NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 KA 0960

STATE OF LOUISIANA

VERSUS

TERRAL WAYNE BRAND, JR.

Judgment Rendered: DEC 22 2016

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On Appeal from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Trial Court No. 544953, Div. H

The Honorable Allison H. Penzato, Judge Presiding

* * * * *

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BEFORE: PETTIGREW, McDONALD, AND CALLOWAY,[1] JJ.

[1] Hon. Curtis A. Calloway, retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

CALLOWAY, J.

The defendant, Terral Wayne Brand, Jr., was charged by grand jury indictment with aggravated rape (of victim under thirteen), a violation of La. R.S. 14:42. The defendant pled not guilty and, following a jury trial, was found guilty of the responsive offense of attempted aggravated rape. *See* La. R.S. 14:27. The trial court sentenced the defendant to forty-six years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating one assignment of error. We affirm the conviction and sentence.

FACTS

The defendant and his wife, Tiffany, married in 2009 and divorced in 2011. H.B.[2] is the biological daughter of the defendant and Tiffany. Tiffany also has a son, who is approximately one year younger than H.B. After the divorce, Tiffany and her children lived in Rocket Ranch Mobile Home Park in Slidell, Louisiana. On October 28, 2013, the defendant was watching the children for Tiffany because she had to be out of town for work. On this day, the defendant inserted his fingers into the vagina of five-year-old H.B. and performed oral sex on her. A few days later, H.B. told her neighbor and good friend of Tiffany, Brandy, about what the defendant did to her. Brandy testified at trial that H.B. told her, "her daddy put his wee-wee on the place you are not supposed to touch and that he put his fingers and his mouth and he spit on it and that it was to love her." H.B. then told her mother, who called the police. Detective Scott Davis, with the St. Tammany Parish Sheriff's Office, lead detective on H.B.'s case, recommended to Tiffany she bring H.B. to the emergency room, which she did. Several days later, H.B. was taken to the Children's Advocacy Center (CAC), where she described in detail to a forensic

[2] The victim is referred to by her initials. *See* La. R.S. 46:1844(W).

interviewer what the defendant had done to her. On December 17, 2013, Detective Davis interviewed the defendant about the allegations H.B. had made about him. The defendant informed Detective Davis that he was intoxicated that night and that, while he may have masturbated in front of H.B., he could not say one way or the other if he had performed oral sex on her.

The defendant did not testify at trial.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues the trial court erred in allowing into evidence the inadmissible hearsay of a doctor's recounting of the victim's allegations of sexual abuse by the defendant. Specifically, the defendant contends the doctor's interview of H.B. was for forensic purposes, rather than for treatment and diagnosis.

On November 4, 2013, Tiffany took H.B. to the emergency room at Children's Hospital. Several days later, on November 8, H.B. underwent her CAC interview with forensic interviewer, JoBeth Rickels. The CAC interview video was played at trial. On November 21, 2013, Tiffany took H.B. to the Audrey Hepburn Care Center at Children's Hospital; there, H.B. was seen by Dr. Ellie Wetsman, a pediatrician.

Both prior to trial, via a motion *in limine*, and during trial, the defendant sought to exclude from Dr. Wetsman's testimony during trial, any references to what H.B. had told her about what the defendant did to her. According to the defendant, such testimony constituted inadmissible hearsay. After argument on this issue at the pretrial motion in limine, the trial court deferred ruling on whether the doctor's testimony would be admissible. The trial court informed defense counsel that at trial he would be allowed to cross-examine Dr. Wetsman "on the foundation," possibly outside of the presence of the jury; at this point, after hearing upon cross-examination precisely what the doctor planned on testifying to, the trial

court would then make a ruling on the admissibility of H.B.'s out-of-court statements to the doctor.

At trial, defense counsel cross-examined Dr. Wetsman outside the presence of the jury. Dr. Wetsman stated that at the time she first saw H.B., she (the doctor) was aware that H.B. had already been to the emergency room at Children's Hospital for a full physical examination. Dr. Wetsman, however, did not have the emergency room medical records at the time she saw H.B. At this point, the defendant had already been identified as the perpetrator. Dr. Wetsman stated that she did a comprehensive physical examination of H.B., and that she made a referral for therapy. Dr. Wetsman further stated that the "official written referral we got was from Detective Davis." She also noted that the medical incident history of H.B. was recorded and transcribed. When asked if it was correct that the transcribed interview of H.B. had no medical value, Dr. Wetsman replied, "Probably not."

At the conclusion of Dr. Wetsman's testimony outside the presence of the jury, the defendant argued that the doctor's testimony about what H.B. told her should not be allowed. Under La. C.E. art. 803(4), hearsay concerning medical treatment and diagnoses is admissible; if the principal reason for the medical examination, however, is forensic, then such hearsay is inadmissible. The defendant argued to the trial court that any testimony as to what H.B. told Dr. Wetsman was inadmissible hearsay because the doctor's (entire) interview of H.B. "was purely forensic in nature." It was designed, according to the defendant, to assist Detective Davis in his investigation. The defendant noted that Dr. Wetsman never once during cross-examination indicated that she considered herself H.B.'s physician. The information, instead, gathered by Dr. Wetsman regarding H.B., was immediately sent to law enforcement.

The prosecutor countered that the information was for medical treatment and diagnosis and, as such, was admissible as an exception to the hearsay rule. The prosecutor pointed out that Dr. Wetsman's identity of the perpetrator would help guide her treatment of H.B. Also, according to the prosecutor, the type of abuse alleged by H.B. would afford Dr. Wetsman the opportunity to get an accurate and beneficial treatment and diagnosis. Also, Dr. Wetsman would need to ascertain whether there was psychological trauma or impairment as a result of the sexual abuse so that the appropriate therapy could be recommended. The prosecutor further noted that the emergency room records contained only a history provided by H.B.'s mother, not by H.B. herself.

The trial court ruled that Dr. Wetsman's testimony concerning H.B.'s history was admissible under Article 803(4). The recording of the interview of H.B., was ruled inadmissible. The trial court made clear, however, that Dr. Wetsman could testify about her notes and what she spoke to H.B. about.

According to the defendant in brief, Dr. Wetsman's examination of H.B. was mainly to provide the State with evidence to help solve a crime and to convict him, rather than for the purpose of diagnosing and treating any injuries H.B. may have incurred. All of the evidence against him, according to the defendant, came from his own "confession" and the statements of H.B. With Dr. Wetsman's hearsay testimony, however, having been allowed into evidence, "the likelihood of the jury finding reasonable doubt under these circumstances was greatly diminished by the imprimatur placed on the child's claim by the testimony of a medical professional whom the court declared as an expert and who was the last and only witness the jury heard [before deliberations]."

At trial, Dr. Wetsman testified on direct examination that she interviewed H.B. After establishing body parts on diagrams, H.B. told the doctor that the defendant, her father, had done something wrong to her. Dr. Wetsman pointed out

that page 4 of her medical report on H.B. contained the "Incident History." The doctor then proceeded to both recall what H.B. told her and to read directly from the incident history in her report. Following is the relevant exchange on direct examination:

> Q. What did [H.B.] tell you about what happened?
> A. She said, "Like, my dad did something wrong to me one time when my mom went away at my house in the living room, then my mom's bedroom. Went in mommy's room and locked the door. He had his tongue out and he started licking my kitchy stuff. He kept doing it again."
>
> And I asked her to identify "kitchy," and she pointed to the genitals on the diagram.
> Q. Was this before or after you went through the genital diagram with her?
> A. This was after.
> Q. So what part -- going back to page five, Exhibit 10, what part of the child's anatomy on there did she identify as the kitchy?
> A. She pointed to the private part, the part that I have written smiling and shrugging by.
> Q. And it's -- it's a nondescriptive -- the child on that diagram is neither male nor female?
> A. Correct.
> Q. And what else did she disclose after that?
> A. She said, "He got naked. He started getting his thing. He spit on it, rubbing it on my kitchy. He wouldn't stop or anything. He said keep it a secret."
>
> I asked her, "If anything hurt?"
>
> She said, "He did stick his finger up my thing two times."
> Q. Go ahead, I'm sorry.
> A. When I asked her to identify "thing" when she was saying -- when she was referring to her father, she pointed to the genitals on the diagram.
>
> And when I asked her to identify "thing" the second time, she pointed to the genitals on the diagram.
> Q. So she -- in your history, she identified his thing as a private in the private area?
> A. Yes.
> Q. Did she indicate whether or not -- I'll use the term that we would use, but did she indicate whether or not he ejaculated or emitted?
> A. I usually ask a child if anything came out of -- and I would use her term "thing," "Did anything thing come out of his "thing?"
>
> And she said, "Something came out. It was leaking on the bed. He wiped it on my kitchy. It was sloppy."

Q. Did she tell you who she first told about what happened?
A. She said that she had first disclosed to Evan's mom.
Q. After speaking to [H.B.], did you have the opportunity to conduct a full physical exam of her?
A. Yes.
Q. And did you examine, and specifically based on what she said, examine her genitalia?
A. Yes.
Q. Did you find any sign of physical injury or trauma? Or better yet, let me ask, what were the results of your physical examination?
A. Her physical exam was completely normal, so no physical signs of trauma.
Q. Okay. And as we spoke about before, is that finding consistent with your experience over 14 years and 5,000 physical examinations?
A. Yes, that's totally expected.
Q. And based upon -- based upon the -- your physical examination and the history that she provided, were you able to -- I want to direct your attention to page 7 of State's Exhibit 10 entitled "Assessment." Can you share with us what this page is and what it signifies?
A. So this is where I would give my professional assessment. It's a summary of what she said in the history and a summary of the physical exam, and then it also has a part where it identifies whether the physical findings and the history given are consistent with each other.
Q. And what was your -- what is your -- what was your summarization of the history she provided?
A. So I have written that she was a five-year-old who gave a clear and detailed history of oral-vaginal and penile-vaginal contact and digital-vaginal penetration by her father.

And then I have quoted what she said. She said, "He had his tongue out and he started licking my kitchy. He started getting his thing, spit on it, rubbing it on my kitchy. He did stick his finger up my thing two times."

And then I clarified that kitchy and thing were referring to genitals.

Louisiana Code of Evidence article 801(C) defines hearsay as "a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is ordinarily not admissible except as provided by the Code of Evidence or other legislation. La. C.E. art. 802. Moreover, a trial court's ruling on the admissibility of evidence will not be disturbed on appeal absent a clear abuse of the trial court's discretion.

A trial court is vested with much discretion in determining whether the probative value of relevant evidence is substantially outweighed by its prejudicial effect. *State v. King*, 2015-0980 (La. App. 4 Cir. 1/20/16), 186 So. 3d 264, 282.

Louisiana Code of Evidence article 803(4) provides, in pertinent part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
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> ***
>
> **(4) Statements for purposes of medical treatment and medical diagnosis in connection with treatment.** Statements made for purposes of medical treatment and medical diagnosis in connection with 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 treatment or diagnosis in connection with treatment.

In *State v. Greene*, 2006-0667 (La. App. 5 Cir. 1/30/07), 951 So. 2d 1226, 1234, *writ denied*, 2007-0546 (La. 10/26/07), 966 So. 2d 571, the defendant was charged with the aggravated rape of S.S., his twelve-year-old daughter. The defendant challenged the testimony of Drs. Sonseeahray Bridges and Ellie Wetsman (the same doctor in the instant matter). Before Dr. Bridges took the stand, the defendant objected to her and Dr. Wetsman's anticipated testimony, about what the victim told them during the medical exam. The trial court sustained the objection. The State took writs, arguing the testimony fell within the hearsay exception under Article 803(4). A fifth circuit panel granted the writ and, accordingly, Drs. Bridges and Wetsman were both allowed to testify regarding the history given by S.S. at the time of examination. In light of the subsequent trial court record, the *Greene* court determined that its writ grant was patently erroneous and produced unjust results. The fifth circuit explained that at the time it decided the writ, Drs. Bridges and Wetsman had not testified, but that on appeal, it now had the testimony at issue available for review.

The *Greene* court, 951 So. 2d at 1234-35, found that it was questionable whether the testimony of either doctor regarding what the victim told them by way of a history was admissible under Article 803(4). Dr. Bridges examined the victim after she was referred by Deputy Cannizaro close to two months after the last incident of alleged abuse; she ordered routine lab work dictated by the allegation of sexual abuse. As such, the court felt the principal purpose of Dr. Bridges' examination of the victim was forensic. The *Greene* court, 951 So. 2d at 1235, further stated:

> Likewise, Dr. Wetsman's examination, one week later, appeared to be for forensic purposes. Dr. Wetsman testified she saw the victim upon referral from the emergency room. She stated she examined the victim only one time and it was for the purpose of evaluating her for sexual abuse. A copy of the report she prepared in connection with her examination was sent to the Jefferson Parish Sheriff's Office. Her physical exam of the victim showed a thickened fold on the hymen but nothing was found in the victim's physical exam that either confirmed or denied sexual abuse. Although Dr. Wetsman testified on re-direct examination that the purpose of her exam was for diagnosis and treatment, such purpose was apparently subsidiary.

In *State v. Lawrence*, 98-0348 (La. App. 4 Cir. 12/1/99), 752 So. 2d 934, 935-37, *writ denied*, 2000-0003 (La. 6/16/00), 764 So. 2d 962, the defendant was charged with the forcible rape and aggravated crime against nature of D.M., his twelve-year-old niece. Immediately following the disclosure of sexual abuse by D.M., D.M. was examined by Dr. Janet Barnes the next day. Two weeks later, D.M. was examined by Dr. Katheryne A. Coffman, Director of the Sexual Abuse Clinic at Children's Hospital.

Detective Cathey Carter testified that she referred D.M. to Dr. Coffman for an examination as part of her usual procedure because "[w]hen there's a case like that where there's maybe some type of trauma from a penetration...we contact the doctor." *Lawrence*, 752 So. 2d at 940. The defendant argued on appeal that

neither Dr. Barnes nor Dr. Coffman should have been allowed to detail what D.M. told them because none of the requirements for an exception to the hearsay rule under Article 803(4) were met. *Lawrence*, 752 So. 2d at 938. The fourth circuit found that the testimony of Dr. Barnes as to what D.M. told her regarding the sexual abuse was admissible under Article 803(4) because she was the first doctor to examine D.M. immediately following D.M.'s disclosure. Dr. Coffman's testimony, however, regarding what D.M. told her (Dr. Coffman) was found to be inadmissible hearsay under Article 803(4). *Lawrence*, 752 So. 2d at 940-41. As to Dr. Coffman's hearsay testimony, the *Lawrence* court, 752 So. 2d at 940, specifically found:

> The evidence thus establishes that although Dr. Coffman testified that an accurate and detailed history was generally necessary to treat victims of sexual abuse, this was not the primary purpose of her examination in this case. Instead,...the history was taken in conjunction with an attempt to determine if scientific evidence existed to confirm the child's allegations. Because Article 803(4) permits the admission only of hearsay statements necessary for medical treatment, or for a diagnosis in connection with treatment, Dr. Coffman's testimony regarding D.M.'s account of the events at issue was erroneously admitted at trial.

Similarly, in the instant matter, H.B. was examined and treated at Children's Hospital emergency room on November 4, 2013. Over two weeks later, on November 21, 2013, H.B. was seen by Dr. Wetsman at Children's Hospital Audrey Hepburn Care Center. It appears from the record before us that Dr. Wetsman saw H.B. only this one time (on November 21, 2013), and that law enforcement had referred H.B. to the doctor. The Audrey Hepburn Care Center billed St. Tammany Parish Sheriff's Office $300 for H.B.'s visit/treatment there. The following day, on November 22, Dr. Wetsman faxed her report on her treatment of H.B. to Detective Davis.

Dr. Wetsman did note in her testimony that she gave H.B. a full physical examination, and that her recommendations for treatment going forward were that H.B. stay away from the defendant; H.B. was referred to "Metro" for therapy; that H.B. was to continue taking the medication she was already on; and that she was to come back in three months for more lab work. While such testimony arguably suggests that the purpose of Dr. Wetsman's exam of H.B. was for diagnosis and treatment, we find that such purpose was apparently subsidiary. *See Greene*, 951 So. 2d at 1235. It appears that the main purpose of the examination, as the defendant argued, was forensic. Dr. Wetsman did little different in the way of treatment and/or examination as done at the emergency room. Dr. Wetsman conceded as much as the following colloquy on cross-examination (outside the presence of the jury) shows:

> Q. But you did not -- you are not a psychiatrist?
> A. That's right.
> Q. You did not describe any medicine for her?
> A. There was none needed.
>
> ***
>
> Q. I guess what I'm thinking is you -- you took her temperature?
> A. Yes.
> Q. You took her -- I'm sorry -- you weighed her?
> A. Correct.
> Q. You took her blood pressure?
> A. Yes.
> Q. I think you even noticed the BMI ratio. I noticed that last night. And these were all things that were done in the emergency room?
> A. Yes. I bet they were.
> Q. And I believe you did -- I noticed that -- if I'm -- that there were -- you did do an examination photographing her hymen and checking --
> A. Yes.
> Q. Which was not done in the emergency room. But other than that, it looks like the vast majority of your examination was to interview the child?
> A. Well, I can conduct a medical history taking.
> Q. Okay. My point is this, it had already been done. You had the records. You are in the same hospital; is that correct?
> A. Right, but I didn't have the record.

> Q. Okay. But am I wrong in saying that it would probably have been fairly easy for you to get those records?
> A. I don't remember the circumstance, but I didn't have the record so I don't know -- I don't know why I didn't.
>
> But a lot of times a child is seen in the emergency department, then they are referred to the subspecialty clinic and a lot of the same things are done.

Based on the foregoing, we find that Dr. Wetsman's testimony at trial about what H.B. told her the defendant had done to her, *i.e.*, the specific sexual acts by the defendant, arguably constituted impermissible hearsay under Article 803(4). While the purpose of Dr. Wetsman's examination of H.B. bore some relation to medical treatment and diagnosis, we find, as did the courts in *Greene* and *Lawrence*, that the principal reason for the examination seemed to be forensic. *See State v. Harris*, 99-2845 (La. App. 4 Cir. 1/24/01), 781 So. 2d 73, 84-85, *writ denied*, 2001-1225 (La. 9/26/03), 854 So. 2d 342 (finding a doctor's testimony regarding what the victim said during the examination to be inadmissible under Article 803(4) since the principal purpose of the doctor's examination was forensic, the victim had been referred to the doctor by the police four weeks after the last incident of abuse, and the victim did not receive any medical treatment as a result of the doctor's examination); *State v. Coleman*, 95-1890 (La. App. 4 Cir. 5/1/96), 673 So. 2d 1283, 1286-87, *writ denied*, 97-0042 (La. 10/31/97), 703 So. 2d 11.

Even assuming that Dr. Wetsman's testimony regarding what H.B. told her was inadmissible hearsay, any error in admitting this evidence was harmless. The test for harmless error of the erroneous admission of hearsay is whether the guilty verdict rendered was surely unattributable to the error. *See State v. Morgan*, 99-1895 (La. 6/29/01), 791 So. 2d 100, 104 (*per curiam*); *State v. Wille*, 559 So. 2d 1321, 1329-32 (La. 1990).

H.B. herself testified at trial about the incidents she recounted to Dr. Wetsman. The testimony of the victim alone is sufficient to prove the elements of the offense. *State v. Orgeron*, 512 So. 2d 467, 469 (La. App. 1 Cir. 1987), *writ denied*, 519 So. 2d 113 (La. 1988); *see also State v. Rives*, 407 So. 2d 1195, 1197 (La. 1981). H.B. testified the defendant put his hands and mouth on her "tush," and that he had touched her "inside" her tush with his mouth. In the CAC interview, H.B. stated that the incident started in the living room with the defendant licking on her "toochie." The defendant also put his fingers inside her "toochie." On the body diagram, H.B. identified "toochie" as the vagina. After what occurred in the living room, the defendant took H.B. into her mother's bedroom where, according to H.B., the defendant spit on his penis and then "rubbed" his penis on her vagina. The defendant put his tongue on her vagina in both the living room and the bedroom. In his interview with Detective Davis, the defendant was informed H.B. had made allegations that he performed oral sex on her, that he masturbated in front of her and ejaculated, and he lubed his penis with spit from his hand. When asked if this was accurate, the defendant replied it was about 70 percent accurate. The defendant told the detective that he was intoxicated, either on alcohol or sleeping medication, and that he did not entirely remember the night; it was, however, a definite possibility that he masturbated in front of H.B. When asked if he could say that he performed oral sex on H.B., the defendant replied, "No sir." When asked, then, if his daughter was lying, the defendant said, "No sir." Detective Davis then asked if the defendant agreed that he could not remember "if or if not" he had performed oral sex on H.B. The defendant replied: "I feel pretty confident that I might have masturbated around her, not intentionally in front of her. And because of the medicated state, I don't entirely remember the night or performing the oral sex." The defendant further provided: "I'm not in no way, you know, calling her a liar. I'm just saying I don't

remember it completely in my own mind, that there is definitely a possibility about the masturbation, but the oral sex I don't completely remember that because of the narcotics and the alcohol."

Thus, given the trial testimony of Brandy and H.B., the CAC interview of H.B. admitted into evidence and played for the jury, and the inculpatory statement of the defendant, the testimony Dr. Wetsman was cumulative and corroborative of other testimony establishing the defendant's guilt. Inadmissible hearsay that is merely cumulative or corroborative of other testimony adduced at trial is considered harmless. *State v. Spell*, 399 So. 2d 551, 556 (La. 1981). Therefore, even if erroneous, its admission into evidence was harmless beyond a reasonable doubt. *See* La. C.Cr.P. art. 921; *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 2081, 124 L. Ed. 2d 182 (1993); *see also State v. Williams*, 2012-0252 (La. App. 4 Cir. 4/17/13), 115 So. 3d 600, 613, *writ denied*, 2013-1141 (La. 11/22/13), 126 So. 3d 477; *Greene*, 951 So. 2d at 1235; *State v. James*, 2002-2079 (La. App. 1 Cir. 5/9/03), 849 So. 2d 574, 584-85; *Harris*, 781 So. 2d at 85-86; *Lawrence*, 752 So. 2d at 943; *Coleman*, 673 So. 2d at 1287.

Based on the foregoing, this assignment of error is without merit. We therefore affirm the conviction and sentence imposed by the trial court.

CONVICTION AND SENTENCE AFFIRMED.