and instruct you on the law at this moment. You, as
25 the jury, are the judges of the credibility and the

1 believability of the witnesses who have testified in this
2 case. And I tell you, as you have observed the case, and
3 remember I moved the interpreter so you could observe the
4 demeanor of a couple of the witnesses who did not speak
5 English. And that was intentional because y'all twelve, I
6 say twelve but fourteen, can use whatever in your good
7 common sense and good judgment you wish to do to evaluate
8 one's credibility. And by that you may use in passing
9 upon one's credibility consider things such as the manner
10 and appearance of the witness who testified. Were they
11 straightforward or were they hesitant in answering. How
12 did the witness come to know the facts to which he or she
13 testified to. Is there some reason a witness would want
14 to give testimony which would help or hurt one side or the
15 other. In other words, was the witness biased or
16 prejudiced in either way for either side. Was the
17 testimony of a witness strengthened or weakened by other
18 testimony or other evidence. You, the jury, can believe
19 as much or as little of any witness' testimony as you deem
20 appropriate. You may believe the testimony of a single
21 witness gainst that of many or a part of a witness'
22 testimony and disbelieve the rest. The fact that
23 testimony is not controverted does not mean you have to
24 accept it as true. You still must gauge the credibility
25 of the witness who provided that testimony to prove the

1 believability or the truth of the facts offered through
2 that testimony and those pieces of evidence.

3 Now, as I instructed you during the trial, there are
4 certain exceptions to fact witnesses which are ones that
5 tell what they saw, they heard or they observed or
6 participated in. An expert witness is allowed, if they
7 are qualified by education, experience, to be an expert in
8 some art or science or profession may state an opinion
9 relevant to a material matter to which the witness claims
10 to be an expert in that field. And may also state the
11 reasons for this opinion. You may consider any expert
12 opinion received in evidence in this case and like any
13 other evidence which was presented to you, and if you
14 decide that the opinion of the expert witness is not based
15 upon sufficient education or experience or if you conclude
16 that the reasons given in support of the opinion are not
17 sound or that the opinion is outweighed by other evidence
18 you may disregard that opinion entirely. An expert
19 witness' opinion is to be given no greater weight or
20 lessor weight, it is just to be considered by you as
21 evidence received in this case. And I also tell you that
22 you are not required to accept the opinion even though it
23 is not controverted.

24 Now, as the sole fact finders you should have
25 listened and I observed you listening closely to the

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Appendix_0518

1 evidence presented. Weighing evidence is entirely a
2 mental process. You do not put it on a scale to see which
3 way it tips. You must weigh the evidence using your
4 believability and credibility, evaluations I described to
5 you and use your good judgment and your common sense.

6 Two types of evidence are generally presented in
7 trials, and in this trial there were. It is direct
8 evidence and circumstantial evidence.

9 Direct evidence is testimony of a person who asserts
10 or claims to have actual knowledge of certain facts such
11 as an eyewitness. Circumstantial evidence is slightly
12 different, it is the proof of a chain of facts and
13 circumstances indicating the existence of another fact.
14 Our law makes no distinction between the weight or value
15 to be given to direct or circumstantial evidence. There
16 is no greater degree of certainty required of
17 circumstantial evidence than that of direct evidence. You
18 should weigh all the evidence in the case presented to
19 you. After weighing all the evidence if you are not
20 convinced of the guilt of the defendant beyond a
21 reasonable doubt you must find him not guilty.

22 We use the term reasonable doubt throughout, I told
23 you early on about what it was. What is it. A reasonable
24 doubt is just this. It is the kind of doubt which would
25 cause a reasonable person to hesitate to act. Reasonable

1 doubt may arise from evidence which is in the case or from
2 the lack or absence of evidence in the case. Proof beyond
3 a reasonable doubt is proof that leaves you firmly
4 convinced of the defendant's guilt. It is also a doubt
5 for which you can assign a reason, if the assignment of
6 the reason can be done reasonably, firmly and
7 convincingly. I charge you that the defendant is entitled
8 to every reasonable doubt that may arise in this case.
9 And what this means is that if you have any doubt about
10 anything during the trial you will be required to resolve
11 that doubt in favor of the defendant. The very fact that
12 you engage in full and free discussion on the issue of
13 guilt or innocence does not automatically mean that a
14 reasonable doubt exist. You must make the determination
15 of whether or not a reasonable doubt exist as to his
16 guilt. And I will tell you if the State has not met its
17 burden of proving beyond a reasonable doubt then the
18 defendant would be entitled to a verdict of not guilty.
19 However, if you are firmly convinced of his guilt you can
20 return a verdict of guilty.

21 Another element of most crimes is the intent.
22 Criminal intent is a necessary element of each crime. It
23 must be proved by the State beyond a reasonable doubt.
24 Criminal intent is always a matter that must be determined
25 by the jury from the circumstances surrounding the

1 situation. There is no way to prove intent to a
2 mathematical certainty. There is no way medical science
3 can dissect one's brain to determine what a person had in
4 mind. So our law simply states intent may be inferred
5 from the circumstances shown to have existed, both before
6 and after the fact. This is how you make the
7 determination of whether or not the element requiring
8 intent was present. Criminal intent is a state of mind
9 that operates jointly with an act or an omission in the
10 commission of a crime. It is a mental state of conscious
11 wrongdoing. It is up to you, the jury, to determine what
12 the defendant intended to do based upon the circumstances
13 shown to have existed.

14 Now, the specifics of the law of this case are the
15 defendant, Mr. Hernandez, is charged with two crimes on
16 these two indictments which I remember explaining to you
17 that they were amended with my blue ink, according to the
18 birthdate which was testified to of the young lady herein.
19 She was less than eleven during part of the allegations,
20 she was more than eleven during the other part of the
21 allegations. And her age is not disputed, it was
22 testified to and agreed to. So her birthdate of [REDACTED],
23 2001 is a stipulated fact as to her age. Now, Mr.
24 Hernandez is charged with a crime of first degree criminal
25 sexual conduct with a minor. In order to sustain a

1 conviction the State must prove beyond a reasonable doubt
2 that Mario Hernandez engaged in a sexual battery with the
3 victim. A sexual battery is sexual intercourse, oral sex,
4 anal intercourse or any intrusion however slight of any
5 part of a person's body or any object into the genital or
6 anal openings of another person's body except when that
7 intrusion is accomplished for a medically recognized
8 treatment. The State must then prove beyond a reasonable
9 doubt that the victim was less than eleven at the time of
10 the sexual battery. Consent, willingness, indifference or
11 ignorance on the part of the minor as to what was taking
12 place does not in any way affect the charge of criminal
13 sexual conduct with a minor because an unmarried woman
14 under the age of eleven cannot legally consent to sexual
15 intercourse.

16 Mr. Hernandez is also charged with the crime of
17 criminal sexual conduct in the second degree with a minor.
18 In order to sustain a conviction of that crime the State
19 must prove beyond a reasonable doubt that the defendant
20 engaged in sexual battery with the victim. A sexual
21 battery again is sexual intercourse, oral sex, anal
22 intercourse or any intrusion however slight of a person's
23 body or any object in the genital or anal openings of
24 another person's body. The State must then prove beyond a
25 reasonable doubt that the victim was more than eleven but

1 less than fourteen at the time of the battery. Again,
2 consent, willingness, indifference or ignorance on the
3 part of the minor, if any, as to what was taking place
4 dose not affect the charge of criminal sexual conduct with
5 a minor because an unmarried woman under the age of
6 fourteen cannot legally consent to sexual intercourse.

7 Now, Ms. Ringer, members of the jury, as y'all retire
8 to begin your deliberations, now you must be mindful of
9 the importance of your responsibility as jurors in this
10 case. You are not called upon often to be jurors in this
11 county. You and I are acting for the community and for
12 the State. And it is our responsibility to see to it that
13 this trial is fair and the verdict is just. It has been
14 my responsibility in this case to rule fairly and
15 impartially on issues of law and it is my job to make
16 certain that everyone receives fair and impartial justice.
17 So, I am asking you and instructing that you go in the
18 jury room and confine your decision as to the evidence
19 presented in this case from this witness stand, the
20 evidence which has been received. Discuss it, weigh it,
21 apply the law as I have instructed it to you and reach a
22 unanimous verdict. Disregard anything outside the jury
23 room other than what you have received here in this
24 courtroom for this case. I am convinced whatever verdict
25 you find will be a result of confining your decision to

1 those three things, the evidence and the law that you have
2 heard in this courtroom in reaching a unanimous decision.
3 Now, the indictments will be in there with you. Mr.
4 Ringer, I will show you here, this is the verdict form and
5 you find guilty or not guilty, sign your name and date it.
6 This is first degree and then this is second degree. They
7 are not long indictments but these will be in the jury
8 room with you. Now, I need to send you to the jury room,
9 and I will tell you a couple of things before I send you
10 in there. After you begin deliberations, I will pull the
11 alternates as soon as you do that, but if you need to hear
12 additional instructions from me, I have had a jury before
13 tell me that what you did to us was getting a drink of
14 water through a fire hose. I really threw a lot at you.
15 But that is just how it is. If you need instructions
16 reinstructed I am more than happy to do that. You need to
17 tell me by note, we would like to hear the definition of
18 reasonable doubt, we would like to hear the definition of,
19 whatever it is, just send me a note and I will try to
20 accommodate that. Sometimes I can send a note back with
21 the instructions or the answer to your question. If you
22 want to hear testimony replayed, we would like to hear the
23 testimony of, name the witness. Ms. Holston made a
24 recording of the entire testimony. She will be more than
25 happy to cue it up and y'all can come in here and listen

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1 to it. The evidence, photographs and drawings and all the
2 things that were described and introduced into evidence,
3 y'all will have those in the jury room and y'all can look
4 at those as long as you like. If you need further
5 instructions or hear testimony played send me a note. If
6 anything comes up that you don't know which way to go send
7 me a note and I will try to respond to it or bring you
8 back in here and respond to it. But it helps me to be
9 able to discuss with the lawyers, when the jury has asked
10 for instructions on. And they can also assist with that.
11 So, I will send you to the jury room and I am going to ask
12 the lawyers were my instructions complete, is it
13 satisfactory. If they say those instructions were
14 complete and satisfactory to what they believe their case
15 has proved, you know what I didn't do, I did not, I just
16 remembered. I did not instruct y'all on the defendant not
17 testifying and I put that in there and did not print it
18 up. All right, let me instruct you on that.

19 The law of South Carolina is simply this. The State
20 has the burden of proof, they have got to prove their case
21 in each and every element of the crime beyond a reasonable
22 doubt. Everyone charged with a crime in South Carolina is
23 presumed innocent until proven guilty beyond a reasonable
24 doubt. A defendant, anyone accused has the right to
25 remain silent. They cannot be forced to waive that right

1 in any way by anyone. It is their right to exercise, it
2 is their protection afforded to them under our
3 constitution. And now I tell you that the fact that the
4 defense put up no witnesses nor did Mr. Hernandez testify
5 may not be discussed by you in the jury room. The fact
6 that he didn't testify is of no relevance to his guilt or
7 innocence. You must base your decision of guilt or
8 innocence on the evidence before you. And I tell you that
9 you may not discuss any reason why he decided to not
10 testify. That is his decision and his alone, the fact
11 that he exercised that right is not to be held against him
12 in any way. So I instruct y'all not to discuss his
13 failure to testify in any way. Confine your decision of
14 guilt or innocence on what evidence is before you. So,
15 you are not allowed to discuss his exercising his
16 Constitutional right. That is his right.

17 All right, y'all step in the jury room and I am going
18 to ask the lawyers if I got my instructions correct. And
19 y'all cannot begin discussing the case until I hand you
20 the evidence. Okay.

21 (Whereupon, the jury was excused to the jury room.)

22 THE COURT: Any exceptions to the instructions?

23 MR. MCMULLEN: No, sir.

24 THE COURT: The State?

25 MR. SCOTT: No, sir.

1 THE COURT: Good deal. Look at the exhibits.
2 (Whereupon, the jury started deliberations at
3 approximately 10:01 a.m.)
4 (Whereupon, the alternates were excused from the
5 trial of the case.)

6 THE COURT: We received a note regarding the
7 statement, translated from Spanish to English. The
8 witness, Alvarado read the Spanish and was translated by
9 the Court's interpreter. The Court Reporter transcribed
10 that last night and her transcription of the English
11 translation was sent to the jury in response to that
12 question as well as the definition for a sexual battery
13 which was the definition in the instruction itself. That
14 is Court's number 5.

15 (Whereupon, Court's Exhibit number 5 was marked for
16 identification only.)

17 (Whereupon, a break was taken waiting for the jury
18 verdict.)

19 THE COURT: I have got a question from the jury and I
20 would like to send them an answer. We will mark this one.
21 The gist of it is, do the verdicts have to be consistent.
22 And do both verdict have to be unanimous. And so I am
23 going to send them a note back that each indictment stands
24 independently of the other. Verdicts must unanimous
25 whether guilty or not guilty. And the verdicts do not

1 have to be the same. Fair enough?

2 MR. SCOTT: Yes, sir.

3 MR. PINILLA: Yes, sir.

4 THE COURT: All right. This is the jury note. This
5 is the response.

6 (Whereupon, Court's Exhibit 6 and 7 were marked for
7 identification only.)

8 THE COURT: I understand that the jury has reached a
9 verdict. Bring them in, please.

10 (Whereupon, the jury came into open court at
11 approximately 1:05 p.m.)

12 THE COURT: Ms. Ringer, has the jury reached a
13 verdict on both of the indictments?

14 MS. RINGER: Yes.

15 THE COURT: And were they unanimous?

16 MS. RINGER: Yes.

17 THE COURT: Very well, hand them to Ms. Folk. All
18 right, they appear to be in order.

19 CLERK OF COURT: The State of South Carolina versus
20 Mario Hernandez, indictment number 13-498, criminal sexual
21 conduct with a minor. Section 16-3-655(a). The verdict,
22 not guilty. Signed Jane Y. Ringer.

23 Indictment 13-500, Mario Hernandez for criminal
24 sexual conduct with a minor, 16-3-655(b). The verdict,
25 guilty. Signed, Jane Y. Ringer.

1 Madam Forelady, ladies and gentlemen, if this is your
2 verdict please indicate by raising your right hand.

3 (Whereupon, all jurors raised their hand.)

4 THE COURT: All right. Any issues for the jury
5 before I excuse them. From the defense?

6 MR. MCMULLEN: No, sir.

7 THE COURT: From the State?

8 MR. SCOTT: No, sir.

9 THE COURT: Ms. Ringer, Ms. Folk says they have your
10 checks ready and your letters from the Clerk in case you
11 need one for work. If y'all don't mind I would love to
12 speak with y'all in the jury room while they are handing
13 those checks out. So, y'all step back in there and I am
14 going to follow you in there.

15 (Whereupon, the jury was excused from court.).

16 THE COURT: Are y'all ready for sentencing?

17 MR. SCOTT: Yes, sir.

18 MR. MCMULLEN: Yes, sir.

19 THE COURT: All right. You want to present anything?

20 MR. SCOTT: Yes, sir. Judge, at the appropriate time
21 Ms. Tomasa, the victim's mother would address the Court.
22 On behalf of the Solicitor's office we respect the jury's
23 decision. We have always contended that the abuse did
24 start before she was eleven. And I understand we were
25 unable to really produce a whole lot of evidence other

1 than the victim's own testimony. I do fully believe this
2 abuse started very shortly after they moved in which would
3 have put her in the nine-year-old range. I guess the
4 quirk in the law, once you obtain the age of eleven the
5 crime of raping a child goes from 25 or life down to 0 to
6 20. And it is just, it could be a day that makes that
7 difference. And just kind of a quirky little part of the
8 law. But seeing that he has been found guilty of a crime
9 that does carry 0 to 20 we would ask for that full 20, to
10 get as close as we could to the sentence he would face had
11 he been found guilty of the CSC first. The prior record I
12 have comes from California. I see a conviction from 1994,
13 a felony burglary out of California.

14 MR. MCMULLEN: There is no conviction on this
15 defendant other than a traffic offense where he paid
16 \$40.00 dollars. There is no record whatsoever.

17 THE COURT: All right.

18 MR. SCOTT: And I can't, a lot of times when we have
19 Hispanic defendants it is difficult to run their rap
20 sheets. But I do have one on a Mario Hernandez.

21 MR. MCMULLEN: I understand but he would have been
22 deported because he is not in our Country legally. Had he
23 been convicted of a burglary anywhere he would have been
24 deported then.

25 THE COURT: Let me hear from Ms. Hernandez, Tomasa

1 Hernandez, is that right?

2 MR. SCOTT: I think it is Aguirre-Cruz is the last
3 name. Is that correct, Tomasa?

4 MS. AGUIRRE-CRUZ: Yes.

5 THE COURT: Ma'am, I will be glad to hear from you.
6 (Whereupon, Ruby Stephens is the interpreter for Ms.
7 Aguirre-Cruz.)

8 MS. AGUIRRE-CRUZ: Want to say that only, I want
9 justice to be done. I am not doing this to get my papers,
10 for nothing. My children are American. I just want him
11 to pay for the damages he did to my daughter. Because my
12 daughter has been very damaged and she has wanted to kill
13 herself. That is all I ask of you.

14 MR. SCOTT: Judge, I kind of neglected to say that.
15 This has traumatized her. I guess hope that she would be
16 able to put this behind her but children that are victim's
17 of a crime like this never can. He is going to get
18 whatever sentence he is going to get but he has in some
19 effect given MINOR a life sentence of her own. She is
20 going to have to deal with this for the rest of her days,
21 sir. We just ask for a sentence appropriate and to
22 recognize that.

23 THE COURT: All right. Mr. McMullen.

24 MR. MCMULLEN: May it please the Court.

25 THE COURT: Yes, sir.

1 MR. MCMULLEN: I believe I am required by the rules
2 to move for judgment notwithstanding the verdict. So I
3 would like to do that.

4 THE COURT: And respectfully understanding the facts,
5 contradictory, for the facts for the jury to consider, to
6 weigh and deliberate upon and there is sufficient facts
7 presented to the jury to get by the directed verdict
8 motion at the end of the trial as well as to support the
9 jury's verdict at this time. And so respectfully I will
10 deny that motion.

11 MR. MCMULLEN: Thank you, Your Honor. I do
12 understand. Let me just please move on to say that I have
13 always respected jury's verdict when they go my way and I
14 respect them again now. We are not here to be impartial,
15 we are not paid to be impartial. The other side but, you
16 know, we just do the best job we can with what we are
17 presented and hope we did that. And hope we gave Mr.
18 Hernandez a good defense such that nothing will be
19 disturbed on appeal. So, having said that, the testimony
20 that we heard was at times quite contradictory and at
21 times quite difficult. And I do submit respectfully there
22 was no physical evidence from that night. Again, I don't
23 want to argue against the verdict but I would argue for
24 some leniency. I don't think that it is fair to say or
25 surmise whether this went on from the time she was nine

1 until the day he was arrested. Obviously the jury at
2 least believed it happened once. And so I know that he
3 was taken into custody the night this occurred. He has
4 not been out of jail since then. And so whatever the math
5 is, I think the Solicitor knows it is 480 something days.

6 MR. DANIEL: 487, Your Honor.

7 THE COURT: Since July 30th of '13?

8 MR. DANIEL: Yes, sir.

9 MR. MCMULLEN: He will be, at some point, deported
10 back to Guatemala. My hope, my belief is that this family
11 will be here where the children are citizens. Don't think
12 he will ever be in their path again, or they in his. And
13 I think that Mr. Pinilla would like to address the Court.
14 But I would remind you that he has no previous record and
15 I will just sit down.

16 MR. PINILLA: Just briefly, Your Honor. Just to
17 emphasize he has been incarcerated 487 days. He has got
18 no history of any type of physical charge, he has got no
19 history of being violent. He has got nothing, Your Honor,
20 I just emphasize, I have worked with Mr. Hernandez for the
21 last 10 or 11 months and we just ask for leniency.

22 MR. MCMULLEN: The Court is aware, whatever sentence
23 Your Honor sees fit to impose, he will serve eighty-five
24 percent before he is considered for parole if he should be
25 paroled. He will be on a plane to Guatemala.

1 MR. PINILLA: Thank you, Your Honor.

2 THE COURT: Anything else?

3 MR. MCMULLEN: No, sir.

4 THE COURT: All right. Having heard the trial, heard
5 the verdict read. The sentence of the Court is that Mr.
6 Gonzales Hernandez be committed to the Department of
7 Corrections for a term of 16 years. He is given credit
8 for the days served since June 30th, '13. Upon his
9 release he will be required to register as a sex offender.
10 Good luck.

11 MR. MCMULLEN: Thank you, Your Honor.

12 MR. SCOTT: Thank you, Judge.

13 *** END OF REQUESTED TRANSCRIPT OF RECORD ***
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CERTIFICATE OF REPORTER

State of South Carolina)
)
County of Newberry)

I, Joy E. Holston, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the County of Newberry, South Carolina on the 28th day of October, 2014.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

March 30, 2015

Joy E. Holston

Joy E. Holston, Court Reporter

My Commission expires: March 13, 2016

LA RENUNCIA ADULTA DE DERECHOS

Yo, Mario Valerio Gonzalez Hernandez soy 42 años

Viejo. Mi dirección es [REDACTED] Newberry SC 29108
(Associate Degree)

He terminado el 14 el grado en la escuela y puedo/no puede leer. Yo ha sido dicho por
Inv. Gaudman / Cpl. Alarado, que yo entienda sea un Oficial de la Policía, que él/ella apreciaría
a Pregúnteme concerniendo el crimen de CSC w/ Minor 1st Degree. Este oficial ha explicado
también a mí y yo entiendo eso:

M G (1) tengo el derecho de permanecer silencioso. Eso significa que yo no tengo que decir nada
ni contestar que cualquiera pregunta.

M G (2) Algo yo digo puede ser usado contra mí.

M G (3) tengo el derecho de hablar a un abogado y para tener a un abogado aquí con mí ayudarme
y me avisa durante inquisitivo.

M G (4) Si quiero tener un abogado con mí durante inquisitivo, pero no puede proporcionar para
pagar un abogado, uno será proporcionado a mí en ningún costo antes yo soy preguntado.

M G (5) Si decido contestar las preguntas ahora, sin un abogado aquí, yo tengo todavía el derecho
de parar las preguntas que contestan cuando quiero a.

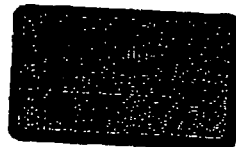
M G (6) tengo también el derecho de parar las preguntas que contestan hasta que haya hablado a
mí abogado.

Entiendo mis derechos como explicado por oficial. Yo ahora expreso que deseo contestar las preguntas en
este tiempo y que yo no deseo tener un abogado aquí durante inquisitivo.

Mi decisión de contestar las preguntas ahora, sin un abogado, se hacen libremente y son mi elección.
Nadie me ha amenazado en cualquier manera o me prometió tratamiento especial. Para mostrar mi
decisión, yo firmo mi nombre en el espacio abajo.

Firmado: la Fecha mgf 7-1-13 : Tiempo 12.20:

[Signature] (testigo) [Signature] (testigo)



ROA_0530

Appendix_0536

ADULT WAIVER OF RIGHTS

I, Mario Valerio Gonzalez Hernandez, am 42 years old. My address is [REDACTED].

I have finished the grade in school and can/can not read. I have been told by T.W. K. Goodman / Cpl. B. Alvarado who I understand is a Police Officer, that he/she would like to question me concerning the crime of CSC w/ Minor 1st degree. This officer has also explained to me and I understand that:

- MG (1) I have the right to remain silent. That means I do not have to say anything or answer any questions.
- MG (2) Anything I say can be used against me.
- MG (3) I have the right to talk to a lawyer and to have a lawyer here with me to help me and advise me during questioning.
- MG (4) If I want to have a lawyer with me during questioning, but can not afford to pay a lawyer, one will be provided to me at no cost before I am questioned.
- MG (5) If I decide to answer questions now, without a lawyer here, I still have the right to stop answering questions whenever I want to.
- MG (6) I also have the right to stop answering questions until I have talked to my lawyer.

I understand my rights as explained by officer Goodman / Alvarado
I now state that I DO wish to answer questions at this time and
that I do NOT wish to have a lawyer here during questioning.

My decision to answer questions now, without a lawyer, is made freely and is my choice. No one has threatened me in any way or promised me special treatment. To show my decision, I am signing my name in the space below.

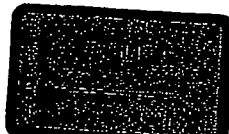
Signed: *my*

Date: 07-01-2013

Time: 12:00pm

K.R. [Signature]
(witness)

[Signature]
(witness)



ROA_0531

Appendix_0537

Statement of
Mario Valerio Gonzalez Hernandez
MADE AT

Newberry, S.C., this 01 day of July, 20 13, at 1251 hours, in the presence of:
Inv. K. Goodman and/or Cpl. Alvarado of the Newberry City Police Department.

I, Mario Valerio Gonzalez Hernandez, understand that I have the right to remain silent. Anything I say can be used against me in court. I have the right to talk to a lawyer for advice before you ask me any questions, and to have a lawyer with me during any questioning. If I cannot afford a lawyer, one will be appointed for me before any questioning, if I wish. If I decide to answer questions now without a lawyer present, I still have the right to stop answering at any time. I also have the right to stop answering questions at any time until I talk to a lawyer. Having been advised of these rights and understanding them I **DO MAKE THE FOLLOWING STATEMENT:**

9-2010. ellos se separaron a vivir en mi casa
hubo respeto en todo yo no jugaba con
la niña ellos se fueron a vivir en Atlanta
en Diciembre 2011 Y Regresaron Julio
2012- en Diciembre 2012. cuando
se juegan con la niña cuando el hombre e Pater
del niño se fue desde entonces hubo confianza
con la niña jugaba mucho ella me traía mis ponis
me mordía los cachete. esta saba en la noche.
la estaba haciendo cosquillas en hombros costillas y brazos

I have made the foregoing statement freely and voluntarily without fear, threat, promise or reward, or hope of reward of any kind.

WITNESS: [Signature]

SIGNED: [Signature]

This is to certify that I have read or have had read to me the foregoing statement consisting of pages and a copy has been given me this 1 day of July, 20 13.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 01 DAY OF July, 20 13.

SIGNED: [Signature]

[Signature]
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES May 03, 2017

Armfield's Printing, Office and School Supply, Inc.



ROA_0532

Appendix_0538

STATEMENT OF

(CONTINUED)

Todo esto se daba con su mamá
 y en frente ellas no había ningún acto
 sexual.
 el sábado 30 estaba. se cuando mi ropa
 y entre a ese el cuarto de a dejar la ropa
 de su mamá le pregunté a ella primero
 y me dijo que ~~propulsio~~ en su cuarto
 y cuando ella la niña estaba en baño. y la puerta abierta
 otra cosa también cuando yo me acostaba
 en el sofá la niña siempre se tiraba
 un arma de mi era siempre un regalo
 de la tía de su mamá.
 ahora me a causa de que yo la he velado
 a su hijo pero yo no lo he hecho eso.

MG

MG

MG

MG

I have made the foregoing statement freely and voluntarily without fear, threat, promise, or reward, or hope of reward of any kind.

WITNESS:

SIGNED:

WITNESS:

This is to certify that I have read or have had read to me the foregoing statement consisting of 2 pages and a copy has been given me this 01 day of July, 20 13.

SWORN TO AND SUBSCRIBED BEFORE ME
 THIS 01 DAY OF July, 20 13.

SIGNED:

NOTARY PUBLIC FOR SOUTH CAROLINA
 MY COMMISSION EXPIRES May 03, 2017

Amold's Printing, Office and School Supply, Inc. • Newberry and Wildesville, SC

ROA_0533

Appendix_0539

SLED LAB No. L13-09485
April 11, 2014

Page 3 of 3

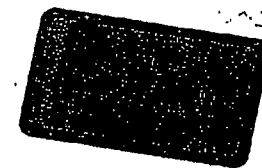


Table 1 - Identifier

Case Items	D8S1179	D21S11	D7S820	CSF1PO	D3S1358	TH01	D13S317	D16S539	D2S1338	D19S433	vWA	TPOX	D18S51	D5S818	FGA	AMEL
1.5 MINOR	14,15	30,31,2	11,13	12,13	15,16	6	10,12	9,10	19,25	12,14	16,18	8,12	12,16	10,11	23,25	X
4 Mario Gonzalez-Hernandez	12,15	31,2,32,2	10,12	11	16	6,9,3	11,13	10	22,23	12,2,15	16,17	8,12	14,16	11	25,26	XY
1.2 Vaginal swabs	14,15	30,31,2	11,13	12,13	15,16	6	10,12	9,10	19,25	12,14	16,18	8,12	12,16	10,11	23,25	X
1.3 Rectal swabs	14,15	30,31,2	11,13	12,13	15,16	6	10,12	9,10	19,25	12,14	16,18	8,12	12,16	10,11	23,25	X
2.1 Nightgown	10,12,14,15	30,31,2,(32,2)	(10),11,12,13	(10),11,12,13	15,16	(6),5,9,3	10,11,12	9,10	19,(23),(24),25	12,13,14,15	16,17,18	8,12	12,16,(17)	10,11	23,25,(26)	X(Y)
5.1 Underwear	14,15	30,31,2	11,13	12,13	15,16	6	10,12	9,10	(19),(25)	12,14	16,18	8,12	12,16	10,11	23,25	X

() = alleles between 75 and 149 db - = no result Bold = major contributor Inc = inconclusive

Table 2 - Yfiler

Case Items	DYS456	DYS389I	DYS390	DYS389II	DYS458	DYS19	DYS385	DYS393	DYS391	DYS439	DYS635	DYS392	Y_GAT A_H4	DYS437	DYS438	DYS448
4 Mario Gonzalez-Hernandez	16	14	24	31	17	14	14,17	13	10	13	22	13	11	14	12	19
2.1 Nightgown	16	(13)	24	-	17	14	(13),14	13	10	12,13	22	(13)	11	14	12	19

() = alleles between 75 and 149 db - = no result Bold = major contributor Inc = inconclusive



P.O. Box 21398, Columbia, South Carolina 29221-1398 Phone (803) 896-7300 Fax (803) 896-7351

ROA_0534

THE STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

INDICTMENT FOR

CRIMINAL SEXUAL CONDUCT
WITH A MINOR
16-03-0655

At a Court of General Sessions, convened on the 23rd day of August, 2013, the Grand Jurors of Newberry County present upon their oath

That Mario Valerio Gonzalez Hernandez, in Newberry County, between the dates of January 1, 2011 and June 30, 2013, being over the age of fourteen (14) years, did unlawfully, willfully and lewdly commit or attempt to commit a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, to wit: Y. A., a minor female, date of birth [REDACTED]/2001, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the said defendant, or of the said child, Y. A., a minor female, date of birth 5/7/2001, in violation of Section 16-3-655(C) of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.


Deputy Solicitor

ROA_0535

Appendix_0541

THE STATE OF SOUTH CAROLINA

INDICTMENT FOR

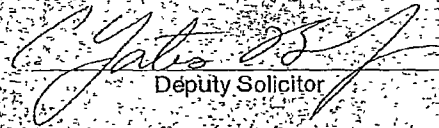
COUNTY OF NEWBERRY

Criminal Sexual Conduct with a Minor
§16-03-0655(A)

At a Court of General Sessions, convened on the 23rd day of August, 2013, the Grand Jurors of Newberry County present upon their oath:

That Mario Valerio Gonzalez Hernandez, in Newberry County, between the dates of January 1, 2011 and May 7, 2013 being older than the victim, did willfully and unlawfully commit criminal sexual conduct with a minor in the first degree, to wit: that the said defendant did engage in sexual battery upon a person under the age of eleven (11) years, a minor female, Y.A., date of birth [redacted], in violation of Section 16-3-655(A) (1) of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided:


Deputy Solicitor

ROA_0536

Appendix_0542

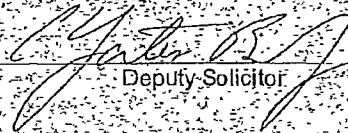
THE STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT
WITH A MINOR
16-03-0655 (B)

At a Court of General Sessions, convened on the 23rd day of August, 2013, the Grand Jurors of Newberry County present upon their oath:

That Mario Valerio Gonzalez Hernandez, in Newberry County, between the dates of May 7, 2013 and June 30, 2013 being older than the victim, did willfully and unlawfully commit criminal sexual conduct with a minor in the second degree, to wit: that the said defendant did engage in sexual battery upon a person who was at least 11, but less than 14 years of age, Y. A., a minor female, date of birth [REDACTED] 2001, in violation of Section 16-3-655(B) of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.


Deputy Solicitor

ROA_0537

Appendix_0543

WITNESSES

Kevin Atkins
Newberry Police Department

WARRANT NUMBER

2013D3600100060

TRUE BILL

Joseph H. Reynolds
Foreman of the Grand Jury
Date: *8-23-13*

VERDICT

Guilty
James V. Ringer
Foreman
10/30/14

THE STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

COURT OF GENERAL SESSIONS

August Term, 2013
Indictment # 13GS36-0500

THE STATE

vs.
Mario Valerio Gonzalez Hernandez

INDICTMENT FOR

CRIMINAL SEXUAL CONDUCT
WITH A MINOR
16-03-0655 (B)

CDR: 0396

ROA 0538

**NOTICE OF APPEAL FROM A SENTENCE IMPOSED BY THE COURT
OF GENERAL SESSIONS**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of General Sessions

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2014-GS-36-500

The State,

Respondent,

v.

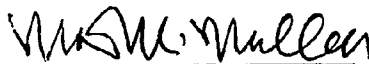
Mario V. Gonzalez Hernandez,

Appellant.

NOTICE OF APPEAL

Mario Valerio Hernandez Gonzalez appeals his conviction and sentence in this case. After a jury trial, the verdict was rendered by the jury and the sentence was imposed by the Honorable Eugene C. Griffith, Jr., on October 30, 2014.

November 7, 2014



Michael D. McMullen
Post Office Box 5027
Columbia, SC 29250
Phone: 803-252-4433
S.C. Bar # 0065483

ROA_0539

Appendix_0545

Other Counsel of Record:
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Attorney for Respondent

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ROA_0540

Appendix_0546

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

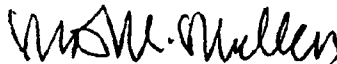
APPEAL FROM NEWBERRY COUNTY
COURT OF GENERAL SESSIONS

HONORABLE EUGENE GRIFFITH, JUDGE
Docket No./Indictment #'s. 2013-GS-36--500

THE STATE OF SOUTH CAROLINA V. MARIO HERNANDEZ

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY THAT THE FOREGOING NOTICE OF INTENT TO APPEAL filed by trial counsel on behalf of MARIO HERNANDEZ, who appeals from the verdict of the jury and the sentence of the Court imposed by the trial Judge, the Honorable Eugene Griffith, which jury verdict and sentence were handed down and imposed on October 30, 2014, in Newberry South Carolina, has been filed with the Honorable Newberry County Clerk of Court, at the following address: Jackie S. Bowers, Clerk of Court, P.O. Box 278, Newberry, SC 29108, and has been served upon opposing counsel, to wit: the Taylor Daniel, Assistant Solicitor, Eight Judicial Circuit, P. O. Drawer 10, Newberry, SC 29108, by placing those documents in the United States Mail, postage prepaid, to the addresses listed above.



Michael D. McMullen
Post Office Box 5027
Columbia, SC 29250
Phone: 803-252-4433
SC BAR# 0065483

The other attorney of record for the Defendant is:
E. Michael Pinilla
111 Executive Pointe Blvd, Suite B
Columbia, SC 29210
Phone: 803-728-0045

Dated: November 1, 2014

NOTICE TO CLERK OF COURT: Notify S.C. Court Administration immediately upon receipt of this Notice of Appeal, so that the Court Reporter may be directed to prepare the transcript.

SCCA 465 (12/2009)

ROA_0541

Appendix_0547

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

JUN 07 2016

SC Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of General Sessions
Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2013-GS-36-00500
Appellate Case No. 2014-002376

The State, ... Respondent,
v.
Mario Valerio-Gonzalez Hernandez, ... Appellant.

FINAL BRIEF OF APPELLANT

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Attorneys for Appellant Mario Valerio-Gonzalez Hernandez

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National Research Council, <i>The Evaluation of Forensic DNA Evidence</i> 193 (1996)	12
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Statement of Issues on Appeal

- I. Did the trial court err in admitting expert testimony that no conclusion could be reached regarding whether Mr. Hernandez could be included or excluded as a contributor to the DNA analysis because the evidence was irrelevant and invited the jury to speculate about its meaning?
- II. Did the trial court err in admitting the investigator's testimony regarding what the interpreter said the defendant told him in Spanish because the testimony was hearsay not subject to any exception?
- III. Did the trial court err in admitting expert testimony corroborating the minor's details of the alleged assault in a forensic interview because it improperly bolstered the minor's testimony?

Statement of the Case

This appeal arises out of a conviction and sentence of Appellant Mario Valerio-Gonzalez Hernandez of criminal sexual conduct with a minor in the second degree. Mr. Hernandez was found guilty by a jury after a trial in the Newberry County Court of General Sessions from October 28, 2014 to October 30, 2014. The State argued at trial that Mr. Hernandez sexually assaulted the minor child of his girlfriend, Tomasa Aguirre-Cruz, both of whom lived at the same residence as Mr. Hernandez. The State theorized that the alleged criminal sexual conduct had occurred from approximately 2010, when the minor was eight years old, until June 29, 2013, when the minor was twelve. The State brought two charges against Mr. Hernandez: criminal sexual conduct with a minor in the first degree and criminal sexual conduct with a minor in the second degree.

At trial, Ms. Aguirre-Cruz testified that, on the evening of June 29, 2013, she found Mr. Hernandez and the minor, who was not wearing underwear, lying on a blanket on the floor of the minor's bedroom. (Tr. 38-44; R. 167-173.) Ms. Aguirre-Cruz testified that the minor told her that Mr. Hernandez had touched and "had relations" with the minor. (Tr. 40; R. 169.) Ms. Aguirre-Cruz testified that the minor left to call the police at a neighbor's house and Ms. Aguirre-Cruz called Liz Rivera, a Spanish-speaking neighbor, to assist at the scene. (Tr. 41, 46-47; R. 170, 175-176.)

Andrew Rowe, a police officer with the Newberry Police Department, testified that he was dispatched and met Ms. Rivera, Ms. Aguirre-Cruz, and the minor at the house. (Tr. 82-84; R. 211-213.) Officer Rowe testified that he brought Mr. Hernandez out of the home for questioning. (Tr. 84-86; R. 213-215.) Officer Rowe testified that he read Miranda rights in English, and Ms. Rivera orally translated the Miranda rights into Spanish to Mr. Hernandez. (Tr.

87-89; R. 216-218.) Officer Rowe then questioned Mr. Hernandez regarding what occurred. (Tr. 92-94; R. 221-223.) Officer Rowe called Investigator Kevin Goodman to the home, and Investigator Goodman testified that he overheard Sgt. Rowe questioning Mr. Hernandez through Ms. Rivera. (Tr. 168; R. 297.) After the conclusion of the interview, Mr. Hernandez was taken to prison. (Tr. 168; R. 297.)

Inv. Goodman testified that, on July 1, 2013, Mr. Hernandez was brought to the police department for an interview. (Tr. 174; R. 303.) He testified that Mr. Hernandez was Mirandized in both English and Spanish, after which Mr. Hernandez signed a Spanish language waiver form. (Tr. 176-81; R. 305-310.) During the interview, Inv. Goodman asked questions to Corporal Boris Alvarado in English, who interpreted the questions and asked them to Mr. Hernandez in Spanish. (Tr. 174; R. 303.) Mr. Hernandez then responded in Spanish to Cpl. Alvarado, who interpreted the response back to Inv. Goodman in English. (Tr. 174; R. 303.) After questioning Mr. Hernandez, Inv. Goodman offered him an opportunity to give a written statement, and Mr. Hernandez wrote a statement in Spanish. (Tr. 181-82; R. 310-311.) Inv. Goodman also interviewed Ms. Aguirre-Cruz and the minor, and the minor also prepared a voluntary statement in English. (Tr. 171-74; R. 300-303.)

On June 29, 2013, after the alleged criminal sexual conduct, the minor was taken to the hospital for a sexual assault examination by Donna Debrew, a sexual assault nurse examiner at Palmetto Health. (Tr. 265; R. 394.) Ms. Debrew testified that she interviewed the minor and performed a sexual assault examination consistent with the answers provided by the minor within six hours after the alleged assault. (Tr. 267-71; R. 396-400.)

Jennifer Bartman, a DNA analyst employed by the State Law Enforcement Division, testified that she performed a DNA analysis on four pieces of evidence recovered from the scene:

buccal, vaginal, and rectal swabs from the minor obtained during the sexual assault examination; a buccal swab from Mr. Hernandez; a cutting from the chest area of the minor's nightgown; and a cutting from the minor's underwear. (Tr. 299-300; R. 428-429.) Ms. Bartman generated DNA profiles from each of the pieces of evidence, then performed short tandem repeat ("STR") and Y-chromosome short tandem repeat ("YSTR") analyses on the profiles. (Tr. 302; R. 431.) The STR analyses identified fifteen loci for comparison, and Ms. Bartman compared the number of repeating sections of DNA in the profile between Mr. Hernandez and the minor at the fifteen loci against established statistical standards to reach conclusions on the data. (Tr. 302; R. 431.) Ms. Bartman testified that Mr. Hernandez could be excluded as a contributor to the DNA mixture samples generated from the vaginal and rectal swabs and the cutting from the minor's underwear. (Tr. 322-23, 327; R. 451-451, 456.) She testified that no conclusion could be made regarding the inclusion or exclusion of Mr. Hernandez as a contributor to the DNA mixture generated from the cutting of the minor's nightgown. (Tr. 311; R. 440.)

Mr. Hernandez was found not guilty of criminal sexual conduct with a minor in the first degree and guilty of criminal sexual conduct with a minor in the second degree. (Tr. 393; R. 522.) A sentence of sixteen years of incarceration was imposed. (Tr. 399; R. 528.) Mr. Hernandez timely filed and served his Notice of Appeal on November 7, 2014.

Argument

- I. The trial court erred in admitting expert testimony that no conclusion could be reached regarding whether Mr. Hernandez could be included or excluded as a contributor to the DNA analysis because the evidence was irrelevant and invited the jury to speculate about its meaning.**

The trial court erred in admitting the expert testimony of Jennifer Bartman, the State's expert witness in the field of DNA analysis; that no conclusion could be reached regarding the inclusion or exclusion of Mr. Hernandez as a contributor to the mixture of DNA found on the cutting from the front of the minor's nightgown. Her testimony had no probative value whatsoever and could not have assisted the jury determine any fact in issue, so it should have been excluded as irrelevant pursuant to Rules 402 and 702 of the South Carolina Rules of Evidence. To the extent that the statistically insignificant DNA evidence could have had any probative value, that value was substantially outweighed by the risk of prejudice in this case because Ms. Bartman failed to explain the meaning or provide the statistical relevance of a non-exclusion result to the jury. As a result, the admission of her testimony invited the jury to serve as their own amateur experts using their preconceived, and likely incorrect, ideas of the meaning of DNA evidence that "could not exclude" Mr. Hernandez. The admission of Ms. Bartman's testimony was prejudicial, and a new trial is required to correct the error.

- A. The DNA evidence was irrelevant and should not have been admitted under Rules 402 and 702 of the South Carolina Rules of Evidence.**

Under the South Carolina Rules of Evidence, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. The evidence to which the expert will testify must be relevant, reliable, and helpful to the jury. *State*

v. *Tennant*, 383 S.C. 245, 255; 678 S.E.2d 812, 817 (Ct. App. 2009). This analysis by the trial court is part of its gatekeeping function “in ensuring the proposed expert testimony meets a reliability threshold for the jury’s ultimate consideration.” *State v. Cain*, 413 S.C. 508, 520, 776 S.E.2d 374, 380 (Ct. App. 2015), *reh’g denied* (Sept. 2, 2015) (quotation omitted). “Generally, the admission of expert testimony is a matter within the sound discretion of the circuit court.” *Id.*, 413 S.C. at 520, 776 S.E.2d at 380 (quotation omitted). This Court will not reverse a trial court’s decision to admit improper expert testimony unless the decision constituted a prejudicial abuse of discretion. *Id.* “An abuse of discretion occurs when the circuit court’s ruling is based on an error of law or a factual conclusion that is without evidentiary support.” *Id.* (quotation omitted).

Generally, South Carolina law recognizes that DNA evidence offered by an expert is reliable, although the admissibility of the DNA evidence may still be challenged on relevance or prejudice grounds. *State v. Ford*, 301 S.C. 485, 490, 392 S.E.2d 781, 784 (1990). “Relevant evidence is any 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.” Rule 401, SCRE. Additionally, 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.” Rule 403, SCRE.

The State offered the expert testimony of Ms. Bartman, a SLED forensic scientist, in the field of DNA analysis. (Tr. 297-98; R. 426-427.) In performing her DNA analysis, Ms. Bartman analyzed four pieces of evidence: a buccal swab from Mr. Hernandez; the minor’s buccal, vaginal, and rectal swabs; a cutting from the minor’s underwear; and a cutting from the chest

area of the minor's nightgown. (Tr. 300-01; R. 429-430.) Ms. Bartman performed STR and Y-STR analyses¹ on the DNA mixtures, and the results from all of the samples conclusively excluded Mr. Hernandez except for the nightgown chest cutting. (Tr. 322-23, 327; R. 451-452, 456.)

Ms. Bartman testified that the DNA profile developed from the nightgown chest cutting was a mixture of at least two individuals. (Tr. 310-11; R. 439-440.) Ms. Bartman testified that the minor could conclusively be included and not excluded as a contributor to the mixture. (Tr. 310; R. 439.) In the context of the minor's contribution to the DNA profile, Ms. Bartman testified that "[t]he probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately 1 in 1,600." (Tr. 311; R. 440.) However, Ms. Bartman testified that, for both the DNA profile and the partial YSTR profile developed from the nightgown chest cutting, Mr. Hernandez could neither be included nor excluded as a contributor to the mixture. (Tr. 311; R. 440.) She did not explain the statistical significance of that result.

The trial court erred in allowing Ms. Bartman to testify about the non-exclusion result on the nightgown chest cutting sample because it had no probative value whatsoever. The DNA results were not inconclusive because of a tainted sample or insufficient sample size; to the contrary, Ms. Bartman's DNA analysis was complete and reached a result—that no conclusions or inferences could be made. Thus, unlike a match, where the contributor can be included and not excluded, the non-exclusion result did not provide any information about Mr. Hernandez's contribution, and the DNA analysis inherently had no value. "Truly inconclusive results, in failing to either include or exclude the defendant, are wholly neutral," and they "are not relevant

¹ Numerous secondary sources, and some cases, discuss the methodologies and evidentiary significance of STR and Y-STR testing. See, e.g., Hon. Ming W. Chin, et al. Forensic DNA Evidence: Science and the Law §§ 2:3, 7:1 (2015); *Harvey v. Horan*, 285 F.3d 298, 305 (4th Cir. 2002).

[] because they do not have a tendency to prove any particular fact that would be material to an issue in the case.” *State v. Johnson*, 862 N.W.2d 757, 775-76 (Neb. 2015). Put simply, Ms. Bartman’s testimony is evidence of nothing, and it was totally irrelevant.

The lack of relevance of the DNA analysis is compounded by the lack of evidence in the record about *why* Ms. Bartman could not reach a conclusion. Ms. Bartman described how the presence of the same number in the box for the individual and the evidence indicated a match for that particular locus. (Tr. 313; R. 442.) When prompted, however, Ms. Bartman never explained the *meaning* of the different potential results—inclusive, exclusive, non-exclusive, or incomplete. Instead, she only repeated her explanation of the methodology:

Q. I guess the question is, it might just be semantics. Why can’t you include him then. You can’t exclude but you can’t include him?

A. Right. Like I mentioned, we look at the profile as a whole. We don’t look at each location individually. Just because, several people can have a 14 repeat and a 15 repeat. That is not necessarily indicative of a person. And we look at these 15 different locations because these are the locations that have been shown to be the most unique between individuals. So, when we look at all of those different locations combined it gives us the best look at whether a person can be there or can be excluded.

(Tr. 314; R. 443.) When again prompted by the State to explain the meaning of the results rather than the methodology, Ms. Bartman only offered circular responses:

Q. And then you say that about Hernandez as well, he cannot be excluded?

A. No conclusive statement can be made regarding the inclusion or exclusion.

Q. What does that mean?

A. Like I said earlier, 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.

(Tr. 316; R. 445.)

- Q. 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 threshold of confidence, I guess.
- A. 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 to conclusively say that he cannot be excluded from that profile.

(Tr. 317; R. 446.) The chart of the results of the testing, but not the report finding that no conclusion could be made from the testing, was shown to the jury. (Tr. 309-10, Ex. 18; R. 438-439, 534.)

While the jury heard that it would have been a striking coincidence—1 in 1,600—for someone other than the minor to have caused the minor's DNA to appear in the profile, the jury was given no context about the meaning of the non-exclusion result for Mr. Hernandez. The statistical context of DNA analysis is crucial to determining what inferences a jury may reasonably take from the results, regardless of what the result was. For example, Mr. Hernandez may have been non-excludable because the results only indicated a broad class of potential contributors. Alternatively, the results may have suggested the contributor possessed some genomic characteristic that would only appear in the DNA of a few people worldwide—but not uniquely identifying Mr. Hernandez. If, *arguendo*, the results were below the State's required confidence interval, the jury had no way to know if Mr. Hernandez was nearly excludable (say, perhaps, only a 1-in-100 chance that the contribution came from him), nearly includable (only a 1-in-100 chance the contribution was *not* from him), or somewhere in between. However missing from the record is the State's proof of any such explanation. Ms. Bartman's opinion thus only provided half of the necessary information to the jury; she did not provide any analysis to explain the *meaning* of that conclusion or even inform the jury that no inferences could be

made from it. Without an explanation, the information that he could not be included or excluded as a contributor simply has no statistical application and no probative value.

In *Commonwealth of Massachusetts v. Mattei*, the Supreme Judicial Court of Massachusetts held that expert testimony regarding non-exclusion results should not be admitted without an accompanying statistical explanation of its meaning. 920 N.E.2d 845, 849 (Mass. 2010). The court noted that the same reasoning why courts require statistical relevance for “match” DNA test results applies equally to non-exclusion results; otherwise, the jury would have no way to evaluate the meaning of the result to assign any personal significance to it. *Id.*, 920 N.E.2d at 856. Other courts have agreed that non-exclusion results are not relevant unless accompanied by an explanation, whether statistical or otherwise, regarding the meaning of the non-exclusion. See, e.g., *Johnson*, 862 N.W.2d at 775; *Duncan v. Com.*, 322 S.W.3d 81, 93 (Ky. 2010); *Deloney v. State*, 938 N.E.2d 724, 730 (Ind. Ct. App. 2010); *State v. Tester*, 968 A.2d 895, 906 (Vt. 2009); *People v. Coy*, 620 N.W.2d 888, 897 (Mich. App. 2000); *State v. Williams*, 574 N.W.2d 293, 298 (Iowa 1998). Without such an explanation, statistical or otherwise, the results are meaningless and of no probative value. Their admission in this case was error.

B. The error in admitting the irrelevant DNA evidence was prejudicial because it invited the jury to engage in amateur speculation about its meaning.

The error in admitting the non-exclusion DNA testimony was not harmless because it invited the jury to become amateur experts and speculate about the meaning of the data for themselves. To the extent that non-exclusion results can have any probative value without an explanation of their meaning, that value was substantially outweighed in this case by the prejudice to Mr. Hernandez of the jury being misled. As a result, this Court should remand the case for a new trial.

“To show prejudice, there must be a reasonable probability that the jury’s verdict was influenced by the challenged evidence or the lack thereof.” *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012) (quotation omitted). “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.” *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quotation omitted). Error is only considered harmless if it could not reasonably have affected the outcome of the trial. *State v. Williams*, 380 S.C. 336, 344, 669 S.E.2d 640, 644 (Ct. App. 2008) (citing *State v. Bryant*, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006)). In such cases, the defendant’s guilt must be “conclusively proven by competent evidence such that no other rational conclusion can be reached.” *State v. Kirton*, 381 S.C. 7, 25, 671 S.E.2d 107, 115-16 (Ct. App. 2008) (quotation omitted). “The determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case.” *Id.*, 381 S.C. at 25, 671 S.E.2d at 115.

Ms. Bartman’s testimony that Mr. Hernandez could not be included nor excluded as a contributor to the DNA mixture prejudiced Mr. Hernandez because the potential existed for the jury to impermissibly infer that it had some significance. Stating that Mr. Hernandez could not be excluded suggests a link that could be more firmly established if more sampling was possible; as the Supreme Court of Nebraska noted, a jury could reasonably conclude that DNA results showing that the defendant could neither be included nor excluded makes that defendant a possible source of the DNA. *State v. Johnson*, 862 N.W.2d 757, 773 (Neb. 2015). However, that is a factually incorrect inference from a non-exclusion result. The only correct determination from a non-exclusion result is that it is “evidence of *nothing*.” *Clark v. State*, 96 A.3d 901, 908 (Md. 2014) (emphasis added). A non-exclusion result implies no greater link

between Mr. Hernandez and the nightgown than *anyone* else. *See Com. v. Nesbitt*, 892 N.E.2d 299, 313 (Mass. 2008) (finding that testimony regarding inconclusive DNA evidence was prejudicial because it had no causal relevance but affirming because defendant did not object to the evidence). It has no statistical meaning or explanatory relevance *whatsoever*. *Johnson*, 862 N.W.2d at 773-74.

Error in admitting irrelevant evidence is particularly harmful when the evidence is DNA analysis. While DNA methodologies continue to increase in reliability, juries continue to both expect DNA to be presented and rationally trust its results—despite usually having no personal understanding of its meaning. As the Colorado Court of Appeals noted:

DNA is different from other identifying evidence. If a witness testified that she could not exclude the defendant as a suspect because the defendant, like the suspect, had brown hair, a juror would know to give almost no weight to that testimony. Jurors are presumed to have some knowledge of the frequency of this characteristic within the general population. But because a juror is unable to observe a person's DNA, "the juror has no idea of the frequency of a particular DNA profile." *Mattei* at 858. And, "[c]ertainly, a judge's or juror's untutored impression of how unusual a DNA profile is could be very wrong." [*State v. Tester*, 968 A.2d 895, 907 (Vt. 2009)] (quoting National Research Council, *The Evaluation of Forensic DNA Evidence* 193 (1996)).

People v. Marks, ___ P.3d ___, 2015 WL 7769092, at *7 (Colo. App. Dec. 3, 2015). "[J]urors place great emphasis on DNA evidence—so much so that the evidence has long enjoyed a status of 'mythic infallibility' for juries." *Id.* at *8 (quoting *Virgin Islands v. Byers*, 941 F.Supp. 513, 526 (D.V.I. 1996)). Unless the expert testifies regarding the significance of the non-exclusion results, then the jury will be invited to become amateur experts and guess what that significance is. *See Com. v. Mattei*, 920 N.E.2d 845, 856 (Mass. 2010) ("Jurors are routinely presented with exceedingly infinitesimal random match probabilities. . . . If the jury are not provided with similar statistical evidence where the DNA test result is a "nonexclusion," there is a real risk that

jurors will be misled into thinking that these DNA test results are similarly significant and that the nonexclusion evidence is similarly conclusive as to the “matched” contributor’s identity, when in fact the actual meaning of such results can vary substantially.”). Doing so is not weighing the evidence—it is impermissibly speculating.

Because Ms. Bartman did not explain why Mr. Hernandez could not be excluded but not included or providing the statistical context of such a result, the trial court improperly “invite[d] the jury to speculate about the probability of a match” by allowing her testimony. *Marks*, ___ P.3d at ___, 2015 WL 7769092, at *7. As a result, there is a “significant possibility” that the “jury might have attributed the potential DNA match preemptive or undue weight.” *People v. Coy*, 243 620 N.W.2d 888, 899 (Mich. App. 2000). The admission of the non-exclusion evidence improperly suggested that it was stronger than it actually was.

The State further exacerbated the harm to Mr. Hernandez and the jury’s confusion about the permissible inferences to be taken from the non-exclusion DNA evidence in its closing argument:

DNA, it can be included or excluded. I guess the jargon or the terms SLED uses sometimes frustrate me. He can’t be included and he can’t be excluded. What are we to take away, I don’t really fully know but when I look at this chart and I look at Mr. Hernandez and I look at that nightgown I see a whole bunch of numbers that match up. And I just don’t understand why a male’s DNA is on her nightgown and I just don’t understand that this acid phosphate is present. And they are going to tell you, well, what about the little boy. Acid phosphate, there is male DNA in there but who is it from. And what are we do with all of these numbers that match up.

(Tr. 368-69; R. 497-498.) Merely matching some numbers—or even a “whole bunch” of numbers, as the State argued—is meaningless when any two humans have nearly entirely identical genomic compositions. The State thus specifically encouraged the jury to continue

speculating about the ultimate conclusion from the DNA analysis even after its own expert declined to do so. See *Com. v. Mattei*, 920 N.E.2d 845, 858 (Mass. 2010) (finding prejudicial error where prosecutor relied in closing on non-exclusion DNA evidence without statistical explanation and suggested jury rely on DNA evidence); *Duncan v. Com.*, 322 S.W.3d 81, 93 (Ky. 2010) (stating that, if the prosecutor relies on a non-exclusion result with no other evidence of its significance, it may not “invite the jury to speculate that the match is actually more significant than the expert testified”). The admission of the irrelevant DNA evidence only created the potential for the jury to act as amateur experts and speculate about why it was inconclusive, fabricating the missing physical evidentiary link to Mr. Hernandez.

Further, the error could not have been harmless because the competent evidence in the record, without the jury’s speculation about the meaning of the DNA evidence, does not conclusively prove guilt such that no other conclusion could have rationally been reached. The non-exclusion of Mr. Hernandez from the nightgown DNA sample was the only piece of direct, tangible evidence suggesting to the jury a link between Mr. Hernandez to the minor on June 29, 2013, the only night that any witness other than the minor testified that an assault occurred. All of the other DNA samples tested from June 29, 2013 conclusively excluded Mr. Hernandez and no spermatozoa from Mr. Hernandez were identified on any sample. (Tr. 321-23, 327; R. 450-452, 456.) Ms. Bartman’s testimony regarding her DNA analysis should have been excluded as irrelevant, and the failure to exclude the evidence was not harmless error because it had the potential to mislead the jury. A new trial is warranted.

II. The trial court erred in admitting the investigator's testimony regarding what the interpreter said the defendant told him in Spanish because the testimony was hearsay not subject to any exception.

The trial court also erred in admitting the hearsay testimony by Investigator Goodman about his interview of Mr. Hernandez on July 1, 2013. Inv. Goodman testified regarding the alleged admissions made by Mr. Hernandez to Cpl. Alvarado in Spanish—as interpreted to him by Cpl. Alvarado in English—even though he was unable to understand Spanish or any of Mr. Hernandez's statements. His testimony about what Cpt. Alvarado told him that Mr. Hernandez said was hearsay with no exception available to make the communications admissible, and its admission was error.

The South Carolina Rules of Evidence define hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Rule 801(c), SCRE. Hearsay testimony is inadmissible unless excepted by the South Carolina Rules of Evidence, by Supreme Court Rule, or by statute. Rule 802, SCRE. However, a witness may testify regarding an out-of-court statement made to him by the defendant as a party admission not subject to the hearsay rule. Rule 801(d)(2), SCRE.

The State asked Inv. Goodman to testify regarding what Mr. Hernandez said in the interrogation, as told to Inv. Goodman by Cpl. Alvarado:

Q. All right. So what happens when he gets to your office?

A. He comes in. I read him his rights and we fill out a form. He's read his rights from our English version and at the same time it's being translated on a Spanish form that he's signing off on the entire time. He waived those rights. I picked up from his conversation 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 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.

Q. Okay. Okay. So he is admitting to touching her private parts but not to penetration?

A. That's right.

Q. And so what -- you said something about 2012. What did he say about the year 2012?

A. He said that's when the inappropriate touching started around that time.

(Tr. 174-75; R. 303-304.) However, Inv. Goodman could not testify directly about what Mr. Hernandez said because he did not speak Spanish. (Tr. 169; R. 298.) During the interview, he was wholly reliant on what Cpl. Alvarado had told him that Mr. Hernandez had said, and in court, he could only repeat what Cpt. Alvarado told him that Mr. Hernandez had said. Thus, his testimony did not include any admissions made by Mr. Hernandez—only out-of-court statements made by Cpl. Alvarado about what Mr. Hernandez admitted, being offered for the truth of the matter asserted therein. Interpretation is not recognized by Rule 802, SCRE, or the South Carolina Supreme Court as admissible hearsay testimony, so Inv. Goodman's testimony was inadmissible. *See, e.g., State v. Morales*, 269 P.3d 263, 271 (Wash. 2012) (en banc) (finding that testimony by officer that a Spanish-speaking interpreter had read warning to defendant was inadmissible hearsay because officer could not testify based on his own understanding and testimony was offered for truth of the matter asserted); *People v. Wing Choi Lo*, 570 N.Y.S.2d 776, 777 (N.Y. Sup. Ct. 1991) ("The testimony of the detective as to what the interpreter stated the defendant told him, in a language the detective did not understand, was hearsay." (citation omitted)); *People v. Gomez*, 491 N.E.2d 68, 73 (Ill. App. 1986) ("[W]e note that a person

conversing with a third person through an interpreter is not qualified to testify to the other person's statements because he knows them only through the hearsay of the interpreter who, ordinarily is the only person who may testify to the third person's words.").

Some courts have recently recognized that interpreters serve only as a "language conduit" between the defendant and the interviewer such that an agency relationship, and testimonial identity, arises between the defendant and the interpreter pursuant to Rule 801(d)(2)(C) or (D). *See, e.g., United States v. Ushakow*, 474 F.2d 1244, 1245 (9th Cir. 1973). However, the language conduit theory fails to recognize that interpretation involves more than the one-to-one translation of words; it involves the translation of concepts. Even if the words originated with Mr. Hernandez, Cpl. Alvarado provided the understanding of the "contextual, pragmatic meaning" of the words and attempted to reproduce the concepts in English to Inv. Goodman. *See United States v. Charles*, 722 F.3d 1319, 1324 (11th Cir. 2013) (holding that interpreter's statements in interrogation were testimonial for purposes of Confrontation Clause). Moreover, whereas Mr. Hernandez speaks a Guatemalan dialect of Spanish, Cpl. Alvarado speaks Bolivian Spanish, and he admitted that Spanish words can have different meanings in different dialects, including between Guatemalan and Bolivian. (Tr. 235; R. 364.) As a result, Cpl. Alvarado's interpretation did not have the same guarantees of reliability underlying the hearsay exceptions in Rule 803, SCRE.

Even if the Court were to find that Cpl. Alvarado merely served as a language conduit, Inv. Goodman's testimony should still not be admissible. The cases finding that the interpreter is merely a language conduit apply a four-factor test to determine whether the interviewer's testimony should be admissible:

- (1) which party supplied the interpreter,
- (2) whether the interpreter had any motive to mislead or distort,

- (3) the interpreter's qualifications and language skill, and
- (4) whether actions taken subsequent to the conversation were consistent with the statements as translated.

United States v. Romo-Chavez, 681 F.3d 955, 959 (9th Cir. 2012). Even if the Court were to apply such a test, each of these factors would weigh against the reliability of Cpl. Alvarado's translation such that it cannot be presumed that he was merely a language conduit.

The State provided Cpl. Alvarado, a police officer, as the interpreter. Although the fact that he is a government employee and police officer "does not, by itself, necessarily prevent his translations from being admissible" or allow a presumption that he would intentionally misinterpret the statements, it makes the first two factors weigh against the State. *Id.* Although Cpl. Alvarado testified that he was fluent in Spanish, he had no certifications in Spanish translations and had not spoken it on a daily basis in almost a decade, so the third factor also weighs against the reliability of the testimony. (Tr. 235; R. 364.) Finally, although Mr. Hernandez subsequently drafted a written statement, Cpl. Alvarado noted that the written statement was inconsistent, as it did not include the words private parts or inappropriate touching. (Tr. 249; R. 378.) Cpl. Alvarado was acting as an interrogator, not a mere neutral translator, and he was not Mr. Hernandez's agent in the interview such that Inv. Goodman's testimony restating Cpl. Alvarado's interpretation was not hearsay.

The erroneous admission of Inv. Goodman's testimony regarding the July 1, 2013 interview was not harmless because it was the first time the jury had heard the statements made by Mr. Hernandez in the interrogation. Although Cpl. Alvarado subsequently testified about the same conversation, his testimony provided significantly less detail:

During the interview, Mr. Hernandez made the statements 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.

(Tr. 232; R. 361.) Because Inv. Goodman had already testified in detail about the interrogation at that time, the damaging testimony had already been heard. The admission of Inv. Goodman's testimony was erroneous and requires reversal.

III. The trial court erred in admitting expert testimony corroborating the minor's details of the alleged assault in a forensic interview because it improperly bolstered the minor's testimony.

Finally, the trial court erred in allowing the expert testimony of Donna Debrew, the forensic nurse that examined the minor on the evening of June 29, 2013, which included the details of the minor's version of events as told to her during the forensic nursing interview. (Tr. 260; R. 389.) Ms. Debrew's testimony improperly bolstered the minor's subsequent testimony and should not have been permitted.

Ms. Debrew testified that she became involved when law enforcement requested that she perform a forensic examination on the minor after the minor was transported to Palmetto Health. (Tr. 265; R. 394.) Ms. Debrew testified about the information that law enforcement told her before the examination:

The brief information that I was given was that she was assaulted by or was reporting that she was assaulted by someone in the home which was a male that was much older than her. It was a 12-year-old victim at that time and when I got to the hospital I spoke with the physician. He had done his initial exam and had cleared her, because the physician has to see the patient before I see them, and he had cleared her for me to do my exam.

(Tr. 265; R. 394.) Ms. Debrew then testified about what the minor told her during the interview portion of the sexual assault examination of the minor:

Q. What was your understanding of the type of assault?

- A. She explained to me that she was assaulted by the landlord and I think she called him the pastor. I'm trying to find the right page.
- Q. I guess, when I'm asking the nature of the assault, was it touching, was it digital penetration, was it?
- A. He penetrated her -- with the questions that we ask, we get very specific what is touched or where something is put. And she did say that, when I questioned her on, did he put his penis in your vagina, she answered yes.
- Q. Okay.
- A. And when I questioned her, did he put his penis in your bottom -- where you poop and she said yes.

(Tr. 268-69; R. 397-398.) On cross-examination, after the State had opened the door to Ms. Debrew corroborating the minor's testimony, Ms. Debrew testified further regarding her report of the minor's statements from the interview:

This is what I typed when she was talking to me. "Like in the night, it was 11:00 or 12:00 and he," (the pastor), that should be, "came in the living room and then he came in my room. He had a bad attitude. He takes down my underpants and he abused me. I was like, mommy, and I ran to the bathroom. My mom came and he acted like nothing happened. My mom went, why are my daughter's underwear on the floor? My mom asked me and I was trembling and I was really scared. The pastor said, nothing is going on and you're lying on me. He said that twice. My mom got the phone. She was going to call 911, and he was like begging and crying for her to stop or for her not to call. My brother was there watching. I went to the neighbor and she called the police and they came and brought us here."

(Tr. 274-75; R. 403-404.)

Ms. Debrew's testimony constituted improper bolstering of the minor's testimony. Under South Carolina law, evidence of prior consistent statements is not admissible unless the witness has been impeached. *State v. Barrett*, 299 S.C. 485, 486; 386 S.E.2d 242, 243 (1989). The purpose of this rule is to maintain "the assessment of witness credibility . . . within the exclusive province of the jury." *State v. Taylor*, 404 S.C. 506, 514-15, 745 S.E.2d 124, 128 (Ct. App. 2013) (quotation omitted). In criminal sexual conduct cases, however, witnesses other than

the alleged victim may testify regarding the alleged victim's complaints as corroborative evidence of the assault. *Barrett*, 299 S.C. at 486-87, 386 S.E.2d at 243. The corroborative witness's testimony must be limited to the time and place of the assault and "may not include particulars or details." *Id.*; see also Rule 801(d), SCRE. "Testimony from other witnesses regarding the victim's identification of the perpetrator does not fall within this hearsay exception." *Dawkins v. State*, 346 S.C. 151, 156, 551 S.E.2d 260, 262-63 (2001).

The details of the minor's statements in the out-of-court interview—the age of the alleged assailant, his identity, the type of touching or penetration, and the alleged events constituting the assault—are exactly the types of "particulars or details" that improperly vouch for the credibility of the minor's testimony. Even though she did not expressly state whether she believed the minor or not, Ms. Debrew still improperly bolstered the minor's testimony because she necessarily relied on and incorporated the minor's out-of-court statements for their truth. See *State v. McKerley*, 397 S.C. 461, 465, 725 S.E.2d 139, 142 (Ct. App. 2012) (finding that testimony of forensic interviewer improperly bolstered testimony of children despite interviewer never testifying that he believed children).

Under South Carolina law, Ms. Debrew's improper bolstering cannot be considered to be harmless. "Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless." *State v. Jennings*, 394 S.C. 473, 478, 716 S.E.2d 91, 93-94 (2011) (quoting *State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978)). "Improper corroboration testimony that is *merely cumulative to the victim's testimony*, however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." *Jennings*, 394 S.C. at 478-79, 716 S.E.2d at 94 (emphasis in original) (quoting *Jolly v. State*, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994)). Ms. Debrew's corroboration of the

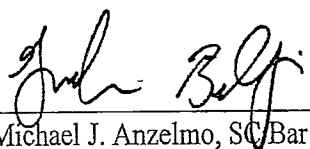
minor's statements was particularly powerful—and particularly prejudicial—because she was employed as a sexual assault nurse examiner and qualified as an expert in the field of forensic nursing for assessment of sexual assaults. (Tr. 260-64; R. 389-393.) In testifying, Ms. Debrew lent her own credibility to the version of events later offered by the minor, whose credibility was not in question as she had not yet taken the stand. *See State v. Barrett*, 299 S.C. 485, 487, 386 S.E.2d 242, 243 (1989) (noting that bolstering error was exacerbated because the victim's credibility was not subject to impeachment because she had not yet taken the stand). The trial court erred in allowing Ms. Debrew to improperly bolster the victim's testimony, and a new trial must be granted to correct this error.

Conclusion

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

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM NEWBERRY COUNTY
Court of General Sessions
Honorable Eugene C. Griffith, Jr., Circuit Court Judge
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SC Court of Appeals

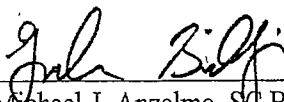
Case No. 2013-GS-36-00500
Appellate Case No. 2014-002376

The State, ... Respondent,
v.
Mario Valerio-Gonzalez Hernandez, ... Appellant.

CERTIFICATE OF COUNSEL

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

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

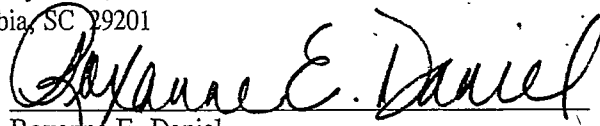
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June 7, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY

Court of General Sessions

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

Appellate Case No. 2014-002376

THE STATE

Respondent

MARIO V. GONZALEZ HERNANDEZ

Appellant

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STATEMENT OF ISSUES ON APPEAL

I.

Appellant's argument concerning the DNA evidence establishing a presence of male DNA and that Appellant could not be included or excluded as a contributor is not preserved for appellate review. However, even if Appellant's argument was preserved for review, Jennifer Bartman's testimony concerning the DNA evidence was relevant and its probative value was not substantially outweighed by its prejudicial effect.

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Appellant's argument concerning Investigator Goodman's testimony about Appellant's interview at the police station is not preserved for appellate review. However, even if Appellant'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 Appellant; Furthermore, any alleged error is harmless, as Investigator Goodman's testimony was cumulative to Corporal Alvarado's testimony about the interview with Appellant.

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Appellant's argument concerning improper bolstering is not preserved for appellate review. However, even if Appellant's argument was preserved, the vast majority of Debrew's testimony elicited by the State was admissible as the statements at issue were made for purposes of medical diagnosis; Debrew's single comment that may be construed as inappropriate was not intentionally elicited by the Solicitor and was rendered harmless by later statements made by Debrew in response to questioning by Defense Counsel. Also, as to Debrew's testimony that was elicited by Defense Counsel, Appellant cannot complain on appeal about an error that the conduct of his own counsel caused. Furthermore, any alleged error in this case is harmless due to the overwhelming evidence of Appellant's guilt.

STATEMENT OF THE CASE

Appellant 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). Appellant proceeded to a jury trial from October 27-29, 2014, in Newberry, South Carolina. At the conclusion of trial, Appellant 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. Appellant timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

STATEMENT OF FACTS

Sometime in 2009, Mother and her children moved in to the home of Pastor Mario Hernandez, the appellant in this case. ROA. p. 159.¹ 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 Appellant's home. ROA. pp. 181-182. ROA. pp. 159-160. Victim was born on May 7, 2001. ROA. p. 160. On June 29, 2013, Mother entered Victim's bedroom and turned on the light to discover Victim lying on the floor without underwear on. ROA. pp. 167-168. When Mother entered the room, Victim got up quickly and went into the bathroom. ROA. p. 168. Appellant was also in the room and got up from the floor very quickly. ROA. p. 168. Mother testified when she entered the room, Appellant was on top of Victim. ROA. p. 172. Mother noticed Appellant's penis was exposed. ROA. p. 172

When Victim came out of the bathroom, Mother asked her what was happening. ROA. p. 168. Victim began crying and told Mother Appellant abused her. ROA. p. 168. Mother testified Appellant told her he had touched and had relations with Victim. ROA. p. 169. Mother told Appellant she was going to call the police. ROA. p. 169. Appellant began crying and threatened to kill himself. ROA. p. 169. Appellant took away Mother's cell phone, causing Victim to run to a neighbor's house to call the police. ROA. p. 169.

Around twenty minutes later, the police arrived. ROA. p. 174. Mother called Liz Rivera, a neighbor who lives a few blocks away, to help interpret when the police arrived. ROA. p. 175. Mother does not speak very much English. ROA. p. 175. Rivera is self-employed as an interpreter. ROA. p. 231. Andrew Rowe, the first responding officer,

¹ All references to the transcript dated October 28, 2014 will be cited as "Tr." All citations to the October 27, 2014 transcript will be cited as "October 27 Tr."

testified he was met by Mother and Rivera when he arrived at the home. ROA. p. 212. Rivera interpreted for Mother. ROA. p. 214. When he arrived at the scene, Mother and Rivera told Rowe Appellant locked himself in the home and had made statements he wanted to kill himself. ROA. p. 214. After a few minutes, Appellant exited the home. ROA. p. 215.

Once Appellant was outside of the home, investigators placed him into handcuffs for an investigative detention. ROA. p. 216. Rivera assisted investigators in interpreting for Appellant. ROA. p. 216 After having his rights explained to him by Rivera, Appellant agreed to speak with investigators. ROA. p. 218. Appellant admitted to inappropriately touching Victim on several occasions. ROA. p. 221. Specifically, Appellant 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." ROA. pp. 221-222. Following these statements, law enforcement took Appellant into custody. ROA. p. 223.

Investigator Kevin Goodman spoke with Appellant at his office at the Sheriff's Department around noon on July 1st. ROA. p. 299. Appellant was transported to Goodman's office by Corporal Boris Alvarado. ROA. p. 303. Alvarado is fluent in Spanish and often assists in investigating cases involving Spanish-speaking individuals. ROA. p. 356. Spanish is Alvarado's native language, as he grew up in Bolivia. ROA. p. 355. Alvarado testified that while Appellant is from Guatemala, he did not have any difficulty understanding the Guatemalan dialect. ROA. p. 359. Appellant provided both oral and written statements to Alvarado and Goodman. ROA. p. 359. While Appellant

made his oral statements, Alvarado interpreted for Goodman. ROA. p. 360. 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.

ROA, p. 361.

Appellant'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.

ROA. pp. 372-373.

Victim testified at trial. ROA. pp. 460-485. Victim described sex as, "when a male puts his part in the female's part." ROA. pp. 471-472. Victim stated Appellant began sexually abusing her when her family moved into Appellant's home. ROA. p. 472. Victim was eight or nine years old at the time the abuse began. ROA. p. 472. Victim disclosed that she never told her mother when the abuse began because Appellant told her that her mother would not believe her. ROA. p. 473. Mother, a diabetic, was hospitalized

on several occasions. ROA. p. 473. When Mother was at the hospital, Appellant would sexually abuse Victim. ROA. p. 474.

Victim testified she remembered what happened on the evening of June 29, 2013. ROA. p. 464. Victim was lying in bed with her pajamas on when she heard Appellant come into her room. ROA. p. 468. Appellant ripped the covers off the bed and threw Victim on the floor. ROA. p. 469. Appellant then crawled on top of Victim and raped her. ROA. p. 469. At the time of the assault, Mother was in S.M.'s room. ROA. p. 475. Mother eventually walked into Victim's bedroom, turned on the lights, and saw Appellant on top of Victim. ROA. p. 475. Victim stated that she was scared so she ran into the bathroom. ROA. p. 475. When Victim emerged from the bathroom, she told Mother Appellant assaulted her. ROA. p. 477. When the police arrived, Victim spoke with them and fully described Appellant's abuse. ROA. pp. 478-479. Victim also travelled to the hospital where she was physically examined. ROA. p. 479.

Donna Debrew, a forensic nurse examiner at Palmetto Health Richland, examined Victim in the early morning hours of June 30, 2013. ROA. pp. 389, 393-394. At the time of the examination, Victim was complaining of vaginal discomfort. ROA. p. 396. Victim disclosed to Debrew she had been sexually assaulted. ROA. p. 396. Debrew noticed bruising and discoloration of Victim's hymen. ROA. p. 398. Debrew testified her findings during the physical examination were consistent with some sort of trauma. ROA. p. 402.

ARGUMENT

I.

Appellant's argument concerning the DNA evidence establishing a presence of male DNA and that Appellant could not be included or excluded as a contributor is not preserved for appellate review. However, even if Appellant's argument was preserved for review, Jennifer Bartman's testimony concerning the DNA evidence was relevant and its probative value was not substantially outweighed by its prejudicial effect.

Relevant Facts

Jennifer Bartman, a forensic scientist, performs DNA analysis in the SLED DNA case work department. ROA. p. 425. At trial, Bartman was qualified as an expert in DNA analysis. ROA. p. 427. 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 Appellant; a cutting from Victim's underwear; and a cutting from the chest area of Victim's nightgown. ROA. p. 428-429. Bartman performed two types of DNA testing on the items in this case, STR testing and YSTR testing. ROA. p. 432. 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. ROA. p. 431. In YSTR analysis, the analyst focuses only on the male DNA that is present. ROA. p. 432. Bartman testified she performed the YSTR test on the nightgown because there was some male DNA present. ROA. p. 447. Bartman further testified the testing for acid phosphate was positive. The presence of acid phosphate is indicative of semen. ROA. p. 447.

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 Appellant as a contributor to this mixture.” ROA. p. 440. Bartman 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.” ROA. p. 445. 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.

ROA. p. 446.

During a recess prior to Donna Debrew’s testimony, Defense Counsel had stated:

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 include 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.

ROA. p. 381.

The court 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.”

ROA. pp. 381-382. The court 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." ROA. p. 382. 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.

ROA. p. 383. The court then asked the Solicitor what he intended to do with the DNA report. ROA. p. 383. The Solicitor responded the cutting from the nightgown revealed a presence of male DNA. ROA. p. 383. 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.

ROA. p. 387.

The trial court 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.

ROA. p. 388.

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." ROA. p. 388. Defense Counsel elaborated "So it's not the testimony I object to but the chart." ROA. p. 388. Defense Counsel later 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. ROA. p. 435. The court 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" ROA. p. 436. Defense Counsel responded "Well, I don't have a problem with that-I have a problem with the --." ROA. p. 436. Defense Counsel continued to elaborate on his desire to have the chart excluded from evidence. ROA. p. 436. The Chart was ultimately not entered into evidence. ROA. p. 438.

Discussion

Appellant contends the trial judge court in admitting expert testimony that no conclusion could be reached regarding whether Appellant could be included or excluded as a contributor to the DNA analysis because the evidence was irrelevant and invited the jury to speculate as to its meaning. Specifically, Appellant asserts Bartman's testimony had no probative value whatsoever and could not have assisted the jury determined any fact in issue. Appellant further asserts any probative value of the DNA evidence was substantially outweighed by the risk of prejudice. However, this argument is without merit, as the DNA evidence was certainly relevant in the case and the very high probative value of the evidence was not substantially outweighed by the risk of unfair prejudice.

Furthermore, any alleged error is harmless because the State presented overwhelming evidence of Appellant's guilt.

Firstly, the State would note Appellant's arguments that the DNA evidence was meaningless and of no probative value due to a lack of statistical context are not preserved for appellate review. Appellant argues, "The statistical context of DNA analysis is crucial to determining what inferences a jury may reasonably take from the results, regardless of what the result was." Br. of App. p. 9. Appellant elaborates that Bartman's testimony was somehow insufficient because she failed to provide a statistical analysis as to the meaning of her conclusion that Appellant could not be included nor excluded in the class of potential suspects. This argument was not raised below, and thus is not preserved for appellate review. Appellant's objection to relevance did not include any sort of argument as to the inclusion of any statistical context of the DNA results. The appellate court will not consider any issues or arguments that were not presented to or passed upon by the trial court, 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."); see also State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal."). Appellant's argument is thus not preserved for appellate review. Furthermore, Defense Counsel was more than welcome to cross-examine Bartman as to the statistical context of the DNA results finding Appellant could not be included nor excluded in the class of potential suspects.

Secondly, the State would note Appellant's contention in section "A" of his argument concerning Rule 702 of the South Carolina Rules of Evidence is conclusory and lacks support. Aside from asserting in his argument heading that the DNA evidence should not have been admitted under Rule 702, Appellant offers no support for the proposition that Bartman's testimony somehow violated the rule. Appellate courts will not consider arguments or issues raised on appeal in a conclusory or unsupported manner. Savannah Bank, N.A. v. Stalliard, 400 S.C. 246, 252, n. 3, 734 S.E.2d 161, 164 (2012). See also State v. Garner, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct. App. 2010) (holding a conclusory, unsupported argument was abandoned on appeal). This Court should, therefore, disregard Appellant's statements concerning Rule 702.

Thirdly, the State contends the remainder of Appellant's argument is without merit. 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).

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.

Trial judges have "particularly wide discretion" in ruling on the comparative probative value and potential prejudicial effect of evidence. Collins, 398 S.C. at 209, 727 S.E.2d at 757. A trial judge's ruling on such a matter should be afforded great deference on appeal and should only be reversed in exceptional circumstances. State v. Lyles, 379 S.C. 328, 339-340, 665 S.E.2d 201, 207 (Ct. App. 2008). 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, 593-594 (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.

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 that Appellant could not be excluded as a contributor. This evidence is absolutely relevant in a CSC prosecution, especially where the Appellant was the only adult male living in the home, Mother testified she walked into Victim's room and saw Appellant on top of Victim with his penis exposed, and Victim testified Appellant 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.

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." State v. Gilchrist, 329 S.C. at 630, 496 S.E.2d at 429. While the DNA evidence was certainly indicative of Appellant's guilt, it did not suggest a decision on an improper basis.

Moreover, even if the trial court somehow erred in admitting the DNA evidence, any error would be harmless in light of the overwhelming evidence of Appellant'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 Appellant's guilt. The jury heard un rebutted testimony from Victim who described years of sexual abuse at the hands of Appellant. The jury also heard Mother recount walking into her daughter's room and discovering Appellant on top of Victim with his penis exposed. Appellant 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 Appellant's arrest. The jury also heard male DNA was found on Victim's nightgown and that said DNA tested positive for acid phosphate, which could be indicative of semen. The jury, therefore, was presented with overwhelming evidence proving Appellant committed criminal sexual conduct in the second degree. Appellant's conviction and sentence should be affirmed.

II.

Appellant's argument concerning Investigator Goodman's testimony about Appellant's interview at the police station is not preserved for appellate review. Even if Appellant'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 Appellant; Furthermore, any alleged error is harmless, as Investigator Goodman's testimony was cumulative to Corporal Alvarado's testimony about the interview with Appellant.

Relevant Facts

As discussed in Respondent's Statement of Facts, Appellant made oral and written statements to Investigator Goodman and Corporal Alvarado at the police station. ROA. p. 359. Alvarado interpreted Appellant'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 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.

ROA. p. 304.

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.

ROA. p. 361.

During a pretrial hearing, Defense Counsel stated, "Judge, if we may briefly discuss the oral statements made to Officer Alvarado." ROA. p. 124. 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.

ROA. p. 124.

The trial court 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.

ROA. pp. 254-255.

The trial court clarified, "Goodman can't tell what Alvarado said to him." ROA. p. 255. At trial, the issue of exactly what Investigator Goodman could testify to arose

again. ROA. pp. 255-256. The State sought to proffer Investigator Goodman's testimony as to the contents of Appellant's oral statement. ROA. p. 261. The court stated, "Sure, let's do that." ROA. p. 261. Following the proffer of Investigator Goodman's testimony, the trial court 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." ROA. p. 288. Defense Counsel responded, "All or nothing." The trial court 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." ROA. pp. 288-289. 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." ROA. p. 289. 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.

ROA. p. 289.

The following morning, the trial court asked the parties whether they wanted to put something on the record. ROA. p. 290. 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." ROA. p. 290. The trial court 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.

ROA. pp. 290-291.

The trial court 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.

ROA. p. 292. Defense Counsel then noted, "And so it is kind of a ruling on completeness and res gestae. There is a complete understanding of that." ROA. p. 292. 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." ROA. p. 292.

Discussion

Appellant asserts the trial court erred in admitting Investigator Goodman's testimony about his interview with Appellant on July 1, 2013, where Corporal Alvarado translated Appellant's statements for him. Appellant 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 Appellant. Furthermore, any alleged error is harmless as Goodman's testimony was merely cumulative to Alvarado's testimony of the exact same course of events and the jury was presented with overwhelming evidence of Appellant's guilt.

Initially, this Court need not reach the merits of Appellant'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."). Appellant'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, Appellant's argument is not preserved for appellate review.

Even if Appellant'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 Appellant and Investigator Goodman. As Appellant 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 Andrew 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 Appellant 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 Appellant'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 Appellant 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 Appellant. As to the fourth factor, Appellant'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 Appellant'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 Appellant'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, 554-555 (2001). Alvarado's testimony concerning Appellant's oral statements was indisputably admissible under Rule 801(d)(2), SCRE, as an admission by party-opponent.

Appellant 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 Appellant's statement, Appellant admits inappropriate touching of Victim's private parts, Appellant stated the touching began in December of 2012, Appellant 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, are thus nearly identical. Therefore, Goodman's testimony was merely cumulative to the admissible testimony of Alvarado.

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

III.

Appellant's argument concerning improper bolstering is not preserved for appellate review. Even if Appellant's argument was preserved, the vast majority of Debrew's testimony elicited by the State was admissible as the statements at issue were made for purposes of medical diagnosis; Debrew's single comment that may be construed as inappropriate was not intentionally elicited by the Solicitor and was rendered harmless by later statements made by Debrew in response to questioning by Defense Counsel. Also, as to Debrew's testimony that was elicited by Defense Counsel, Appellant cannot complain on appeal about an error that the conduct of his own counsel caused. Furthermore, any alleged error in this case is harmless due to the overwhelming evidence of Appellant's guilt.

Relevant Facts

During Debrew's testimony, she discussed her initial involvement in the case, stating, "So I received a call at home. Spoke with the nurse that was taking care of her at the time and they called me to the hospital and said law enforcement is there and they're requesting a forensic exam." ROA. p. 394. Debrew testified her understanding of the case was:

The brief information that I was given was that she was assaulted by or was reporting that she was assaulted by someone in the home which was a male that was much older than her. It was a 12-year-old victim at that time and when I got to the hospital I spoke with the physician. He had done his initial exam and had cleared her, because the physician has to see the patient before I see them, and he had cleared her for me to do my exam.

ROA. p. 394. Debrew testified Victim "explained to me that she was assaulted by the landlord and I think she called him the pastor." Debrew was asked about the nature of the assault. ROA. p. 396. Debrew responded, "He penetrated her - - with the questions that we ask, we get very specific what is touching or where something is put. And she did say that, when I questioned her on, did he put his penis in your vagina, she answered yes."

During cross-examination, Defense Counsel asked Debrew to refer to her report from the evening of June 30, 2013. ROA. p. 403. Defense Counsel asked "On the third page, ma'am, she gave as part of your interview a statement as to what happened or what she says happened?" ROA. p. 403. Debrew answered:

This is what I typed when she was talking to me. Like in the night, it was 11:00 or 12:00 and he, (the pastor), that should be, came in the living room and then he came in my room. He had a bad attitude. He takes down my underpants and he abused me. I was like, mommy, and I ran to the bathroom. My mom came and he acted like nothing happened. My mom went, why are my daughter's underwear on the floor? My mom asked me and I was trembling and I was really scared. The pastor said, nothing was going on and you're lying on me. He said that twice. My mom got the phone. She was going to call 911, and he was like begging and crying for her to stop or for her not to call. My brother was there watching. I went to the neighbor and she called the police and they came and brought us here.

ROA. p. 404.

Discussion

Appellant contends Debrew's testimony constituted improper bolstering of Victim's testimony. This argument is without merit, as the vast majority of Debrew's testimony elicited by the State did not constitute improper bolstering and was admissible for purposes of medical diagnosis under Rule 803(4), SCRE. Debrew's single comment that may be construed as inappropriate was not intentionally elicited by the Solicitor and was rendered harmless by later statements made by Debrew in response to questioning by Defense Counsel. As to the testimony elicited by Defense Counsel, Appellant cannot complain on appeal about an error the conduct of his own counsel caused. Furthermore, any alleged error in this case is harmless due to the overwhelming evidence of Appellant's guilt.

Appellant's argument is not preserved for appellate review, as Defense Counsel did not object to Debrew's testimony at issue. 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). Since Defense Counsel failed to object to Debrew's testimony, Appellant cannot raise this issue on appeal for the first time.

In any event, the vast majority of Debrew's testimony was admissible under Rule 803(4), SCRE, because the statements at issue were made for purposes of medical diagnosis. As one of the recognized exceptions to the hearsay rule, the medical diagnosis or treatment exception allows for the admission of out-of-court statements of a declarant "made for the 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" despite the general prohibition against hearsay evidence. Rule 803(4), SCRE. In order for a statement to be admissible pursuant to the medical diagnosis or treatment exception, two conditions must be met: (1) the declarant's motive in making the statement must be consistent with the purpose of promoting diagnosis or treatment; and (2) the content of the statement must be such as is reasonably relied upon by a medical provider in making a diagnosis or providing treatment. Willingham v. Crooke, 412 F.3d 553, 562 (4th Cir. 2005). Significantly, the medical diagnosis or treatment "exception to

the hearsay rule is premised on the notion that a declarant seeking treatment 'has a selfish motive to be truthful' because 'the effectiveness of medical treatment depends upon the accuracy of the information provided.' " Id.; see White v. Illinois, 502 U.S. 346, 356 (1992) ("[A] statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility that a trier of fact may not think replicated by courtroom testimony.").

Debrew's testimony did not constitute improper bolstering because she was recounting injury-specific information she was given in order to treat Victim. Debrew's statement, "she was assaulted by or was reporting that she was assaulted by someone in the home which was a male that was much older than her. It was a 12-year-old victim at that time and when I got to the hospital I spoke with the physician," was made for the purpose of medical diagnosis. The fact that Victim was assaulted in the home was relevant to potential medical issues arising from incest. The fact that the assailant was an older male was also pertinent as to what kind of injuries Victim may have suffered and how severe her injuries may be. Debrew's statement "he penetrated her - - with the questions that we ask, we get very specific what is touching or where something is put. And she did say that, when I questioned her on, did he put his penis in your vagina, she answered yes," was similarly a statement Victim made for purposes of medical diagnosis. The nature of the assault is overwhelmingly relevant to Victim's medical treatment and did not amount to improper bolstering.

The only portion of Debrew's testimony that could be considered unduly corroborative of Victim's testimony was where she testified, "she explained to me that

she was assaulted by the landlord and I think she called him the pastor.” ROA. p. 396. Debrew gave that answer after being asked by the Solicitor, “What was your understanding of the type of assault?” ROA. p. 396. The Solicitor’s question regarding the type of assault does not seem to have been intended to elicit the identity of the perpetrator from Debrew, and Appellant neither objected to or moved to strike the response. Further, Debrew’s statements where she noted Victim disclosed she was assaulted by her landlord were later rendered harmless to the testimony elicited by Defense Counsel. Debrew’s report from the interview, which she read at trial at the behest of Defense Counsel, contained the same identification of “the pastor” as the man who assaulted her, as well as many more specific details about the assault. Additionally, this testimony elicited on cross does not appear to be responsive to or necessitated by the allegedly objectionable comment on direct.

Appellant’s contention that the testimony elicited by Defense Counsel constituted improper bolstering is wholly without merit, as Appellant cannot complain about an error directly caused by his own conduct. See State v. Logan, 279 S.C. 345, 348, 306 S.E.2d 622, 624 (1983) (“Appellant can neither take advantage of an error he contributed to at trial nor preserve a vice and, upon learning of the outcome of trial, raise it on appeal.”); State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) (“A party cannot complain of an error which his own conduct has induced.”). Defense Counsel specifically asked Debrew if she had her report from her examination of Victim, and then asked her to tell the jury what the report indicated Victim said. Appellant cannot assert these statements are improper bolstering when he specifically had them admitted at trial.

As discussed in Respondent's Issues I and II, any alleged error in this case is harmless due to overwhelming evidence of Appellant's guilt. Appellant contends under South Carolina law, testimony amounting to improper bolstering cannot be considered to be harmless. In support of this argument, Appellant cites State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011). However, in Jennings, the South Carolina Supreme Court repudiated the per se rule, and reaffirmed that admission of testimony, even cumulative testimony, can be harmless. Jennings, 394 S.C. at 478–79, 716 S.E.2d at 93–94 (2011) (Kittredge & Hearn, JJ., concurring) (Toal, C.J., dissenting) (rejecting a per se rule of prejudice when corroboration testimony is cumulative to the victim's testimony); State v. Young, 378 S.C. 101, 107, 661 S.E.2d 387, 390 (2008) (requiring a showing of prejudice for an appellate court to reverse based on the erroneous admission of evidence). This Court therefore should find any alleged error harmless due to the overwhelming evidence of Appellant's guilt. Appellant's conviction and sentence should be affirmed.

CONCLUSION

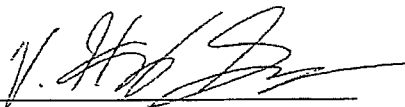
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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June 3, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Newberry County
Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

MARIO V. GONZALEZ HERNANDEZ,

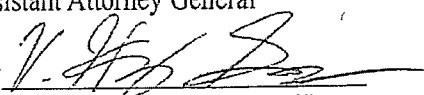
Appellant.

CERTIFICATE OF COUNSEL

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

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Appellant.

PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final 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 St, 17th Floor, Columbia, SC 29201 and Robert M. Dudek, Esquire, Chief Appellate Defender, SC Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 3rd day of June, 2016.


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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

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APPEAL FROM NEWBERRY COUNTY SC Court of Appeals
Court of General Sessions
Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2013-GS-36-00500
Appellate Case No. 2014-002376

The State, ... Respondent,

v.

Mario Valerio-Gonzalez Hernandez, ... Appellant.

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Argument

- I. The trial court erred in admitting expert testimony that no conclusion could be reached regarding whether Mr. Hernandez could be included or excluded as a contributor to the DNA analysis because the evidence was irrelevant and invited the jury to speculate about its meaning.

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

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

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

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

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

That Ms. Bartman will state whatever else is true, no semen was detected on anything, even the nightgown. So whatever three people's DNA is on that nightgown, it didn't come from semen. And so I would just submit respectfully that under 403, when evidence doesn't help the trier of fact to better understand the testimony, then the evidence should just stay out. The chart should stay out. It would just confuse them. And Jennifer Bartman, I would submit she is an expert and she can state, you know, all the king's horses and all the king's men tried to get what we could out of this but all we can say is inconclusive, the samples we got don't shed any light on this, who's DNA this is. And let me add, Your Honor, that I would not open the door at any point by saying that if these things had been tested that they would have not found his DNA in the items that were not tested.

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

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

THE COURT: I think the State can call an expert witness in a field of particularity if that expert is qualified in the field of DNA. They can call them, question them and if it gets outside of the scope of assisting the fact finder in determining the questions of fact they have then at that point, the testimony would not be allowed. However, what's been presented thus far is consistent with the DNA testimony I've heard in the past subject to cross-examination of, not having heard the testimony yet it's hard for me to rule on. An expert is allowed to proffer opinions and to proffer comments on the things they've analyzed and the facts and the data they relied upon in reaching those opinions and are subject to cross-examination. So I think at this time, I will listen for questions outside of the scope of assisting the trier of fact. But thus far, I think the State would be allowed to call that person and to testify consistently what she's done in this case.

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

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

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

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

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

B. The inconclusive DNA evidence is irrelevant.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. The trial court erred in admitting the investigator’s testimony regarding what the interpreter said the defendant told him in Spanish because the testimony was hearsay not subject to any exception.

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

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

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

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

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

THE COURT: And he was there with you working with the suspect and he didn't translate it back to you, and so that's where the lawyers are exploring as to exactly what you knew as opposed to what Mr. Hernandez was saying to Corporal Alvarado. And you kind of, are out of the loop a little bit because you don't speak Spanish.

MR. GOODMAN: Right.

THE COURT: So that's what we're trying to explore to make certain that you don't violate any of my rules yesterday volunteering something that you shouldn't.

MR. GOODMAN: Right.

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

MR. MCMULLEN: Well, just -- and I just didn't think that these things, Your Honor, bore a relationship to the verbal things that may lack trustworthiness but I think your opinion is the one that counts.

THE COURT: I think he gets to say what Alvarado translated back to him as he initiated the oral interview being, tell me when this started, who was there, how'd it happened, just like what he said. He's allowed -- he will be allowed to do that and you're allowed the full breadth of cross-examination about what else he didn't do or analyze or otherwise.

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

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

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

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

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

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

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

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

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

III. The trial court erred in admitting expert testimony corroborating the minor's details of the alleged assault in a forensic interview because it improperly bolstered the minor's testimony.

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

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

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

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

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

The admission of Ms. Debrew's testimony cannot be harmless error. "Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless." *State v. Jennings*, 394 S.C. 473, 478, 716 S.E.2d 91, 93-94 (2011) (quoting *State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978)). "Improper corroboration testimony that is *merely cumulative to the victim's testimony*, however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." *Jennings*, 394 S.C. at 478-79, 716 S.E.2d at 94 (emphasis in original) (quoting *Jolly v. State*, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994)).

Conclusion

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

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of General Sessions
Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2013-GS-36-00500
Appellate Case No. 2014-002376

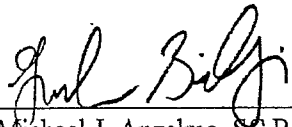
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SC Court of Appeals

The State, ... Respondent,
v.
Mario Valerio-Gonzalez Hernandez, ... Appellant.

CERTIFICATE OF COUNSEL

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

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In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
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Case No. 2013-GS-36-00500
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SC Court of Appeals

The State, ... Respondent,

v.

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

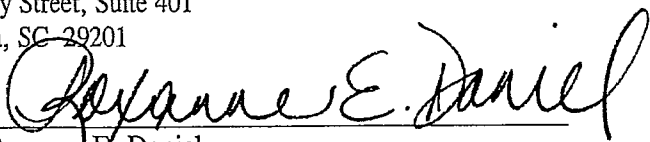
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June 7, 2016

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Mario Valerio Gonzalez Hernandez, Appellant.

Appellate Case No. 2014-002376

Appeal From Newberry County
Eugene C. Griffith, Jr., Circuit Court Judge

Unpublished Opinion No. 2017-UP-324
Heard May 2, 2017 – Filed August 2, 2017

AFFIRMED

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PER CURIAM: Mario Valerio Gonzalez Hernandez (Appellant) appeals his criminal sexual conduct (CSC) with a minor in the second degree conviction, asserting on appeal the trial court erred in (1) admitting testimony from an expert in DNA¹ analysis—that no conclusion could be reached regarding whether he could be included or excluded as a contributor of DNA—because the evidence was irrelevant and invited the jury to speculate about its meaning; (2) admitting testimony of an investigator regarding what an interpreter told the investigator Appellant said in Spanish, because the testimony was hearsay and was not subject to any exception; and (3) admitting expert testimony from a forensic nurse examiner that corroborated details of an alleged assault on the minor victim (Victim) because it improperly bolstered Victim's testimony. We affirm.

1. We find Appellant's first issue is not preserved. Though "[a] party need not use the exact name of a legal doctrine in order to preserve it, . . . it must be clear that the argument has been presented on that ground." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). "An objection must be made on a specific ground." *State v. Jennings*, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011). *See id.* at 481-82, 716 S.E.2d at 95 (holding, though appellant argued against the admission of videos prior to the victims' testimony, he failed to make any constitutional arguments in support of his objection, and therefore his argument that his constitutional rights were violated was not preserved); *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) ("[A]n objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial [court]."). In order to preserve an objection for appellate review, the objection must be made "with sufficient specificity to inform the [trial court] of the point being urged by the objector." *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011). Appellant contends the trial court erred in admitting the DNA expert's testimony that no conclusion could be reached regarding the inclusion or exclusion of him as a contributor to the mixture of DNA found on Victim's nightgown, arguing the testimony had no probative value and could not have assisted the trier of fact. In particular, Appellant argues on appeal that the expert's testimony indicated Appellant could be included, and not excluded, as a contributor to the DNA on the nightgown, and this DNA evidence was irrelevant and of no probative value due to a lack of statistical

¹ "DNA is the commonly used abbreviation for deoxyribonucleic acid, 'the long, double-strand molecule found in the chromosomes carried in cell nuclei' that 'contains the genetic blueprint for all living organisms.'" *State v. Simmons*, 416 S.C. 584, 587 n.1, 788 S.E.2d 220, 222 n.1 (2016) (quoting *State v. Dinkins*, 319 S.C. 415, 417, 462 S.E.2d 59, 60 (1995)).

context regarding his DNA profile. Appellant's argument that the DNA evidence had no probative value due to a failure to include statistical context was never raised to the trial court. Based upon the arguments as they were made to the trial court,² we find trial counsel was not "sufficiently specific to bring into focus the precise nature of the alleged error so it [could] be reasonably understood by the trial [court]." *Prioleau*, 345 S.C. at 411, 548 S.E.2d at 216.

More importantly, Appellant failed to preserve this issue for review because he failed to make a contemporaneous objection when the testimony of which he complains was offered at trial. Technically, Appellant's motion to exclude testimony that he could neither be included nor excluded as a contributor to the DNA mixture was not a motion in limine because it was made after the trial had begun. *See State v. Mueller*, 319 S.C. 266, 269 n. 1, 460 S.E.2d 409, 410 n. 1 (Ct. App. 1995) ("A motion in limine is a pretrial procedure . . ."). Nonetheless, as with a motion in limine, the purpose of trial counsel's motion was to receive a preliminary ruling that would prevent the disclosure of possibly prejudicial matter to the jury. *See, e.g., 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."). Because the ruling was preliminary, it was subject to change based on developments at trial. *See id.* ("A ruling on the motion is not the ultimate disposition on the admissibility of evidence. It remains subject to change based upon developments during trial."); *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

² Citing the Maryland case of *Diggs and Allen v. State*, 73 A.3d 306 (Md. Ct. Spec. App. 2013), trial counsel argued to the trial court that testimony Appellant could neither be included nor excluded as a contributor of DNA on any of the items should be excluded because it was "evidence of nothing." In the *Diggs and Allen* case, Allen argued testimony that he "could neither be 'included nor excluded' as the source of the DNA recovered—in other words, that the DNA analysis was inconclusive" was "irrelevant and, therefore, inadmissible, because it prove[d] nothing." *Id.* at 328. The Maryland Court of Special Appeals held, "[w]hile we agree with Allen that an inconclusive test is evidence of nothing, we also agree with the State that any error committed in admitting this evidence is harmless beyond a reasonable doubt because evidence of nothing could not prejudicially affect the fairness of Allen's trial." *Id.* at 328-29. Contrary to his appellate argument, defense counsel did not raise any issue in regard to the lack of statistical relevance when citing that case to the trial court.

contemporaneous objection when the evidence is introduced."). Had no evidence been presented between the trial court's ruling from the initial in camera hearing and the presentation of the objectionable evidence, then no contemporaneous objection would have been necessary to preserve the issue for appeal. *See id.* at 642-43, 541 S.E.2d at 837, 840 (finding no contemporaneous objection was necessary because the trial court had denied the motion in limine immediately before the witness testified). However, the trial court heard the direct, cross-examination, and re-direct and re-cross testimony of another witness before the objectionable testimony was elicited from the DNA expert by the solicitor, therefore making it necessary for trial counsel to make a contemporaneous objection to allow the trial court to make a final ruling on the issue.³ Further, a review of the record shows the trial court did not consider its ruling on the admissibility of the DNA expert's testimony final, but subject to exclusion based upon any objections made regarding trial counsel's concern that the evidence would not assist the trier of fact. *See State v. Atieh*, 397 S.C. 641, 646, 725 S.E.2d 730, 733 (Ct. App. 2012) ("A ruling in limine is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review."); *id.* at 646-47, 725 S.E.2d at 733 (providing exceptions to the rule that a contemporaneous objection must be made at the time evidence is offered to preserve the matter (1) when the motion in limine is made immediately prior to the introduction of the evidence in question and (2) when the trial court clearly indicates its ruling is final). Because no objection was made when the evidence was admitted, the issue is not preserved for our review.

2. As to Appellant's second issue, even assuming *arguendo* that the trial court erred in admitting Investigator Goodman's testimony regarding what the interpreter was told by Appellant in Spanish, we find any such error is harmless beyond a reasonable doubt. "An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result." *State v. Chavis*, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015). "Whether an error is harmless depends on the circumstances of the particular case." *State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (quoting *State v. Mitchell*, 378 S.C. 305, 316, 662 S.E.2d

³ We recognize an objection was raised and another in camera hearing was held during the testimony of the DNA expert, prior to admission of the testimony to which Appellant objects on appeal. However, that objection was made on a different basis, and no objection was made by trial counsel during this second in camera hearing concerning the admissibility of testimony from the DNA expert regarding whether Appellant could be included or excluded as a contributor to the DNA mixture.

493, 499 (2012)). "Error is harmless when it could not reasonably have affected the result of the trial." *Id.* (quoting *Mitchell*, 378 S.C. at 316, 66 S.E.2d at 499). Both Investigator Goodman and the interpreter testified Appellant stated there was inappropriate touching of the private parts; it started around December 2012; clothes were on at all times; and there was no penetration involved. Therefore, Investigator Goodman's testimony in this respect was cumulative to the unobjected to testimony of the interpreter. *See State v. Johnson*, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989) ("The admission of improper evidence is harmless [when] it is merely cumulative to other evidence."). We further note testimony that Appellant admitted to inappropriately touching Victim but denied having sexual intercourse with her was previously admitted through the testimony of Officer Rowe and Ms. Rivera. Finally, the substance of any additional details contained in Investigator Goodman's testimony not provided by the interpreter's testimony was either inconsequential or was favorable to Appellant. Accordingly, the admission of the testimony in question could not reasonably have affected the result of the trial, and any possible error in admitting this testimony is harmless.

3. In regard to Appellant's third issue—that the trial court erred in admitting testimony from the expert in forensic nursing that corroborated Victim's details of the alleged assault because it improperly bolstered the Victim's testimony—we hold this issue is not preserved for our review. Appellant never objected to the testimony from this expert he now challenges on appeal. Nor did he raise any argument to the trial court concerning improper bolstering. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012) ("While it may be good practice for [the appellate court] to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it clearly is unpreserved."); *State v. Johnson*, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005) (noting, in order to properly preserve an issue for appellate review, there must be a contemporaneous objection that is ruled upon by the trial court, and if a party fails to properly object, he is procedurally barred from raising the issue on appeal); *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693-94 ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal.").

AFFIRMED.

LOCKEMY, C.J., and HUFF and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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08/10/2017

SC Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of General Sessions
Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2013-GS-36-00500
Appellate Case No. 2014-002376

The State, ... Respondent,

v.

Mario Valerio-Gonzalez Hernandez, ... Appellant.

PETITION FOR REHEARING

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Appellant Mario Valerio-Gonzalez Hernandez petitions the Panel to grant rehearing in *State v. Hernandez*, Op. No. 2017-UP-324 (S.C. Ct. App. filed August 2, 2017). Mr. Hernandez respectfully submits that rehearing and/or issuance of a new opinion reversing the trial court and granting a new trial in favor of Mr. Hernandez is warranted in this action because the Panel's opinion overlooked or misapprehended several matters of fact and law.

I. The Panel overlooked or misapprehended the facts and law demonstrating that Mr. Hernandez's objection to Ms. Bartman's testimony was preserved.

In its Opinion, the Panel found that the issue of whether the testimony from Ms. Bartman, the State's expert in DNA analysis, should have been excluded as irrelevant was unpreserved for appellate review. The Panel found that Mr. Hernandez's argument was unpreserved for two reasons: (1) Mr. Hernandez failed to contemporaneously object to the testimony; and (2) Mr.

Hernandez failed to raise the specific argument about the lack of statistical relevance of the DNA evidence to the trial court.

A. No contemporaneous objection was required, but regardless, Mr. Hernandez did contemporaneously object.

The Panel correctly recognizes that, under South Carolina law, no contemporaneous objection is required if a motion *in limine*, made at the beginning of trial, is ruled upon immediately prior to the introduction of the challenged testimony. *Id.* p. 5 (citing *State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001)). The Panel found that, because an intervening witness testified between Mr. Hernandez's motion to limit Ms. Bartman's testimony and the introduction of Ms. Bartman's testimony, Mr. Hernandez was required to renew his objection to Ms. Bartman's testimony in order to preserve the objection. *Id.* p. 6.

The Panel overlooks that the motion to limit Ms. Bartman's testimony was not a pretrial motion *in limine*, which are made prior to the introduction of any evidence and are necessarily subject to change based on developments at trial. *State v. Mueller*, 319 S.C. 266, 269, 460 S.E.2d 409, 410 (Ct. App. 1995). To the contrary, Mr. Hernandez moved to limit Ms. Bartman's testimony after the trial court had heard all of the evidence in the record about the DNA evidence other than Ms. Bartman's testimony. Ms. Bartman was the final witness to testify other than the minor, and the intervening witness, Donna Debrew, only testified regarding the findings of her forensic examination of the minor. Ms. Debrew's testimony was thus wholly unrelated to Ms. Bartman's testimony about the irrelevant DNA testing results and provided no basis to the trial court to revisit or change its ruling regarding the admissibility of Ms. Bartman's testimony. *Id.*, 319 S.C. at 269, 460 S.E.2d at 411. Unlike a motion *in limine*, the trial court was fully informed

regarding the evidence when it denied Mr. Hernandez's motion to limit Ms. Bartman's testimony, so re-raising the issue would have been futile.

Regardless, the Panel overlooked that Mr. Hernandez contemporaneously objected prior to the admission of the relevant evidence. After Ms. Bartman explained the background of the DNA testing, Mr. Hernandez objected and the trial court excused the jury. (R. 432.) Although the objection was directed to the admission of the chart of DNA results, counsel for Mr. Hernandez explained the objection in terms of the trial court's prior ruling allowing Ms. Bartman to testify regarding her results:

MR. MCMULLEN: Yes sir, but she was handed page three and it was marked as an exhibit and she was asked to refer to this and give the results of her testing. And the results of her testing, Your Honor, is that she, they can't make any statement regarding the inclusion or exclusion of the defendant. That is the results. **And that is why I wanted to keep all of this mumbo jumbo out because it doesn't shed any light, it does not assist the trier of fact at all, it is not going to change a fact that the results on page two don't tell us, they don't find Mario Hernandez's DNA.**

(R. 433-45 (emphasis added).)

The trial court heard the testimony at issue, then confirmed its prior ruling that "her testimony and the report being shown to the jury on how she arrived at it is absolutely allowable." (R. 437.) Accordingly, Ms. Bartman immediately testified regarding her conclusions. Mr. Hernandez was not required to raise the issue for a third time in order for the issue to be preserved for appeal. The Panel overlooked this contemporaneous objection, so rehearing is warranted.

B. Mr. Hernandez's argument about the lack of relevance of Ms. Bartman's testimony was specifically raised to the trial court.

The Panel ruled that Mr. Hernandez's argument on appeal that Ms. Bartman's testimony was irrelevant due to a lack of statistical context regarding the DNA profile was unpreserved because it was not specifically raised to the trial court. *State v. Hernandez*, Op. No. 2017-UP-324 p. 2 (S.C. Ct. App. filed August 2, 2017). The Panel misapprehended the nature of the DNA test performed by Ms. Bartman and Mr. Hernandez's appellate argument.

If an YSTR DNA test does not meet the required confidence or statistical standards established by the scientific community, then the result will be that the defendant can "neither be included nor excluded." (*See* R. 443-44 (explaining that the tested locations must reach a certain confidence threshold approved by SLED in order for a number to appear on the results chart).) Thus, the statistical relevance of the test fundamentally *is* the relevance of the test; no distinction exists between the two terms. The result will not be "neither included nor excluded" unless the test results are statistically irrelevant. The argument is the same.

Mr. Hernandez's position that Ms. Bartman's failure to explain the scientific meaning behind the "neither included nor excluded" result exacerbated the trial court's error in admitting the irrelevant testimony is merely explanatory and is not a separate argument. (*See* App. Br. p. 8 ("The lack of relevance of the DNA analysis is *compounded* by the lack of evidence in the record about *why* Ms. Bartman could not reach a conclusion." (emphasis added)).) Ms. Bartman's testimony regarding the results remains irrelevant regardless of whether she had explained to the jury how the results were irrelevant. Her failure to do so simply heightened the error because it further invited the jury to speculate about the DNA test result's meaning. The

Panel misapprehended Mr. Hernandez's relevance argument as unpreserved, so rehearing should be granted.

II. The Panel overlooked or misapprehended the facts and law demonstrating that Investigator Goodman's testimony regarding what Corporal Alvarado said that Mr. Hernandez told him in Spanish was not cumulative and harmless error.

The Panel found that any error caused by the admission of Investigator Goodman's testimony regarding what Corporal Alvarado told him that Mr. Hernandez said in Spanish was harmless beyond a reasonable doubt because the testimony was cumulative to the unobjected testimony of Corporal Alvarado and consistent with the testimony of Officer Rowe and Ms. Rivera. Rehearing is appropriate because the Panel misapprehended that Investigator Goodman's testimony was not more detailed than Corporal Alvarado's and contextually different from Officer Rowe's and Ms. Rivera's.

Investigator Goodman testified before Corporal Alvarado, so the improper admission of Investigator Goodman's testimony nullified any value to objecting to Corporal Alvarado's testimony regarding the same statements. *See State v. McDaniel*, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995) ("So long as the judge had an opportunity to rule on an issue, and did so, it was not incumbent upon defense counsel to harass the judge by parading the issue before him again." (quotation omitted)). The Panel's finding that the additional statements to which Investigator Goodman testified were "inconsequential or favorable" misapprehends that the statements, including that Mr. Hernandez said the minor would sit on his lap or that Mr. Hernandez discussed the particular night in question, were actually prejudicial. Additionally, although Investigator Goodman's testimony about what Mr. Hernandez told Corporal Alvarado was consistent with what Officer Rowe and Ms. Rivera testified that Mr. Hernandez told them, the context for the statements differed. Investigator Goodman testified regarding alleged

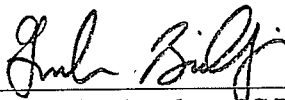
statements by Mr. Hernandez which occurred on a different day than the statements testified to by Officer Rowe and Ms. Rivera and in a custodial setting. Accordingly, Investigator Goodman's testimony was not harmless, and rehearing to grant a new trial is appropriate.

Conclusion

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

Respectfully submitted,

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Columbia, South Carolina
August 16, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of General Sessions
Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2013-GS-36-00500
Appellate Case No. 2014-002376

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The State, ... Respondent,

v.

Mario Valerio-Gonzalez Hernandez, ... Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

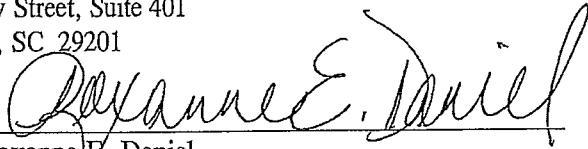
Pleadings: PETITION FOR REHEARING

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Aug. 16, 2017

The South Carolina Court of Appeals

The State, Respondent,

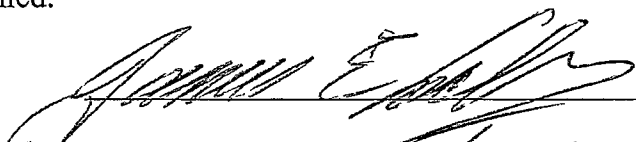
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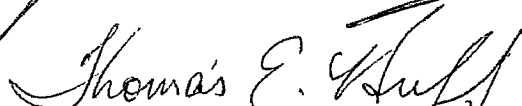
Mario Valerio Gonzalez Hernandez, Appellant.

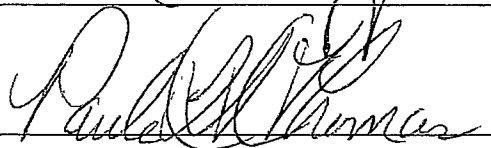
Appellate Case No. 2014-002376

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


C.J.


J.


J.

Columbia, South Carolina

FILED

September 22, 2017

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