

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

JAN 14 2016

APPEAL FROM UNION COUNTY
Court of General Sessions

SC SUPREME COURT

John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2013-000435

The State of South Carolina,.....Respondent,

v.

Stephen Douglas Berry,.....Petitioner.

APPENDIX

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ATTORNEYS FOR PETITIONER

ATTORNEYS FOR RESPONDENT

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM UNION COUNTY
Court of General Sessions

John C. Hayes, III, Circuit Court Judge

Case No. 2011-GS-44-0413

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OCT 08 2014

SC Court of Appeals

The State of South Carolina,.....Respondent,

v.

Stephen Douglas Berry,.....Appellant.

RECORD ON APPEAL

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ATTORNEYS FOR APPELLANT

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WITNESSES

T. Humphries/UCSO

ARREST WARRANT NUMBER

M675577

ACTION OF GRAND JURY
TRUE BILL

Person of Grand Jury

Date: JUL 12 2012

VERDICT

Foreperson of Petit Jury

Date: 2/8/13

DOCKET NO. 2011-GS-44-0013
Amended Indictment

The State of South Carolina
County of Union

COURT OF GENERAL SESSIONS

JULY 16, 2012 TERM

THE STATE

vs.

STEPHEN DOUGLAS BERRY

Indictment for

CRIMINAL SEXUAL CONDUCT
WITH A MINOR, 2ND DEGREE

SC Code: 16-03-655

CDR Code: 397

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF UNION)

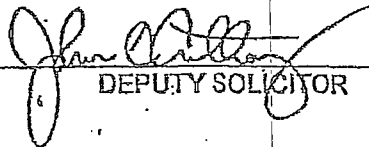
INDICTMENT

At a Court of General Sessions, convened on July 12, 2012, the Grand Jurors of Union County present upon their oath:

CRIMINAL SEXUAL CONDUCT WITH A MINOR, 2ND DEGREE

That in Union County, South Carolina, between on or about May 01, 2010 and on or about [REDACTED] 2010, Stephen Douglas Berry did commit the crime of Criminal Sexual Conduct with a Minor in the Second Degree, in that the Defendant, on one or more occasion, did commit a sexual battery upon the victim, [REDACTED] a minor who was at least fourteen years of age but who was less than sixteen years of age, by digitally penetrating or engaging in sexual intercourse with the victim, and the Defendant was in a position of familial, custodial, or official authority to coerce the victim to submit or the Defendant was older than the victim, in violation of Section 16-03-655, Code of Laws of South Carolina (1976, as amended).

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


DEPUTY SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF

Union

STATE

VS.

Stephen Douglas Barry

INDICTMENT/CASE#: 2011GS 44 - 0413

AW#: M-675577

Date of Offense: 05/10/2010 - 05/23/2010

S.C. Code §: 16-03-0655

CDR Code #: 0 3 9 7

AKA: _____
 Race: W Sex: M Age: _____
 DOB: 07/18/1972 SS#: 247-33-1042
 Address: 848 Bob Little Road
 City, State, Zip: Jonesville, SC 29353

DL# _____ SID# SC00837055
☐ CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No

In disposition of the said indictment comes now the Defendant who was
 TO: 2nd Degree Criminal Sexual Conduct with a Minor

In violation of § 16-3-635 of the S.C. Code of Laws, bearing CDR Code # 0397
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45
 (CSC w/minor 1st or Lewd Act)

The charge is: ☐ As indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentation to Grand Jury. (def's initials)
 The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

7116

Solicitor SC Bar # _____ Defendant Attorney for Defendant SC Bar # _____
 WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center,
 for a determinate term of 15 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and or payment
 of \$ _____; plus costs and assessments as applicable, the balance is suspended with probation for
 months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are
 incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State
 Department of Corrections.

☒ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922; it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-85 (Criminal
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP _____

Total: \$ _____ plus 20% fee: \$ _____ days/hours Public Service Employment

Payment Terms: _____

☐ Set by SCDPPPS

Recipient: _____

File:
 §14-1-206 (Assessments 107.5%) \$ _____
 §14-1-211 (A)(1)(Conv. Surcharge) \$100 \$ 100
 §14-1-211 (A)(2)(DUI Surcharge) \$100 \$ _____
 §56-5-2995 (DUI Assessment) \$12 \$ _____
 §56-1-286 (DUI Breath Test) \$25 \$ _____
 Proviso 47.9 (Public Def/Prob) \$500 \$ _____
 §14-1-212 (Law Enforce. Funding) \$25 \$ 25
 §14-1-213 (Drug Court Surcharge) \$150 \$ _____
 §50-21-114 (BUI Breath Test Fee) \$50 \$ _____
 §56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____
 Proviso 90.5 (SCCA Surcharge) \$5 \$ 5
 3% to County (if paid in installments) \$ _____
 TOTAL \$ 1379.50

Clerk of Court/Deputy Clerk _____
 Court Reporter: _____

Obtain GED ☐

Attend Voc. Rehab. Or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐

Random Drug/Alcohol Testing: ☐

Fine may be pd. in equal consecutive weekly/monthly

prts. of \$ _____ Beginning

\$ _____ Paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel,
 §47.12 requires \$500 be paid to Clerk
 during probation.

Presiding Judge: John C. Hays

Judge Code: 2047

Sentence Date: 2/8/13

SCCA/217 (03/2011)

THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

APPEAL FROM UNION COUNTY
Court of General Sessions

JOHN C. HAYES, CIRCUIT COURT JUDGE

Case No.: 2011-GS-44-0413

The State of South Carolina, Respondent
v.

Stephen Douglas Berry, Appellant

WILLIAM F. GAULT
CLERK OF COURT
UNION, SC

2013 FEB 11 AM 11:52

FILE FOR RECORD

NOTICE OF APPEAL

Stephen Douglas Berry appeals his guilty verdict and sentence imposed by the Honorable John C. Hayes on February 8, 2013. The Appellant was tried by jury and found guilty of 2nd Degree Criminal Sexual Conduct with a Minor and received a sentence of fifteen (15) years..


Erik D. Delaney
Attorney for Appellant
Union County Public Defender
Sixteenth Judicial Circuit
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(864) 429-1687

This 11th day of February, 2013
Union, South Carolina

Other Counsel of Record:
John C. Anthony, Deputy Solicitor
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Union, SC 29379
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RECEIVED
FEB 22 2013
SC COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
IN THE SOUTH CAROLINA COURT OF APPEALS

APPEAL FROM UNION COUNTY
COURT OF GENERAL SESSIONS

JOHN C. HAYES, CIRCUIT COURT JUDGE

WILLIAM F. GAULT
CLERK OF COURT
UNION, SC

2013 FEB 11 AM 11:52

FILE FOR RECORD

Case No: 2011-GS-44-0413

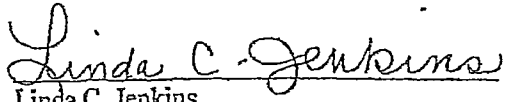
The State of South Carolina, Respondent

v.

Stephen Douglas Berry, Appellant

Certificate of Service

This is to certify that a copy of the Notice of Appeal in the case of The State vs. Stephen Douglas Berry, was served upon Deputy Solicitor John C. Anthony, on February 11, 2013 by hand-delivering a copy to the Solicitor's Office, 220 W. Main Street, Union, South Carolina by the undersigned.


Linda C. Jenkins
Legal Secretary for Erik D. Delaney
Attorney for the Defendant

February 11, 2013

State of South Carolina.,) In the General Sessions
) Court of Union
)
) Case No.: 2011-GS-44-00413
)
County of Union.)

State of South Carolina.,)
)
Plaintiff.,)
)
vs.) Transcript of Record
)
Stephen Douglas Berry.,)
)
Defendant.)
)

February 5-8, 2013
Union, South Carolina

B E F O R E:

The Honorable John C. Hayes, III, Judge, and a jury.

A P P E A R A N C E S:

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For the Defendant

I N D E X
E X A M I N A T I O N

<u>WITNESS</u>	<u>BY:</u>	<u>PAGE NO.</u>
	Solicitor Anthony	100-132
		132-134 (In Camera)
		135-138 (In Camera)
		141-150
		174-178
	Ms. Inzerillo	134 (In Camera)
		150-170
		170-173
Eddie Williams	Solicitor Anthony	180-196
		221-224
		520-521
	Mr. Delaney	197-221
Sherrie Tucker	Solicitor Anthony	225-237
	Ms. Inzerillo	237-245
Andrew 	Solicitor Anthony	245-254
		261-263
	Mr. Delaney	254-261
Marla Pridemore	Solicitor Anthony	264-268
		270-271
	Mr. Delaney	268-270
Phillip 	Solicitor Anthony	272-278
	Mr. Delaney	279-281

I N D E X - C O N ' T
E X A M I N A T I O N

<u>WITNESS</u>	<u>BY:</u>	<u>PAGE NO.</u>
Jason Smith	Solicitor Anthony	282-286
		293-294
	Mr. Delaney	287-293
Kaitlyn Koepke	Solicitor Anthony	295-300
	Ms. Inzerillo	300-301
Jadea Berry	Solicitor Anthony	302-324
		359-363
	Mr. Delaney	325-329
		329-336 (In Camera)
		337-359
		364-365 (In Camera)
Julia Krasinski	Solicitor Anthony	366-370
		371 (In Camera)
		372-381
		389-390
	Mr. Delaney	381-388
		391
Allen Black	Solicitor Anthony	392-394
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	Mr. Delaney	395-397
Roxie Belue	Solicitor Anthony	399-408
		437-440

I N D E X - C O N ' T

E X A M I N A T I O N - C O N ' T

<u>WITNESS</u>	<u>BY:</u>	<u>PAGE NO.</u>
Roxie Belue	Mr. Delaney	408-437
Kim Roseborough	Solicitor Anthony	444-487
	Ms. Inzerillo	487-491
Terry Humphries	Solicitor Anthony	492-501
		516-518
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Closing Arguments	Mr. Delaney	581-602
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Verdict		645-
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Voir Dire/Batson Sheet		656

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
ST.1	Photo	P.180	P.235
ST.2	Photo	P.180	P.235
CT.1 & 2	Jury Notes		P.654
Reporter's Note: All Exhibits were filed with the Union			
County Clerk of Court's office.			

1 THE COURT: Ms. Shugart being - The Victim's Advocate?

2 MR. DELANEY: Well, again, Your Honor, if she's gonna

3 ---testify our position would be have her sequestered.

4 THE COURT: Why does she need to stay in? She's - The
5 victim is of age and if she's gonna be a witness I think we
6 probably ought to treat her like we do every other witness.

7 SOLICITOR ANTHONY: Yes, sir. Its just part of her
8 job to be in the courtroom.

9 THE COURT: I know but we've got a kind of having it
10 both ways. Having her as witness and being in as the
11 victim's witness assistant, it makes it a little difficult
12 if she's aware of the victim witness assistant as in
13 integral part in the case as opposed to just being the
14 detached victims assistance. I think they should be
15 treated just as a regular witness.

16 SOLICITOR ANTHONY: Yes, sir.

17 THE COURT: Now any Lyle testimony?

18 SOLICITOR ANTHONY: No, sir. We don't have any

19 intention

20 THE COURT: Now the Sixth Motion is a little
21 different, a motion to limit the testimony of any alleged
22 sexual acts between the victim and the defendant to the
23 dates contained in the indictment and to any acts occurring
24 only in Union County. Any issue with that?

25 SOLICITOR ANTHONY: Yes, sir. The evidence is going

1 to be that this started when the victim was fifteen. The
2 end date in the indictment is her sixteenth birthday, but
3 ~~she would testify that this situation, this relationship~~
4 with the defendant continued on into March. Her birthday
5 was in [REDACTED] of 2010 and these acts continued on into
6 March of 2011, was shortly before she disclosed.

7 THE COURT: Let me see the indictments.

8 Can I see the indictments? Can I see the indictments?

9 SOLICITOR ANTHONY: Yes, sir. Yes, sir, I have them.

10 (INDICTMENTS RECEIVED UP BY THE COURT FROM SOLICITOR
11 ANTHONY.)

12 THE COURT: Well to start off with criminal sexual
13 conduct with a minor. At what age - She's still a minor at
14 age sixteen, but what is the age of consent?

15 THE COURT: Sixteen.

16 THE COURT: Okay. What - There is no crime.

17 SOLICITOR ANTHONY: Yes, sir, but she was - There was
18 still an ongoing set of acts between the two of them from
19 the time of her sixteenth birthday on into March of 2011.

20 And in order to show that on going relationship, we believe
21 that she should be allowed to testify about the fact that
22 the relationship and those acts continued up until the time
23 she disclosed.

24 THE COURT: Well let me think about that. The
25 relevancy would be what? And that's why she waited to

1 disclose or?

2 SOLICITOR ANTHONY: Yes, sir. She - The case is not
3 going to make really any sense if it is portrayed to the

4 jury that these acts stopped right at her sixteenth
5 birthday, four months passed before she ever told anybody.

6 THE COURT: Well it's not the Court's responsibility
7 to make the case make sense. I mean it's got the facts;
8 the facts are the facts and the allegations are for a
9 certain time period - I'll give it some thought but I don't
10 see how a continuing relationship is a commission of a
11 crime and it may be reversible. Lyle: It's kind of Lyle
12 in reverse that this continued pattern of bad acts
13 afterward the how she reached the age of consent.

14 SOLICITOR ANTHONY: I have a case I'd like to hand up
15 on that.

16 THE COURT: All right.

17 SOLICITOR ANTHONY: This is a very old case but as far
18 as I can tell it's still a good case. It's *State v.*

19 *Richie*; it's 70 S.E. 729. I'm handing a copy to the
20 defense. I think its very much similar to the case that we
21 have here.

22 THE COURT: All right. I'll take a look at this over
23 lunch. Any other issues before we break for lunch?

24 SOLICITOR ANTHONY: The only thing that I would ask,
25 Your Honor, since I imagine the court would want to go

1 MS. PRICE: All right. Thank you.

2 THE COURT: Yes, ma'am.

3 (JUROR NUMBER 213, JENNIFER PRICE EXCUSED FROM JURY
4 SERVICE.)

5 THE COURT: All right. Bullock is the one, it's not
6 Sandra, but Ms. Bullock has been chosen, Sharon, so she
7 will be the alternate that's serving and that leaves us one
8 alternate Mr. Hendricks.

9 Anything else before we get - -

10 SOLICITOR ANTHONY: Not on this matter.

11 THE COURT: Anything else?

12 MS. INZERILLO: No, Your Honor.

13 THE COURT: All right. I have reviewed both the
14 Richie case and my case from 1999, Weaver - Weaverling.
15 And I still find some of the language of the Richie case a
16 little confusing but the Weaverling case is fairly - Both
17 of them are on point regarding the acts post the victim's
18 sixteenth birthday. The Weaverling case I found that this
19 was ~~and I don't want to misquote~~ *some comment he said to the*

20 Anyway they upheld me for allowing the testimony after
21 this victim in the Weaverling case turned of age. I guess
22 that was the issue. I just got handed this case.

23 (PAUSE.)

24 THE COURT: Of course in looking at the Weaverling
25 case the victim was - knowed nothing about the age of

1 consent involves and this was a homosexual relationship. I
 2 hate to use that word, male on male relationship, the
 3 victim was male and the perpetrator was a male, but in that
 4 case I allowed the evidence of continuing sexual abuse
 5 outside of the time charged. It's different a little bit
 6 from our case because in our case we have a consent issue.
 7 In spite of that I'm going to allow the State to show under
 8 the *Riley* case and the language it gives me some concern
 9 there but I think it's covered more clearly in the
 10 *Waverling* case.

11 In *Riley* the court talks about continuousness of
 12 eliciting the Court admissible evidence as shown "the
 13 relation and mutual disposition of the parties." I quite
 14 frankly don't know what that means. Both the court in
 15 *Waverling* picked up that exact language but they went
 16 further and upheld me for allowing similar - again it's not
 17 exact as we've got on this case - but I find that these
 18 aren't prior bad acts as subsequent bad acts and that's
 19 what the *Richie* case talks about mainly is subsequent acts.

20 MS. INZERILLO: Your Honor, if I can be heard very
 21 briefly.

22 THE COURT: Yeah. Just a minute.

23 In that case while there was not a consent issue it
 24 was the relationship issue controlled the stepfather -
 25 that's *State versus Adams*. I'm trying to digest this on

1 the fly so to speak. I was looking at some language I saw
2 earlier.

3 ..(PAUSE.)

4 THE COURT: Yeah this language. "We find those
5 testimony regarding the pattern of sexual abuse suffered by
6 *Wavering* to be quintessential to the common scheme of plan
7 evidence. Evidence. Evidence of the defendant's prior and
8 subsequent elicit sexual activity closely similar to the
9 charge and it is admissible." And they cite *State versus*
10 *Richie*. In this I haven't heard the evidence but I have to
11 find at some point I guess outside - I guess outside the
12 presence of the jury I will have to find that the evidence
13 such as no criminal charge that it's clear and convincing
14 before I can allow it in. Just like the *Riley* I do find
15 that it is clear and convincing that it's probative value
16 out weighs the danger of unfair prejudice to Mr. Berry.

17 All right, I'll be glad to hear from you, Ms.

18 Inzerillo.

19 MS. INZERILLO: Thank you, Your Honor. Just wanted to
20 note the defense's position of this on the record.

21 Your Honor, in sort of my review of *State v. Richie* as
22 well as the *Wavering* case over the break, we would just
23 note that it seems like *State v. Richie* is essentially a
24 prelog - precursor to the common scheme of plan.

25 THE COURT: Well that gave me some concern too that

1 that case hadn't been over turned but it way way way
2 predates our rules of evidence, and so how that play would
3 work we still talk about Lyle which predated and we still
4 cite it. But I was concerned about Richie predating the
5 what is now is not codified, of course, but it's a rule
6 under the administrative procedures act as of course the
7 law and the rules of evidence we have to apply.

8 Go ahead.

9 MS. INZERILLO: Thank you, Your Honor. I just state
10 for the record and ask the court to read more in relation
11 in terms of that as opposed to just stand alone cases. As
12 the court can see in *Waverling* it is often cited as a
13 precursor case to the subsequent case in terms of being the
14 common scheme of plan exception in one of the cases
15 including *Weaverling*. Your Honor, our case, it's the
16 defense's contention that the case before the court today
17 is not a common scheme of plan case.

18 Our case is distinguishable from *Weaverling* in that
19 ~~from reviewing the court's review of the case and~~
20 understand Your Honor was actually the presiding judge in
21 *Waverling* but from reviewing the case as provided in
22 *Waverling* that there were common scheme of plan in terms of
23 other witnesses, I believe some other siblings that were
24 testifying to other abuse. We don't have that in this
25 case. Essentially we have one alleged victim that would

1 testify to some acts falling outside of the terms of the
2 indictment which would be the position of the defense that
3 that is not the common scheme of plan and would not fall
4 under that exception.

5 More over, Your Honor, the court did hit on this
6 briefly, before the lunch break the defense did make a Lyle
7 Motion and was informed by the State that there would be no
8 Lyle evidence that they would intend to present. And if
9 this is the case law that they in turn are relying on in
10 order to fall outside the term of the dates relied upon in
11 the indictment then this is involving case law and it would
12 be our position that we would like to revisit that motion
13 and any specific evidence that they intend to introduce
14 outside of the dates in the indictment the court now treat
15 it as Lyle and make that finding under Lyle and - or make
16 that finding before we go forward and treat it as Lyle,
17 that is, if the court intends to go forward with using
18 these cases.

19 THE COURT: Well the later part is that I will have to
20 hear the evidence and decide, convincing me clearly and
21 convincingly that - When do you want to do that?

22 SOLICITOR ANTHONY: What I intend to do would be for
23 me to call the victim and really the most - all of the
24 specific acts I'm going to ask her about before she turned
25 sixteen. So before I ask her and essentially all I intend

1 to do is just ask her if this behavior continued from the
2 time that she was sixteen up until the time she disclosed.
3 And before I ask her that question I can advise the court
4 and we can send the jury out and do a proffer.

5 THE COURT: All right. Yes I would like to get the
6 jury working as long as we could. That will be another
7 thing to stay away from.

8 SOLICITOR ANTHONY: I'm just trying to figure out how
9 to open and not explain to the jury that this occurred over
10 a lengthy period of time.

11 THE COURT: I think you can explain that. I mean
12 that's - I think that's what he's charged with. I think
13 the dates -

14 SOLICITOR ANTHONY: Well she also didn't disclose
15 until March and she turned sixteen in [REDACTED]

16 THE COURT: Well I know but he's charged with May 1,
17 2010 to [REDACTED], 2010. That's a pretty substantial
18 period of time.

19 SOLICITOR ANTHONY: All right. I can just stay away
20 from saying how long it lasted. I think I can do that.

21 THE COURT: Anything else before we get the jury in?

22 SOLICITOR ANTHONY: No, sir.

23 MS. INZERILLO: No, Your Honor.

24 THE COURT: Bring in the jury.

(
25 (JURY REENTERS COURTROOM AT 02:55 P.M..)

1 which the witness testified. All of these things you
2 consider to determine the true facts apply the law and your
3 ~~verdict will in fact speak the truth.~~

4 If you can't see - you don't need to take notes but if
5 you can't see or you can't hear let me know. Cup your ear
6 or give me a voice raising gesture, nudging gesture, and I
7 will try to correct it. We want you to see and hear the
8 things that are important in this case and if you can't I
9 want to know about it and I will try to correct it.

10 We take breaks about every hour and a half. I find
11 that's a good time usually. However if any of you need a
12 break at any time simply raise your right hand and with no
13 questions ask we will take a break. It's hard to pay
14 attention if you are in discomfort and you need a break
15 raise your hand and we'll take a break.

16 And I extend that to counsel and Mr. Berry. Again
17 we'd like to move the case along as quickly as possible.
18 Not hurriedly but quickly. But if we need a break we will

19 ~~take one~~
20 Counsel.

21 SOLICITOR ANTHONY: Thank you, Your Honor.

22 Good afternoon, you all. My name is John Anthony. I'm
23 the Deputy Solicitor here in Union and I'm gonna be
24 representing the State of South Carolina in this case.

25 I want you all to think just a minute about all of the

1 things that you count on other people to do. And all the
2 things that you trust other people with. And it can be as
3 simple as you trust your car to your mechanic. You trust
4 your money to your bank. You trust your health to your
5 doctor. And if you ask most parents, most parents I'm sure
6 will tell you that the most precious thing that they trust
7 anybody is their children. And they trust their children
8 to the schools, to school teacher, maybe the coaches, maybe
9 the boy scouts leaders, girl scout leaders, but parents
10 also trust their children to churches and the pastors.

11 Either later on this afternoon or first thing in the
12 morning you all are gonna hear from a man by the name of
13 Eddie Williams. And Eddie Williams is a Public Safety
14 officer for the town of Union. He's a single parent, he has
15 three children. He has a oldest child, his daughter
16 [REDACTED] then he has two boys Andrew and Philip. He lives
17 right up the road from his mother and his mother has helped
18 him raise his children up on [REDACTED] in Jonesville.
19 And back in the spring of 2009 that's really when this case
20 starts is in 2009 Eddie Williams and his family join New
21 Life Baptist Church. And New Life Baptist Church was where
22 the defendant in this case, Mr. Berry, was employed as the
23 youth pastor.

24 Now when they joined New Life Baptist Church his
25 daughter was fourteen. [REDACTED] was fourteen and she

1 developed some important relationships at New Life Church.
2 She became best friends with Mr. Berry's daughter who's
3 name is Jadea. And then she also became very attracted to
4 this older boy in the youth group named Jason Smith. And
5 Eddie Williams noticed that his daughter, who was fourteen
6 at the time, was attracted to a seventeen year old boy.
7 And he had some real reservations about that so he went and
8 talked to Mr. Berry about that. And Mr. Berry agreed to
9 keep Ms. [REDACTED] and the boy that she liked, [REDACTED] liked
10 Jason Smith, he agreed that he'd keep them separated.

11 So that happened in - around the summer of 2009. Well
12 we go now again to the spring of 2010; May of 2010. And
13 something very important happened then because in May of
14 2010 Mr. Berry and his family moved. They were living in
15 Union and they moved to Jonesville and they moved just
16 three or four houses down from where Eddie Williams and
17 [REDACTED] and his family were living. After he moved some
18 very peculiar things started happening. Mr. Berry started
19 coming to [REDACTED]'s grandmother's house a lot to see
20 her. And then he started coming up to [REDACTED] house.
21 And he come up to [REDACTED] house when Mr. Williams -
22 come up to [REDACTED] house when Mr. Williams wasn't there.

23 One time he came up there not wearing anything except
24 a bathing suit after a swimming party at his house. And so
25 this became a concern to Eddie Williams and he talked to

1 Mr. Berry about it but nothing really changed over time in
2 2010.

3 Well at the same time as Mr. Berry started doing these
4 things, and showing this attention to [REDACTED]
5 [REDACTED] behavior changed and she started - she
6 became a lot more of a problem, started having a lot more
7 problems, causing a lot more problems for Mr. Williams over
8 this period of time. And then finally one day at school
9 [REDACTED] told a friend of her's that Stephen Berry
10 had been performing sexual acts on her over time. That he
11 had been primarily digitally taking his hand and what they
12 refer to as fingering her, putting his finger up inside of
13 her and this behavior had gone on over time.

14 And she reported that to the guidance counselor at the
15 school. She first told a friend of hers. The friend told
16 the guidance counselor and then the guidance counselor
17 referred it to law enforcement so people from the sheriff's
18 office came and they took a statement from her and they
19 began to investigate this case.

20 So what we're gonna do in this case is we're going to
21 basically present this evidence to you. You are going to
22 hear from [REDACTED] you are going to hear from
23 several of her family members, you're going to hear from
24 the boy she liked Jason Smith. You're going to hear from
25 her friend that she told about this at school. You're

1 going to hear from the detectives at the sheriff's office
2 who investigated the case. And then you are also going to
3 hear from Mr. Berry's own daughter, Jadea Berry, who is
4 [REDACTED] best friend for a long time. And I want
5 you to pay attention to her testimony because she saw some
6 things going on at Mr. Berry's house between Mr. Berry and
7 [REDACTED] that verify, confirm to you the truth of what [REDACTED]
8 [REDACTED] is going to testify to you about this afternoon.

9 So that's essentially the case we're going to present.
10 We're going to start this afternoon by calling [REDACTED]
11 and then we'll call these other witnesses over the next day
12 or so. And we believe that once you've heard all of the
13 evidence in this case that you will find Mr. Berry is
14 guilty of criminal sexual conduct with a minor in the
15 second degree. Thank you all.

16 MR. DELANEY: May it please the Court.

17 THE COURT: Yes, sir.

18 MR. DELANEY: Good afternoon. A rush to judgment that
19 is what this case is about. A rush to judgment before you
20 know the whole story. The complete story. The true story.
21 A rush to judgment before all of the evidence is examined.

22 What is great about the process we are about to go
23 through, this foundation is built upon not making that
24 mistake. It's built upon being deliberate, being sure that
25 information, facts, can be corroborated. Being sure that

1 information, facts, make sense.

2 Ladies and gentlemen, you must listen to all of the
3 testimony, hear all of the evidence through the entirety of
4 this trial. And you cannot begin making your decision
5 until you've heard all of that; until you listen to all of
6 that. That is your duty as a juror and as part of the oath
7 as you've taken here today. You are going to hear about
8 the investigation that was done in this case. And an
9 investigation that you will hear the facts do not show that
10 it was deliberate. The facts will not show that there was
11 any checking into someone's story, someone's statement to
12 see if there's corroboration or contradiction.

13 An investigation but it wasn't checking to see if
14 someone's story, someone's statement makes sense, add up.
15 An investigation where you are going to hear that a warrant
16 was sworn out after talking to one person. The bulk of the
17 investigation came afterward. And this one person, [REDACTED]
18 [REDACTED] the State's star witness.

19 You're going to hear about her behavior. You are
20 going to hear about her lies. You're going to hear when
21 she takes this stand and tells the story and that story
22 she's going to tell is going to change and it's going to
23 change and it's going to change. You are going to hear
24 from up here one of the versions of one of these stories
25 has her in a room being a victim of a brutal rape that's

1 witnessed by potentially three people. Three potential
2 witnesses in this room that witnessed a forcible, potential
3 witness, a forcible rape. That's one of the versions you--
4 are going to hear.

5 There is a certain level of trust a parent has with a
6 child especially when that child is getting older, getting
7 close to adulthood. A parent wants to believe, wants to
8 trust that their child is telling the truth. As you heard
9 Eddie Williams is going to get on this stand and testify.
10 And what I want you to do is to go back at the end and look
11 at his testimony; remember his testimony. Does that
12 testimony make sense? Does it add up? You're gonna hear
13 from a guy named Jason Smith. Listen closely to what Jason
14 Smith tells you about his relationship with [REDACTED]
15 [REDACTED]. Listen closely to Jason Smith's testimony and
16 see if he corroborates anything that [REDACTED] [REDACTED] says
17 from this stand.

18 There is going to be other witnesses that are going to
19 come up and sit there as well. And what you're going to
20 have to do and as you've heard listen closely look, listen.
21 Does it make sense? Is it being corroborated? It doesn't
22 make any sense. Is it contradicting each other? Those are
23 the things that you are going to look for in this case.
24 You are going to hear and you already did from the
25 Solicitor, Mr. Berry went up to [REDACTED]'s residence with a

1 bathing suit on. No shirt, with his bathing suit on. This
2 was you're going to hear mid summer, late mid to late
3 summer. You're going to hear a pool party was going on.
4 You're gonna hear how long these shorts were.

5 You're also gonna hear some testimony with respect
6 that Stephen Berry was in his bedroom watching TV or a
7 movie. He was on one end of the bed, [REDACTED] was
8 on the other end of the bed. You're gonna hear that
9 Stephen Berry knew [REDACTED] like a daughter. You're
10 gonna hear it was not unusual for one of his daughters to
11 go into his room when he was watching TV or a movie and
12 watch some TV with him, talk to him, sometimes on the bed.

13 You're gonna hear there were a few occasions where
14 Stephen Berry had to take [REDACTED] home from the
15 church and it was just the two of them. Most of the time
16 you will hear his daughter's were with him. But you are
17 going to hear that there were occasions where [REDACTED]
18 [REDACTED] had to be home by a certain time and he took her
19 home.

20 This is the indictment, this is the charge in this
21 case. Criminal sexual conduct. That is the charge that's
22 in front of you today. That's what this case is about.
23 Did Stephen Berry have sexual relations with [REDACTED]
24 [REDACTED]? That is what this case is about. It's not about
25 whether he wore a bathing suit in midsummer after a pool

1 party. This case is about the evidence and what they can
2 prove.

3 There is going to be some topics that come up in this
4 case that are not going to be the most comfortable to
5 discuss. People who take this stand are going to be ask
6 tough questions. That is because this is serious business;
7 this is a serious case and it's a serious charge. And
8 those questions need to be ask and this is the place to do
9 it. The rush to judgment stops here. At the end of this
10 case after you've heard everything, examine all of the
11 evidence, I contend you will not be firmly convinced, you
12 will be hesitant to act and you will find Stephen Berry not
13 guilty. Thank you.

14 THE COURT: Call your first witness.

15 SOLICITOR ANTHONY: We call [REDACTED].

16 THE COURT: Come up and be sworn.

17 (WHEREUPON: [REDACTED])

18 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

19 'DIRECT' EXAMINATION

20 [REDACTED] BY SOLICITOR ANTHONY:

21 Q. Could you state your name, please?

22 A. [REDACTED]

23 Q. [REDACTED], how old are you?

24 A. Eighteen.

25 Q. And when is your birthday?

1 A. [REDACTED], 1994.

2 Q. All right. And are you currently in school?

3 A. Yes, sir.

4 Q. Where do you go to school?

5 A. University of South Carolina, Union.

6 Q. And what year are you in now?

7 A. Freshman year.

8 Q. And when did you graduate high school?

9 A. Last May 2012.

10 Q. And what is your plan after you finish up this year
11 and next year at USC Union?

12 A. I plan on transferring to USC Upstate and major in
13 psychology.

14 Q. And do you have a job now too?

15 A. I do.

16 Q. Where do you work?

17 A. Dairy A.

18 Q. Where do you live, [REDACTED]?

19 A. I live with my father and my two brothers in
20 Jonesville, South Carolina.

21 Q. And how long have you lived just with your father?

22 A. Ever since I was like ten.

23 Q. Okay. And what happened in your parent's relationship
24 to leave you just living with your father?

25 A. My mom and dad got a divorce when I was little.

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BY SOLICITOR ANTHONY

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1 Q. And along with living with your father during the last
2 eight years or so, who have you stayed with, what adult
3 have you stayed with a lot?

4 A. My grandmother.

5 Q. And what's her name?

6 A. Sherrie Tucker.

7 Q. And where does Ms. Tucker live in relation to where
8 you and your father and your brothers live?

9 A. Right behind them.

10 Q. All right. I want to take you now back to the summer
11 of 2010. Where were you going to church then?

12 A. New Life Baptist Church.

13 Q. And when did you start going to New Life Baptist
14 Church?

15 A. My eighth grade year. It was Spring time so it had to
16 be the Spring of 2009.

17 Q. Of 2009?

18 A. Uh-huh.

19 Q. Okay. All right. And where you in school for the
20 eighth grade?

21 A. Jonesville Middle School.

22 Q. And when you attended New Life Baptist, who was the
23 youth pastor there?

24 A. Stephen Berry.

25 Q. And how often did your family go to church?

1 A. Three times a week.

2 Q. And before you all starting going to New Life, had you
3 ever met Mr. Berry? Did you know him from any time before
4 going to New Life?

5 A. Yes, sir.

6 Q. And how was that?

7 A. I knew him by his brother, David.

8 Q. And how did you know him?

9 A. We used to go to church with David at Lakeside Baptist
10 Church in Union.

11 Q. And had you ever seen him anywhere else?

12 A. That's it.

13 Q. Had you ever seen him at the middle school?

14 A. Well, yes. I seen him at the middle school.

15 Q. Okay. And how did he come to be there?

16 A. He would come to the middle school with some other
17 people that would come to the school and talk to the kids
18 that wanted to know about God and would just talk with them
19 about how they can improve better and they were just
20 basically help and try to improve their Christian walk and
21 tried to deal with every peer pressure they have at school.

22 Q. Now, did Mr. Berry have any children your age?

23 A. He did.

24 Q. And what was the name of his child that was your age?

25 A. Jadea.

1 Q. Okay. And what was your relationship with Jadea
2 Berry?

3 A. She was my best friend.

4 Q. And what kind of things would the two of you all, you
5 and Jadea do?

6 A. We would spend the night at each other's house. We
7 would just go and hang out. We would go swimming.
8 Basically anything I did Jadea done; anything Jadea done
9 she done. She was my best friend. We did everything
10 together.

11 Q. Okay. And were you friends with anybody else in the
12 youth group, with any other girls in the youth group at New
13 Life that you were as close to as you were Jadea?

14 A. No.

15 Q. And what was it, was there anything you all shared in
16 common that you think made you all such close friends?

17 A. Her parents got a divorce when she was little and she
18 knew what it was like not to have her mom there all the
19 time so we comforted each other because I was struggling
20 not having my mom and so she helped me through that.

21 Q. And was Mr. Berry married at the time that you were
22 going to New Life?

23 A. Yes, sir.

24 Q. And what was his wife's name?

25 A. Sandy Berry.

EXHIBIT

BY SOLICITOR ANTHONY

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1 Q. And was Sandy Jadea's mother?

2 A. No, sir.

3 Q. Okay. And then how many other children did he have?

4 A. Three.

5 Q. And what were their names?

6 A. Courtney, Logan and Peyton.

7 Q. And just going to say the summer of 2010. What would
8 have been the approximate age of the three girls?

9 A. Courtney, 12; Logan, 10; Peyton, 7 or 8.

10 Q. Okay. All right. And when you were at New Life, did
11 you met -- was there a boy there named Jason Smith?

12 A. Yes, sir.

13 Q. Okay. And how old -- When you started going, going
14 back to the time you started going in 2009 when you were in
15 the eighth grade, how old was Jason at that time?

16 A. He was seventeen.

17 Q. And then how old were you?

18 A. I was fourteen.

19 Q. Okay. And where was Jason in school as far as what
20 grade was he in?

21 A. I think he had just got out of high school.

22 Q. All right. He graduated that spring ---

23 A. Yes, sir.

24 Q. --- of '09?

25 A. Yes, sir.



1 Q. Okay. And what developed between you and Jason Smith
2 in the summer of 2009?

3 A. We talked like. We dated but it was nothing really
4 major because I was underage and its not like we could go
5 out and go out on a date or anything, so we just talked on
6 the phone and seen each other when I went to church.

7 Q. Okay. So is it fair to say the two of you liked each
8 other?

9 A. Yeah.

10 Q. Okay. And how did you all communicate?

11 A. We communicated by text messages. When I went to
12 church, we would talk then. Other than texting, that's
13 when we talked.

14 Q. Okay. And where would you all see each other?

15 A. Church.

16 Q. Now, your father, Mr. Williams, what was his reaction?

17 Did he become aware that you and Jason liked each
18 other?

19 A. He did.

20 Q. And what was his reaction to that?

21 A. He didn't like it.

22 Q. And so what kind of rule did he give you as far as
23 the nature of your relationship with Jason Smith?

24 A. He told both of us that we could not have any contact
25 outside the church.



1 Q. And how did you respond to that?

2 A. I didn't listen. I continued to text him.

3 Q. You kept texting him?

4 A. I kept texting him.

5 Q. Okay. Could you just scoot up just a little bit,
6 maybe scoot that chair up so we can get you good in that
7 microphone.

8 (WITNESS MOVED WITNESS CHAIR CLOSER TO MICROPHONE.)

9 Q. Okay. Thank you.

10 A. You're welcome.

11 Q. And how did your father -- Did your father become aware
12 of the fact that you kept on texting him?

13 A. Yes, sir.

14 Q. And how did he react to it?

15 A. He had a meeting with Jason and Stephen.

16 Q. Okay. All right. And this would have been in the
17 summer of 2009?

18 A. Yes, sir.

19 Q. Okay. All right. And did Mr. Berry tell you anything
20 or say anything to you about being involved with Jason back
21 in the summer of 2009 when this first started?

22 A. Yes, sir.

23 Q. And what did he say?

24 A. He told me he was too old for me.

25 Q. Well as 2009 passed and you started back to school in

1 the fall and going on into the spring of 2010, did anything
2 change about how you felt about Jason?

3 A. No.

4 Q. Now, going now into 2010, before May of 2010, where
5 had Mr. Berry lived?

6 A. On Katherine Street in Union.

7 Q. And then what happened around May of 2010?

8 A. He moved from Katherine Street up to [REDACTED],
9 which is like three houses down from me.

10 Q. And was there an occasion when you and Mr. Berry went
11 to the house on Katherine Street?

12 A. Yes, sir.

13 Q. Around in May of 2010?

14 A. Yes, sir.

15 Q. Okay. And who went on that occasion?

16 A. Just me and Stephen.

17 Q. And what was going on that led to him taking you there
18 to the Katherine Street residence?

19 A. I went to church and he was suppose to take me
20 straight home after church and he didn't.

21 Q. Okay. And so how did you all get to Katherine Street?
22 What was the means of getting there?

23 A. He had told me that he needed to stop by Katherine
24 Street to get a few more things that he needed at the other
25 house, so we went by there and we got some things.

1 Q. And what were you riding in?

2 A. His van.

3 Q. And so once you got to the Katherine Street house what
4 happened?

5 A. Stephen told me to go into Jadea's room to make sure
6 she had everything and I did that. And when I went to go
7 check, Stephen came in there and he hugged me from behind
8 and —

9 Q. Let me just stop a second. Where did you go to in the
10 house?

11 A. Jadea's room.

12 Q. Okay. And what was the purpose of doing that?

13 A. To make sure she had everything out of her room.

14 Q. Okay. And did you do that?

15 A. Yeah.

16 Q. And then did you tell Mr. Berry anything about what
17 you had done?

18 A. I told him Jadea had everything.

19 Q. Okay. And so where did you go after that?

20 A. We put the stuff that we had back in the van and we
21 came back into Jadea's room.

22 Q. Okay. And so what happens when the two of you came
23 back into Jadea's room?

24 A. I was leaning against her desk looking out the window
25 and Stephen comes in behind me and he hugs me.

1 Q. Okay. And did he touch you anywhere? Where did he
2 touch you when he hugged you?

3 A. He touched my butt.

4 Q. I'm sorry. Where did he touch you?

5 A. My butt.

6 Q. Okay. And what did you do when he did that?

7 A. I turned around and looked at him like he was stupid.

8 Q. And had he ever done anything like that to you before?

9 A. No, sir.

10 Q. Okay. And so how did you feel when he did that?

11 A. I felt violated.

12 Q. Okay. And what happened when you turned around and
13 looked at him, what did he say?

14 A. He asked me why I was looking at him like that.

15 Q. And how did you respond.

16 A. I told him because you touched my butt.

17 Q. Okay. And what did you do after that exchange between
18 the two of you?

19 (PAUSE/NO RESPONSE.)

20 Q. Where did you go in the room? What was the next thing
21 you did?

22 A. I sat on Jadea's desk.

23 Q. Okay. And at that time, did you all have any
24 conversation between the two of you?

25 A. We did.



1 Q. Okay. And what were you talking about?

2 A. Talking about me and my dad and our relationship and
3 Jason.

4 Q. Okay. All right. And what happened next? What was
5 the next thing he did?

6 A. Stephen comes up to me and he gives me a hug and he
7 looks at me and tells me that I'm beautiful and I'm like,
8 thank you. And he starts rubbing my legs and he starts
9 unbuttoning and unzipping my pants and I pushed him away.

10 Q. And when you pushed him away, how did he react? What
11 did he do?

12 A. He walked away; then he came right back and pulled my
13 pants down.

14 Q. And did he finger — or did he pull down any other
15 clothing aside from your pants?

16 A. He pulled my underwear down too.

17 Q. Okay. And what did you do after he pulled your pants
18 and your underwear down?

19 A. He fingered me.

20 Q. Now when you use the term "fingered," what
21 specifically happened? What part of his body touched what
22 part of your body?

23 A. His finger went inside my vagina.

24 Q. After he did this, did he do — what was the next thing
25 he did?

1 A. He walked back and then he sat on a crate and he just
2 looks at me and his eyes, I'll never forget his eyes. And

3 he starts walking towards me and unbuttoning and unzipping
4 his pants and he turns me around and tries to stick his
5 penis in my butt.

6 Q. Okay. And when he did this, when he came to you and
7 turned you around and tried to put his penis inside you,
8 what did you do?

9 A. I pushed him.

10 Q. And what happened after you pushed him?

11 A. He falled back and then not two seconds later he
12 started walking back towards me and tried it again.

13 Q. And how did you react when he did that?

14 A. I pushed him.

15 Q. Okay. Did this have any emotional effect on you at
16 the time?

17 A. Yeah.

18 Q. Okay. What did you start doing, how did you react?

19 A. I started crying.

20 Q. And what did he do after you pushed him away the
21 second time?

22 A. He came back one more time.

23 Q. And what happened then?

24 A. He tried it again.

25 Q. And how did you respond when he came back the next

1 time?

2 A. I pushed him and I turned around and I just staring

3 out the window and I'm crying and he asked me "well what's

4 wrong?" And I told him, I said, "I feel like I'm being

5 raped." And he asked me, "would you ever think I would do

6 anything like that to you?" I'm like, "no but it happened

7 to Jadea and it scares me."

8 Q. Okay. And what did he do after that?

9 A. He walked back and sat on the crate and he jacked off.

10 Q. When you said he jacked off. What specifically did

11 you see him do?

12 A. He had his hands on his penis and he was going in a

13 up and forward motion and semen came out.

14 Q. And what did he do after he had ejaculated there in

15 the bedroom, what did he do next?

16 A. He went in the kitchen and got a rag and cleaned it

17 up.

18 Q. And then what happened after that?

19 A. We left.

20 Q. And when the two of you left, was there any

21 conversation between you after you left the residence?

22 A. Yes, sir.

23 Q. Okay. What did he say? What did he tell you?

24 A. He told me if I wanted —

25 MS. INZERILLO: Objection to hearsay, Your Honor.



1 THE COURT: Objection to what?

2 MS. INZERILLO: Hearsay, Your Honor.

3 THE COURT: I think she is talking about the
4 defendant.

5 MS. INZERILLO: Okay. I misunderstood, Your Honor.

6 SOLICITOR ANTHONY: It is. It's a question about what
7 Mr. Berry said.

8 THE COURT: You may proceed.

9 A. He told me, he said, "[REDACTED] I know you probably
10 think that I've done this to other people but you're the
11 first one."

12 Q. And what else did he tell you?

13 A. He told me that I could talk to Jason as long as I
14 don't say anything about it and that it had to stay between
15 us.

16 Q. And so did you tell anybody after that time?

17 A. No.

18 Q. Okay. And why not?

19 A. Because I was scared that I would never talk to Jason
20 and I would lose my best friend.

21 Q. And who was your best friend?

22 A. Jadea Berry.

23 Q. All right. And then after this incident, was there
24 another time that some sexual happened ---

25 A. Yes, sir.

Q. --- between you and Stephen? Okay. And how much time passed approximately before the next time?

A. Two weeks.

Q. And how did the second incident come about?

A. He called me and asked me if I was at home and I told him yeah but my brother is in the bed. And he said well it would only take a few minutes because I just want to talk

Q. Well was there ever a time that you and Mr. Berry went to his residence together?

A. Yes, sir.

Q. Okay. And how much time passed from the incident at Katherine Street to the time you went to his residence?

A. A week.

Q. Okay. What happened then?

A. He called me and I was at my grandma's house and he asked me if I wanted to go see the new house since it's been painted and stuff because I haven't seen it since it

was painted and I told him yeah.

Q. And did the two of you go to his house?

A. Yes, sir.

Q. Okay. How did you get there?

A. He had came to my grandma's and picked me up.

Q. And what was the situation as far as you and your grandma and her either wanting you to go or not wanting you

1 to go?

2 A. She didn't want me to go at first but I talked her
3 into it because I wouldn't shut up about it.

4 Q. Okay. All right. And so he picks you up and takes
5 you up to the house on [REDACTED]?

6 A. Yes, sir.

7 Q. Okay. And was anybody else there?

8 A. No, sir.

9 Q. What happened when you went there? What happened
10 there in the house?

11 A. He showed me where all the rooms was and where Jadea's
12 room was, the other girls and where his and Sandy's room
13 was.

14 Q. And what happened after that?

15 A. And we sat on the floor and we was just talking about
16 Jason and stuff and how I still felt about him and he
17 fingered me.

18 Q. And how did that, how did it occur? How did he start
19 trying to do that? What did you do when he started trying
20 to do that?

21 A. I told him no. I pushed his hand away.

22 Q. And how many times did he try to put his hand down
23 your pants?

24 A. Twice.

25 Q. Okay. And then what did you eventually do?

1 A. I eventually gave in because there was no use in even
2 trying to stop it.

3 Q. And so after he put his finger in you that time, where
4 did the two of you go? What happened after that?

5 A. He took me back to my grandma's house.

6 Q. Okay. All right. And then was there an occasion
7 after that where he came to your house?

8 A. Yes, sir.

9 Q. And who was there at the house when he came?

10 A. It was just me and my brother.

11 Q. Okay. What time of the day was it?

12 A. Night.

13 Q. Okay. All right. And where was Mr. Williams?

14 A. My dad was at work.

15 Q. And you said it was just you and your brother?

16 A. Yes, sir.

17 Q. Where was your brother?

18 A. My brother Andrew was in his room asleep.

19 Q. Now where was your other brother?

20 A. Phillip was at my grandma's.

21 Q. Okay. And so was that a common situation that your
22 father was working nights?

23 A. Yes, sir.

24 Q. Okay. So how did Mr. Berry make contact with you
25 about coming to the house that day or that night?

1 A. He called me asking what I was doing and I told him
2 just watching some TV and he told me he was going to stop
3 by for a few minutes. I told him Andrew was asleep. He
4 was like, "it won't be long".

5 Q. And so did he show up at the house?

6 A. He did.

7 Q. And what happened when he got there to the house?

8 A. He came in the front door, he told me to sit on the
9 couch. So I got out the chair and I went to sit on the
10 couch and he turned the TV onto a fight.

11 Q. I'm sorry. What now? He did what?

12 A. He turned the TV from what I was watching to a fight.

13 Q. Okay. And what happened then?

14 A. His phone was laying on his lap about right here where
15 his knee is at and I grab it and I went to his pictures to
16 where a mission trip was where there was a picture of all
17 the youth and there was, Jason was in it and I looked at it
18 and while I was looking at the picture Stephen takes his
19 hands inside my pants and he fingers me.

20 Q. And what were you wearing at that time?

21 A. I was wearing a pair of elastic pajama pants.

22 Q. And what did you do when he did that?

23 A. I just looked at him.

24 Q. And how did this incident end?

25 A. He gave me a hug and he told me he loved me and he

1 left.

2 Q. All right. Was there an occasion that summer where

3 you went to his house to swim?

4 A. Yes, sir.

5 Q. Okay. And what kind of a function did you go to?

6 A. It was a youth swimming party.

7 Q. Okay. And who went from your family?

8 A. It was me and my two brothers.

9 Q. And was there an incident that occurred after you got
10 home from that swimming party?

11 A. Yes, sir.

12 Q. Okay. What did you do - What did you and your
13 brothers do once you got home from the swimming party?

14 A. As soon as we got home we sat on the couch and we
15 watched some TV. We had our towels so in case it was still
16 a little bit damp we wouldn't get the furniture wet. And
17 the next thing we know, Stephen walks through the door and
18 he tells my brothers that he needs to talk to me and tells
19 my brothers to go outside.

20 Q. And what were you wearing when he came in?

21 A. I was still wearing my swimsuit because we just got
22 home.

23 Q. Okay. And what was he wearing when he came in the
24 house?

25 A. Nothing but his swimming trunks.

1 Q. Okay. Did he have a shirt on?

2 A. No, sir.

3 Q. Okay. And so he told your brothers to go outside?

4 A. Yes, sir.

5 Q. And what happened after that?

6 A. We went into my room.

7 Q. Into your room?

8 A. Yes, sir.

9 Q. Okay. And what happened when you all went into your
10 room?

11 A. He sat on my bed and I was digging through my closet
12 to find a shirt and some shorts to throw on. And once I
13 did I threw them on and I sat on my bed and he just starts
14 talking. I wasn't paying him any attention and the next
15 thing I know, I'm being fingered.

16 Q. And did he do anything -- what did he -- What was done
17 to the door to your room when you all walked in the
18 bedroom?

19 A. He shut it.

20 Q. Okay. And that time when he put his finger in you,
21 what else did he do?

22 A. He jacked off again that night.

23 Q. Okay. And what happened while he was there in the
24 bedroom with you? Was there any contact from anybody else?

25 A. My house phone rung and my brother Andrew came to my

EXHIBIT 10-1-1

BY SOLICITOR ANTHONY

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1 door and told Stephen that my grandma just called saying
2 that he needed to leave and leave now or else she was
3 calling the law.

4 Q. And so what did Mr. Berry do when he was advised of
5 that?

6 A. He stayed about five minutes and then he left.

7 Q. All right. Was there a time that somebody was there
8 in the house besides you and your brothers and Mr. Berry
9 showed up?

10 A. Yes, sir.

11 Q. Okay. Who else was there?

12 A. My cousin Marla.

13 Q. And what were you and your brothers doing and what was
14 Marla doing when he came to the house at that time?

15 A. We were cleaning up the house.

16 Q. And what happened when Mr. Berry came in that day?

17 A. He came in right through the door. Shocked that my
18 cousin was there and he told my cousin that he needed
19 to talk to me. And I was coming out my room and I seen him
20 and he was asking my cousin if she had a church she goes to
21 and if she didn't that she could come to New Life. My
22 cousin in turn replied that she had a church.

23 Q. And so did anything happen sexual that day?

24 A. No, sir.

25 Q. Okay. Well, the activity that you described, did that

1 continue throughout the summer of 2010?

2 A. Yes, sir.

3 Q. And did it continue on into the school year?

4 A. Yes, sir.

5 Q. Okay. And what -- Did Mr. Berry come up with any terms
6 that he used to describe this type of behavior?

7 A. Yes, sir.

8 Q. And what term did he come up with?

9 A. He called it relieving stress.

10 Q. And during this time leading into the school year, the
11 2010-2011 school year, how often would these kind of things
12 occurring?

13 A. At least once a week.

14 Q. All right. It would be sometimes more than once a
15 week or once a week the most it would be?

16 A. Once a week was the most it would be.

17 Q. Okay. So it would be at most once a week?

18 A. Yes, sir.

19 Q. Okay. All right. And when he would come, where would
20 your father normally be when he would come?

21 A. He would usually be at work.

22 Q. Okay. And where would the two of you go like at your
23 house? When he would come to your house, where would the
24 two of you go for these type incidents to occur?

25 A. My room.



1 Q. And then what would he sometimes have your brothers
2 do?

3 A. He would either have them to go outside or go into
4 another part of the house.

5 Q. And you testified about during the incident where he
6 came after the pool party that your grandmother called?

7 A. Yes, sir.

8 Q. Okay. Would that happen from time to time?

9 A. Every time my grandma seen him she would call.

10 Q. Okay. Would you normally get calls from her when he
11 came in the night time?

12 A. No, sir, because she would be asleep.

13 Q. Okay. All right. And then, aside from your house
14 where would these incidents normally occur?

15 A. At his house.

16 Q. Okay. And where would they occur at his house?

17 A. His bedroom.

18 Q. And was there a time at his house where Jadea Berry
19 came in the bedroom while you were there?

20 A. Yes, sir.

21 Q. Okay. What had happened to lead you to be over there
22 on that occasion?

23 A. I stayed with Jadea that night.

24 Q. Okay. And so what time of day did this incident
25 happen?

1 A. I want to say about eleven in the morning.

2 Q. In the morning? Okay. And how you come to be in Mr.

3 Berry's bedroom that morning?

4 A. I woke up and he seen me because I went to the
5 restroom and I was going back and I was going to go back to
6 bed and Stephen seen me and told me to come into his room
7 for a minute, he had to talk to me.

8 Q. So when you went to the bedroom, what did you do?

9 Where did you go?

10 A. I went and I sat on the bed.

11 Q. And where was Mr. Berry?

12 A. Laying down in the bed.

13 Q. All right. And what were you wearing?

14 A. I was wearing pajamas.

15 Q. And what was Mr. Berry wearing?

16 A. Nothing but his underwear.

17 Q. And so what happened - Once you sat down on the bed,
18 what happened between the two of you?

19 A. He told me to come here and lay down and get up under
20 the covers. I didn't do it because I wasn't cold but then
21 eventually I got cold so I went under the covers and he
22 fingered me.

23 Q. Okay. Well, where did you - You said you got under
24 the cover. What part of the bed did you lay down on?

25 A. The side he was at.



1 Q. I'm sorry?

2 A. The side he was at.

3 Q. Okay. Were you at the foot of the bed or the head of
4 the bed?

5 A. The head.

6 Q. Okay. And where was Mr. Berry?

7 A. At the head.

8 Q. He was at the head too. Okay. And so while you all
9 were there in the bed together, what did Mr. Berry do?

10 A. He fingered me.

11 Q. And while you all were there in the bed, who else came
12 in the room?

13 A. Jadea walked in.

14 Q. How did Mr. Berry react when Jadea walked in?

15 A. He looked like he was shocked.

16 Q. Did he say anything to her?

17 A. He told her to get out.

18 Q. And did Jadea ever ask you anything that day?

19 A. She did.

20 Q. What did she ask you?

21 A. She asked me if her dad made me feel uncomfortable in
22 any way and I told her no and she was like, okay.

23 Q. And why did you tell her no?

24 A. Because I said I wouldn't say anything.

25 Q. Okay. And what were you afraid would happen between

1 you and Jadea if you had said anything?

2 A. I was afraid I would lose her.

3 Q. And was there an occasion where something happened
4 that was more than - where Mr. Berry did more to you than
5 just putting his finger in your vagina?

6 A. Yes, sir.

7 Q. Okay. And what time of the year was that?

8 A. In the fall or the winter.

9 Q. Okay. Of 2010?

10 A. Yes, sir.

11 Q. Okay. And do you recall how old you were when that
12 incident occurred?

13 A. I was fifteen.

14 Q. Okay. Where were you at that time?

15 A. I was at Stephen's house in the bottom floor where the
16 other girl's room and we was - me and the other girls was
17 watching a movie.

18 Q. And so who all was in the room?

19 A. Me, Courtney and Logan.

20 Q. And so Jadea was not there at that time?

21 A. She wasn't there.

22 Q. Okay. And do you know where she was?

23 A. She was at her mama's.

24 Q. Okay. And so where - Who was initially there in the
25 room?

1 A. The first people was me, Courtney and Logan.

2 Q. Okay. At first it was just you three girls?

3 A. Yes, sir.

4 Q. Okay. And where were you all seated or positioned in
5 the room?

6 A. The cover was in the middle of the floor and I was
7 there, then it was Courtney and Logan.

8 Q. Okay. All right. And then who else came?

9 A. Then Stephen comes in.

10 Q. All right. Where did Mr. Berry go? Where did he wind
11 up positioning himself compared to you and the other two
12 girls?

13 A. He laid down right beside me.

14 Q. All right. And so where was he, where was his body in
15 relation to your body? Was it beside you? In front of
16 you? Behind you?

17 A. He was behind me.

18 Q. Behind you, okay. And what part of your body were you
19 lying on? Were you lying on your stomach?

20 A. I was lying on my side.

21 Q. Okay. And what part of his body was he lying on?

22 A. His back.

23 Q. Okay. And what was -- How much light was there in the
24 room?

25 A. The only light was the TV.

1 Q. Okay. And so he was right behind you, and then where
2 was the other two girls?

3 A. The two girls they done scooted on down to the other
4 side where there was hardly any blankets at.

5 Q. Okay. So they were down the beside, beside you down
6 from you?

7 A. Yes, sir.

8 Q. Is that the right way to put it? Okay. All right.
9 And what were you wearing?

10 A. I was wearing a tank top and some soccer shorts.

11 Q. Okay. And what kind of - How are those shorts made?
12 What kind of waist do they have?

13 A. Elastic waist.

14 Q. Okay. Do they have a zipper or button or anything
15 like that?

16 A. No, sir.

17 Q. Okay. All right. And what was Mr. Berry wearing?

18 A. A shirt and a pair of shorts or pants.

19 Q. And so while you were there lying in the floor
20 watching that movie, what did Mr. Berry do?

21 A. He comes in and he lays down.

22 Q. Okay. And then what did he do to you?

23 A. He fingered me and —

24 Q. Okay. Where did he initially place his hands?

25 A. On my sides.



1 Q. Okay. On both sides?

2 A. Yes, sir.

3 Q. Okay. And then what did he do to your shorts that you
4 were wearing?

5 A. He pulled them down.

6 Q. And what happened to your panties?

7 A. They came down too.

8 Q. Okay. And after that happened, what did you feel
9 happening to you?

10 A. I feel something other than his finger in me.

11 Q. I'm sorry?

12 A. I feel something more in me besides his finger.

13 Q. Well, did you initially feel a finger though?

14 A. No.

15 Q. Okay. Okay. So you felt something more than his
16 finger?

17 A. Yes, sir.

18 Q. Okay. And what did you do then?

19 A. Once I realized it was something more, I jerked away
20 and I turned my head and I looked down and there was his
21 penis laying on the floor.

22 Q. And where were his pants positioned on his body when
23 you looked and saw that?

24 A. They were down.

25 Q. Okay. And how - What if anything was covering him up?

1 A. A blanket.

2 Q. If you were in that room and hadn't been looking right
3 under the blanket at him would you have been able to see
4 his exposed penis?

5 A. No, sir.

6 Q. Okay. And why was that?

7 A. Because the blanket was over him.

8 Q. All right. And at any point during that episode did
9 you feel his finger inside you?

10 A. No, sir.

11 Q. Okay. You just felt his penis inside you?

12 A. Yes, sir.

13 Q. Okay. After this happened and you pulled away from
14 him, what was the next thing that he said to you or you
15 said to him?

16 A. He told me I needed to go to the bathroom.

17 Q. And so what did you do?

18 A. I got up and I went to the bathroom.

19 Q. Okay. And did you look at your private area when you
20 went to the bathroom?

21 A. Yes, sir.

22 Q. Okay. Did you notice anything unusual about your
23 private area?

24 A. No, sir.

25 Q. Were you bleeding at all at that time?

1 A. No, sir.

2 Q. Okay. What did you do after you went to the bathroom?

3 A. I went back downstairs and I laid down to finish
4 watching the movie.

5 Q. Okay. And did Mr. Berry communicate with you some way
6 after that?

7 A. Yes, sir.

8 Q. All right. How did he communicate with you?

9 A. He grabbed his phone and he typed to me that I wasn't
10 a virgin anymore and he showed me.

11 Q. And did you respond in some way?

12 A. I typed back and I asked if I could get pregnant and
13 he typed back and he said, "no I'm fixed".

14 Q. Okay. All right. During these events that you talked
15 about, were you allowed to talk to Mr. Smith, to Jason
16 Smith?

17 A. Yes, sir.

18 Q. Okay. How many times did you talk to him when that
19 was facilitated by Mr. Berry?

20 A. Twice.

21 Q. Okay. All right. Was there any other time that Mr.
22 Berry at least represented to you that he was trying to get
23 in touch with Mr. Smith so you could talk with him?

24 A. Yes, sir.

25 Q. And how many times did that happen?

BY SOLICITOR ANTHONY
BY SOLICITOR ANTHONY - IN CAMERA

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1 A. One.

2 Q. Okay. And when you talked to him, how did you talk to

3 him? How did he make a means available for you to get in
4 touch with him?

5 A. He would leave his phone sitting somewhere and walk
6 out the room and I would grab it and I would text him.

7 SOLICITOR ANTHONY: May we approach a minute?

8 (SIDE BAR CONFERENCE OFF THE RECORD OUT OF THE HEARING
9 OF THE JURY AT 04:02 P.M.)

10 THE COURT: Let me let the jury go to the jury room
11 for a break at this time.

12 (JURY EXITS COURTROOM AT 04:02 P.M..)

13 THE COURT: All right.

14 DIRECT EXAMINATION - IN CAMERA

15 BY SOLICITOR ANTHONY:

16 Q. [REDACTED], you turned sixteen in [REDACTED] of 2010;
17 is that right?

18 A. Yes, sir.

19 Q. Okay. And that was while these incidents with Mr.
20 Berry were going on; is that correct?

21 A. Yes, sir.

22 Q. Okay. After you turned sixteen - Well, when did you
23 actually tell someone and make a report of what was going
24 on between you and Mr. Berry?

25 A. I told Katie one day at school.

1 Q. And do you remember what month and year that was?

2 A. March 2011.

3 Q. Okay. And in that in between time between [REDACTED] of
4 2010 and March of 2011, what was the - Well, did these
5 episodes with Mr. Berry continue during that time?

6 A. Yes, sir.

7 Q. Okay. What did he continue to do to you?

8 A. He continued to finger me.

9 Q. Okay. And where did they occur? Where he do these
10 things?

11 A. At his house and in his car.

12 Q. Okay. Did he continue to come to your house?

13 A. He did.

14 Q. Okay. And that persisted for somewhere around four
15 more months before you told?

16 A. Yes, sir.

17 Q. Okay. At his house were these things still going on
18 in his bedroom?

19 A. Yes, sir.

20 Q. Okay. And at your house were they still going on in
21 your bedroom?

22 A. Yes, sir.

23 Q. Did really anything change about the nature of what
24 was going on between you and Mr. Berry, the things he was
25 doing during that four month period?

[REDACTED] BY SOLICITOR ANTHONY - IN CAMERA
BY MS. INZERILLO - IN CAMERA

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1 A. No, sir.

2 Q. Was the frequency basically the same?

3 A. Yes, sir.

4 Q. Okay.

5 SOLICITOR ANTHONY: That would be my proffer on the
6 Lyle issue at this time.

7 THE COURT: All right. Cross.

8 MS. INZERILLO: Your Honor, just one or two at this
9 time.

10 THE COURT: Sure as many as you want.

11 CROSS EXAMINATION - IN CAMERA

12 [REDACTED] BY MS. INZERILLO:

13 Q. [REDACTED], you turned sixteen on [REDACTED] 2010;
14 is that right?

15 A. Yes, ma'am.

16 Q. Okay. And the last incident that you claim between
17 you and Mr. Berry happened about the Monday or Tuesday
18 prior to your disclosure to Katie; is that correct?

19 A. Yes, ma'am.

20 MS. INZERILLO: Your Honor, that would be all the
21 questions that I have.

22 SOLICITOR ANTHONY: I just have a couple of more
23 things I need to go through just to make it for the record.

24 REDIRECT EXAMINATION - IN CAMERA

25 [REDACTED] BY SOLICITOR ANTHONY:

[REDACTED] BY SOLICITOR ANTHONY - IN CAMERA

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1 Q. You said that there were incidents in his car?

2 A. Yes, sir.

3 Q. And was there an incident anywhere else besides your
4 house, his house and his car?

5 A. Yes, sir.

6 Q. And where was that?

7 A. The church.

8 Q. Okay. All right.

9 SOLICITOR ANTHONY: Thank you. That's everything.

10 THE COURT: I'm a little concerned at this point about
11 the general nature of the testimony, Mr. Anthony. I will
12 give you an opportunity to clarify it if you can but it's
13 just very general and vague at this point.

14 SOLICITOR ANTHONY: Well let me see if I can make it
15 more specific.

16 REDIRECT EXAMINATION - IN CAMERA CON'T

17 [REDACTED] BY SOLICITOR ANTHONY:

18 Q. The incidents at his - The incidents that continued to
19 occur at his house, where did they occur, what part of his
20 house?

21 A. His room.

22 Q. Okay. Would anybody else be in the room when they
23 occurred?

24 A. No, sir.

25 Q. Okay. And what would he do on those occasions?

1 A. He would finger me.

2 Q. Okay. When you say finger you, what specifically did

3 he do to your clothes?

4 A. He would either pull my pants down or he would slide
5 his hand through my shorts and underwear and finger me.

6 Q. Okay. And that's essentially the same conduct he was
7 engaging in before you turned sixteen?

8 A. Yes, sir.

9 Q. Okay. In the same place?

10 A. Yes, sir.

11 Q. Okay. And then at your house, when would he come to
12 your house?

13 A. When my daddy wasn't home.

14 Q. When your father wasn't there. And what time of the
15 day would he normally come?

16 A. Night.

17 Q. Okay. And is that when he would come most often and
18 do these things before you turned sixteen?

19 A. Yes, sir.

20 Q. Okay. And where would these incidents happen at your
21 house?

22 A. In my room.

23 Q. In your room?

24 A. Yes, sir.

25 Q. Okay. And what would he do specifically? What would

1 he do in your room?

2 A. He would finger me or he would jack off.

3 Q. All right. Well let me just -- What specifically would
4 he do to your clothes?

5 A. He would slip his hand through my shorts or either
6 pull them down.

7 Q. Okay. And then where would he touch you?

8 A. My vagina.

9 Q. Okay. And is that basically the same pattern that had
10 been occurring before you turned sixteen?

11 A. Yes, sir.

12 Q. Okay. He would come to the house -- Before you turned
13 sixteen he would come to the house at night when your
14 father was gone?

15 A. Yes, sir.

16 Q. He would go in your room. Is that correct?

17 A. Yes, sir.

18 Q. The two of you would go in your room. Would he shut
19 the door?

20 A. Yes, sir.

21 Q. Okay. At that point in time he would pull your under
22 -- whatever you were wearing, your shorts, your underwear
23 down; is that correct?

24 A. Yes, sir.

25 Q. And he would put his finger inside you?

[REDACTED]

BY SOLICITOR ANTHONY - IN CAMERA

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1 A. Yes, sir.

2 Q. And he would do that before you turned sixteen?

3 A. Yes, sir.

4 Q. And your testimony is that basically that same
5 behavior, same place, circumstance, same act, that all
6 continued for four months after you turned sixteen?

7 A. Yes, sir.

8 Q. Okay. All right.

9 SOLICITOR ANTHONY: Your Honor, does the Court have
10 any more questions?

11 THE COURT: Well, its not my witness.

12 SOLICITOR ANTHONY: Yes, sir.

13 Q. When he came to your house before you turned sixteen
14 where would your brother be?

15 A. He would be in the bed.

16 Q. Okay. And after you turned sixteen, where would your
17 brother be?

18 A. In the bed.

19 Q. Okay.

20 SOLICITOR ANTHONY: Your Honor, I think we showed the
21 same conduct both before and after her birthday. And I
22 submit that's a sufficient proffer.

23 THE COURT: Anything else from the defense?

24 MS. INZERILLO: We have no questions of the witness,
25 Your Honor, we just restate our prior objections to this

1 line of - of this evidence being admitted to the jury.

2 THE COURT: These incidents, I'm going to ask you a

3 question now. These instances that occurred after [REDACTED]
4 of 2010 when you turned sixteen, did you consent to them or
5 were they done without your consent?

6 THE WITNESS: Without my consent.

7 THE COURT: All right. Let's take a break and I'll
8 make a ruling.

9 You can step down and have some water.

10 THE WITNESS: Okay.

11 (COURT IN RECESS @ 04:12 P.M..)

12 (COURT BACK IN SESSION @ 04:27 P.M..)

13 THE COURT: Thank you. Take your seats.

14 [REDACTED], will you come back up here.

15 (WITNESS RETURNS TO THE WITNESS STAND.)

16 THE COURT: All right. I'm going to allow the
17 evidence. I find that it's been proven by clear and
18 contention evidence that this touching continued, this what
19 amounts to as sexual battery continued, that it occurred
20 with a frequency like that to which it had been occurring
21 since it started and up until the time of her sixteenth
22 birthday. It took place at his house, her house, in her
23 car, at night, and that it consisted of his again
24 committing a battery by using his finger and placing it in
25 her vagina. And I specifically find that by the testimony,

1 again I find her to be credible, that this occurred at
2 least up until based on cross examination by counsel for

3 the defense Monday or Tuesday prior to the time she
4 reported which was in March of 2011, so I find that there
5 is a close degree of similarity between the subsequent bad
6 acts and the charge for which Mr. Berry is on trial.

7 I have exercised the balancing between the probative
8 value of the evidence and it's prejudicial effect, and I
9 find that the approbative value outweighs the prejudicial
10 effects, and it is admissible. I find that by clear and
11 convincing evidence. Again, I find there is not a
12 substantial outweighing of unfair prejudice the approbative
13 value outweighs the prejudicial effect and I therefore will
14 allow it.

15 I particularly had some concerns and don't like to
16 invade the province of the people who have the burden of
17 proof which is the State, but I was concerned that that in
18 the *Wavering* case , citing *Whitner, W-h-i-t-n-e-r*, 228 S.E.
19 244, the cases, and I think *Richie* although I haven't a
20 looked at it over the break, the wording in *Wavering* is a
21 "continued elicit intercourse between the same parties."
22 This was not intercourse, this was a different kind of
23 sexual battery. But the question I asked and I thought
24 needed to be asked because after she turned sixteen, if she
25 consented then it was "elicited," it would be consensual

1 and she had the right to consent. But she testified it was
2 not consensual so I find it does fall under what would be
3 considered elicit sexual battery and therefore will allow
4 the testimony.

5 All right, bring in the jury.

6 (JURY REENTERS COURTROOM AT 04:31 P.M..)

7 THE COURT: It really doesn't matter where everybody
8 sits but the alternate and the foreperson. Thank you.

9 You may continue.

10 SOLICITOR ANTHONY: Thank you, Your Honor.

11 DIRECT EXAMINATION - CON'T

12 [REDACTED] BY SOLICITOR ANTHONY:

13 Q. [REDACTED], the conduct that you just testified
14 about of Mr. Berry's, did that continue on into 2011?

15 A. Yes, sir.

16 Q. Okay. And where did these incidents continue to occur
17 towards the end of 2010 and going into the first part of
18 2011?

19 A. His house, my house, his car.

20 Q. Okay. All right. And during this time, from the time
21 these incidents started in the summer of 2010 on into the
22 next year, what changed about your behavior?

23 A. Everything.

24 Q. Okay. Well what - Did it get better or did it get
25 worse?

1 A. Can you repeat your question?

2 Q. The way you behaved, your interaction with your

3 family, the way you were with your friends in school, did
4 that change for the better or for the worse during this
5 period of time?

6 A. It got worse.

7 Q. Okay. And how did it get worse?

8 A. My attitude, it was horrible. I would get violent
9 with everybody. One time I busted out my window in my
10 room.

11 Q. Okay. And in the first part of 2011, did anything
12 change about Mr. Berry's job with New Life?

13 A. Yes, sir.

14 Q. What happened? Did he keep being the youth pastor?

15 A. No, sir.

16 Q. Okay. All right. And after he left being the youth
17 pastor at New Life, would you still see him over at Jadea's
18 house?

19 A. Yes, sir.

20 Q. And did these things, these sexual incidents, continue
21 on?

22 A. Yes, sir.

23 Q. Okay. Who was the first person that you told about
24 what Mr. Berry was doing?

25 A. Katie Koepke.

- 1 Q. And who is Katie Koepke?
- 2 A. Katie is my best friend.
- 3 Q. Okay. And when did you tell her?
- 4 A. I told her one day at school.
- 5 Q. Okay. And what month was it if you recall?
- 6 A. March.
- 7 Q. Okay. Of 2011?
- 8 A. Yes, sir.
- 9 Q. All right. And how did you know Katie?
- 10 A. I knew her from when we went to school at Jonesville
- 11 and by Jadea.
- 12 Q. And on that day in March when you told Katie, what was
- 13 going on that brought about her talking to you about this
- 14 type thing?
- 15 A. I was crying and I was upset and she asked me what was
- 16 wrong.
- 17 Q. And what did you tell her?
- 18 A. I told her what was wrong with me.
- 19 Q. Did you tell her right then?
- 20 A. I waited.
- 21 Q. Okay. All right. And so was there a second time that
- 22 she asked you what the problem was?
- 23 A. Yes, sir.
- 24 Q. Okay. All right. And so at that point in time what
- 25 did you do?



1 A. When she asked me the second time I told her.

2 Q. Okay. All right. And what was it that caused you to

3 disclose what Mr. Berry was doing? In your mind what was
4 the factor that led you to feel like you had to tell
5 somebody?

6 A. I couldn't destroy my dad the way I had before.

7 Q. Okay. And what was going on specifically that made
8 you worry about your father?

9 A. I used to cut.

10 Q. You used to cut?

11 A. Yes, sir.

12 Q. Okay. And when you say you used to cut, What
13 do you mean? What specifically what would you do?

14 A. I would take a knife and slice my wrist.

15 Q. And what was the purpose in doing that?

16 A. The point in it was to try to get rid of the emotional
17 pain with physical pain so I wouldn't have to deal with the
18 emotional pain.

19 Q. Okay. And at the time you were doing this, you know
20 when you would do this, was it your intention to actually
21 cause yourself to bleed and inflict that degree of injury?

22 A. No, sir.

23 Q. Okay. And so what had you decided to do in regards to
24 the cutting before you told Katie?

25 A. I'm sorry?

1 Q. What had you decided to do in regards to the cutting
2 behavior before you told Katie what Mr. Berry was doing?

3 What were you trying not to do anymore?

4 A. I was trying not to do it.

5 Q. You were trying not to cut?

6 A. Yes, sir.

7 Q. Okay. And why was that?

8 A. Because when my dad found out it destroyed him and I
9 could not see him like that again.

10 Q. All right. And had you in the past done this? Did
11 you engage in this kind of behavior before these things
12 started with Mr. Berry?

13 A. Yes, sir.

14 Q. Okay. When did that been?

15 A. When my mom first came back into my life.

16 Q. Okay. And after you got more adjusted to your mom
17 back in your life, what had you done in regards to the
18 cutting?

19 A. I stopped.

20 Q. Okay. And then when this conduct began with Mr.
21 Berry, what did you start doing in regards to the cutting?

22 A. I started back.

23 Q. Okay. So after you talked to Katie about what was
24 going on, when was the next time somebody approached you
25 about this?

- 1 A. The next day at school.
- 2 Q. Okay. And who approached you?
- 3 A. I got called out of class by the guidance counselor.
- 4 Q. Okay. All right. And did she ask you anything?
- 5 A. She asked me what happened.
- 6 Q. Okay. All right. And what did you tell her?
- 7 A. At first I told her nothing.
- 8 Q. Okay. And then what did you do?
- 9 A. And then I eventually told her.
- 10 Q. Okay. And after you told the guidance counselor - and
- 11 you basically told the guidance counselor what had been
- 12 going on?
- 13 A. Yes, sir.
- 14 Q. All right. Well after you told the guidance
- 15 counselor, what were you asked to do?
- 16 A. I was asked to stay there until the people from the
- 17 sheriff's office got there.
- 18 Q. Okay. And did the people from the sheriff's office
- 19 come?
- 20 A. Yes, sir.
- 21 Q. Okay. Who came?
- 22 A. Roxie Belue and Michelle Shugart.
- 23 Q. And what happened there at the school after you made
- 24 that disclosure to the guidance counselor?
- 25 A. I went into another room across the hall from Ms.

1 McGee's office and talked to Roxie and Michelle.

2 Q. And did you have a conversation there with them at the
3 school?

4 A. Yes, sir.

5 Q. And then after you had that conversation, did you have
6 another conversation with them?

7 A. Yes, sir.

8 Q. Okay. And where was that?

9 A. At the sheriff's office and Michelle's office.

10 Q. Okay. And did anybody from your family get called to
11 the school?

12 A. Yes, sir.

13 Q. Who was that?

14 A. My daddy.

15 Q. Okay. And then did he also go to the sheriff's office
16 when you were taken there?

17 A. Yes, sir.

18 Q. And so what did you do when you got to the sheriff's
19 office?

20 A. I wrote a statement.

21 Q. Okay. And do you remember what day of the week that
22 was?

23 A. No, sir.

24 Q. You don't? Okay. That's fine. Well what happened
25 after you wrote the statement that day, do you remember

1 when the next time was you saw Jadea?

2 A. A couple of days later at school.

3 Q. Okay. And was there a conversation between you and
4 Jadea? Well, did Jadea ask you anything?

5 A. Yes, sir.

6 Q. What did she ask you?

7 A. She asked me why did I get in a cop car at school.

8 Q. Okay. And did you tell her what you had told the
9 people at the sheriff's office?

10 A. At first I told her I couldn't talk about it and she
11 started crying and begging me to tell her so I told her.

12 Q. Okay. And then what did Jadea do after that?

13 A. She left school.

14 Q. Okay. And did you after -- Do you recall that day that
15 you had that conversation with Jadea being a Monday?

16 A. I believe it was.

17 Q. After you had that conversation with Jadea, did you
18 actually go back to the sheriff's office on that Monday?

19 A. Yes, sir.

20 Q. Okay. And what did you do there?

21 A. I wrote another statement because I remembered some
22 more things that happened.

23 Q. And then the next day after you went to the sheriff's
24 office that Monday, did you see Jadea the next day?

25 A. Yes, sir.

1 Q. And where did you see her?

2 A. My grandma's.

3 Q. Okay. And where - At what point of the day did you
4 see her?

5 A. After school.

6 Q. I'm sorry?

7 A. After school.

8 Q. Okay. Was she there when you got home?

9 A. Yes, sir.

10 Q. Okay. And when you got home and Jadea was there, what
11 happened between the two of you?

12 A. When me and Jadea saw each other we ran up to each
13 other. I threw my stuff down and we just started hugging
14 and crying.

15 Q. And then where did the two of you go?

16 A. We went up to my front porch.

17 Q. And was there anybody else there when you all talked
18 there on the porch?

19 A. Yes, sir.

20 Q. And who was that?

21 A. Julia Krasinski.

22 Q. Okay. And who is she? How did you know her?

23 A. I know her from when her and her family started coming
24 to New Life.

25 Q. Okay. And then after you talked awhile what did Jadea

[REDACTED] BY SOLICITOR ANTHONY
BY MS. INZERILLO

1 and Ms. Krasinski and Jadea's boyfriend do?

2 A. They left.

3 Q. Was her boyfriend with her that day as well?

4 A. He was.

5 Q. Okay. All right.

6 SOLICITOR ANTHONY: If I could get one moment.

7 (PAUSE.)

8 SOLICITOR ANTHONY: All right. Thank you.

9 That's everything on direct.

10 THE COURT: Cross.

11 MS. INZERILLO: May it please the Court, Your Honor.

12 CROSS EXAMINATION

13 [REDACTED] BY MS. INZERILLO:

14 Q. So, [REDACTED], your testimony here today is that
15 Stephen Berry fingered you a number of times and allegedly
16 had sex with you one time over a number of months from the
17 end of May - March to - I'm sorry, the end of May to March
18 of 2011; is that right?

19 A. Yes, ma'am.

20 Q. And then you say it started when Stephen and his
21 family moved from Katherine Street near where you were you
22 lived on [REDACTED]; ---

23 A. Yes, ma'am.

24 Q. --- is that right?

25 A. Yes, ma'am.

~~CONFIDENTIAL~~

BY MS. INZERILLO

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1 Q. And that it started when you were helping him clean
2 out essentially the old house where they lived.

3 A. Yes, ma'am.

4 Q. Is that right? Okay. And that while you All were at
5 the house at Katherine Street that he fingered you and
6 tried to have anal sex with you and then masturbated in
7 front of you; is that right?

8 A. Yes, ma'am.

9 Q. Okay. Now, Katherine Street is a residential area in
10 the city of Union. Right?

11 A. Yes, ma'am.

12 Q. Okay. There's houses All around?

13 A. Yes, ma'am.

14 Q. Okay. You didn't scream when this happened?

15 A. No, ma'am. I was scared.

16 Q. You didn't go out of the house and ask a neighbor for
17 help?

18 A. No, ma'am.

19 Q. You didn't go out and ask a neighbor and tell them
20 what happened?

21 A. No, ma'am.

22 Q. In fact, your testimony was when he touched your rear
23 end you just looked at him like he was stupid; is that
24 right?

25 A. Yes, ma'am.

[REDACTED] BY MS. INZERILLO

1 Q. Okay. And that when he tried to have anal sex with
2 you, you pushed he off of you; is that right?

3 A. Yes, ma'am.

4 Q. And that you - I believe you testified to this,
5 actually watched him masturbate with your pants unbuttoned;
6 is that right?

7 A. Yes, ma'am.

8 Q. But you didn't ask any of the neighbors in this
9 residential neighborhood for help; is that right?

10 A. No, ma'am.

11 Q. And you didn't go home and tell your daddy what he had
12 done did you?

13 A. No, ma'am.

14 Q. And your daddy is a cop. Right?

15 A. Yes, ma'am.

16 Q. Your daddy could have had Stephen arrested that day.
17 Right?

18 A. Yes, ma'am.

19 Q. In fact, [REDACTED], you didn't tell anybody what
20 happened because the truth is that Stephen's daughter Jadea
21 was in the room packing up her stuff with you and Stephen
22 on that day; isn't that right?

23 A. No, ma'am.

24 Q. Okay. Now, I believe you testified that about a week
25 later Stephen told you to come around and visit his new

1 house.

2 A. Yes, ma'am.

3 Q. Is that right? And you were at your grandma's house
4 at this point?

5 A. Yes, ma'am.

6 Q. In fact, your grandma told you not to go.

7 A. Yes, ma'am.

8 Q. And you told Stephen, on my way out, I'll go. Is that
9 right?

10 A. Yes, ma'am.

11 Q. When your grandma told you not to go you pretty much
12 said I'll go.

13 A. I had to call him back to let him know that I couldn't
14 go but I had called him back to let him know that I can go
15 because I talked my grandma into letting me go.

16 Q. But your grandma initially told you no you can't go;
17 is that right?

18 A. Yes, ma'am.

19 Q. Okay. And this is a week after this man allegedly put
20 his finger in you; is that right?

21 A. Yes, ma'am.

22 Q. Tried to anally rape you. Right?

23 A. Yes, ma'am.

24 Q. And masturbated in front of you?

25 A. Yes, ma'am.

1 Q. Okay. Now, you indicated on direct with Mr. Anthony
2 that you acknowledge you got some behavior problems.

3 Right?

4 A. Yes, ma'am.

5 Q. Okay. And you acknowledged there was one time you
6 busted out the window in your bedroom I think it was; is
7 that right?

8 A. Yes, ma'am.

9 Q. And you busted out that window when you weren't
10 allowed to see Stephen; is that right?

11 A. No, ma'am.

12 Q. Okay. And you also testified under direct that when
13 your daddy told you you couldn't see Jason anymore you
14 continued to text him; is that right?

15 A. Yes, ma'am.

16 Q. Does that mean you don't mind your adults? You do
17 what you want when they tell you not to do something?

18 A. No, ma'am.

19 Q. Okay. So you talk grandma into letting you get back
20 in the car with someone who just did allegedly despicable
21 acts and you said he does it to you again; is that right?

22 A. Yes, ma'am.

23 Q. Okay. And again the second time you don't tell your
24 daddy. Right?

25 A. No, ma'am.

1

Q. And at this time your daddy is still a cop. Right?

2

A. Yes, ma'am.

3

Q. He still has arrest powers. He could still arrest

4

Stephen; is that right?

5

A. Yes, ma'am.

6

Q. And of course when you speak to Michelle Shugart in

7

March of 2011, you don't mention that incident do you?

8

A. Which incident?

9

Q. Of telling Grandma you wanted to hop in the car and

10

see Stephen and the new house?

11

A. I told Michelle a lot of things that day.

12

Q. When you met with Michelle and Roxie Belue you made a

13

statement. Right?

14

A. Yes, ma'am.

15

Q. In fact, in this case you gave two statements?

16

A. Yes, ma'am.

17

Q. Okay. You made a statement, I know you probably don't

18

remember these, but essentially you gave two statements

19

about three days apart; is that right?

20

A. Yes, ma'am.

21

Q. Okay. And those statements you wrote out; is that

22

right?

23

A. Yes, ma'am.

24

Q. Okay. And you wrote these out, right? Ms. Shugart

25

and Investigator Belue, they didn't write those statements

1 Q. So it wouldn't be the cutting it was more like
2 scratching and leaving a red mark?

3 A. It was a knife.

4 Q. Okay. Well please correct me, you would know. And
5 all that started prior to March of 2010; is that right?

6 A. Yes, ma'am.

7 MS. INZERILLO: Your Honor, may we approach.

8 (SIDE BAR CONFERENCE OFF THE RECORD @ 05:08 P.M.)

9 THE COURT: We're going to take a short break. I'm
10 going to let the jury go to the jury room just for a
11 refresher break while we take up a matter outside your
12 presence.

13 (JURY EXITS COURTROOM AT 05:08 P.M.)

14 (COURT IN RECESS AT 05:09 P.M.)

15 (COURT BACK IN SESSION AT 05:17 P.M..)

16 THE COURT: Thank you. Take your seats. Before we
17 get back to where we are, I want to go back just a minute.
18 I've set forth my analysis earlier on the Wavering and
19 Richie issue, but I never did start at the beginning, and
20 my ruling was based on the exception to the admission of
21 evidence prior or subsequent bad acts under the common
22 scheme or plan exception. I don't think - I think I danced
23 around that and wasn't real clear.

24 Now on the current issue, I have read the portions of
25 the transcript and I think the best thing now would be to

FOIA b 7 - D

BY SOLICITOR ANTHONY

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1 SOLICITOR ANTHONY: Okay. You're done?

2 MS. INZERILLO: I am done.

3 SOLICITOR ANTHONY: Okay.

4 THE COURT: All right, bring in the jury. While the
5 jury is coming in, it's almost 5:30, so when we finish with
6 this witness we'll probably stop for the today, I would
7 like to see the attorneys just for a few minutes inside -
8 in my chambers.

9 (JURY REENTERS COURTROOM AT 05:23 P.M..)

10 THE COURT: Ms. Inzerillo, you have any further
11 questions?

12 MS. INZERILLO: No, Your Honor.

13 THE COURT: Redirect?

14 REDIRECT EXAMINATION

15 **FOIA b 7 - D** BY SOLICITOR ANTHONY:

16 Q. You testified on cross examination again about this
17 incident where you pulled away from Mr. Berry and saw his
18 penis; is that correct?

19 A. Yes, sir.

20 Q. And when that happened, what - When you became aware
21 that his penis was inside of you, what was your reaction?

22 A. I jerked away.

23 Q. Okay. All right. And you testified about giving a
24 statement about this incident or about this course of
25 conduct of Mr. Berry; is that correct?

1 A. Yes, sir.

2 Q. Okay. And you've seen that statement since you wrote
3 it out. Correct?

4 A. Yes, sir.

5 Q. Okay. And I'm going to just hand this to you. Is
6 that the statement you gave that day that you went to the
7 sheriff's office with Ms. Shugart and Investigator Belue
8 and they asked you to write out what had happened?

9 A. Yes, sir.

10 Q. Okay. How many pages is that, [REDACTED]?

11 A. Four.

12 Q. Okay. And how long had all of this been going on
13 between Mr. Berry and yourself?

14 A. Since May of 2010.

15 Q. And how many months was that?

16 A. Let me do the math. About ten months.

17 Q. About ten months. So you basically were asked to
18 summarize ten months' worth of behavior in four pages; is
19 that correct?

20 A. No, sir.

21 Q. I mean that's basically what that statement is.
22 Right?

23 A. Yes, sir.

24 Q. Okay. It's about ten months worth of behavior in four
25 pages?

1 A. Yes, sir.

2 Q. Okay. And you were asked -- well --

3 SOLICITOR ANTHONY: If I could just have one moment.

4 (PAUSE.)

5 Q. You were asked about the incident where Mr. Berry
6 picked you up and took you to his house; is that correct?

7 A. Yes, sir.

8 Q. On cross examination you were asked about that?

9 A. Yes, sir.

10 Q. And did you make any reference to that in that
11 statement?

12 A. (No response)

13 Q. If you would, just take a look at Page 3 of that
14 statement.

15 A. Yes, sir.

16 Q. Okay. And what did you say?

17 A. You want me to read it?

18 Q. Yeah, sure.

19 A. Where it first starts?

20 Q. Uh-huh. It's just a sentence, right?

21 (PAUSE.)

22 Q. The sentence where you mention going to his house.

23 (PAUSE.)

24 Q. Is it Page 3? Maybe it's Page 4. Yeah. I'm sorry, I
25 was referring you to the wrong page. Look on Page 4 and

1 see if it's referenced on there.

2 A. Yes, sir.

3 Q. Okay. If you would read it, please.

4 A. "Before the Berry family got moved into the new house
5 completely, he fingered me then."

6 Q. Okay. So you gave that - I mean you're talking about
7 ten months of behavior but you did mention it?

8 A. Yes, sir.

9 Q. Okay. And the detail about going to the bathroom
10 after the incident in the floor, is that in that four page
11 statement?

12 A. No, sir.

13 Q. Okay. But you are covering ten months?

14 A. Yes, sir.

15 Q. All right. And when you say - When you used the word
16 texted in the statement that you gave and in talking to
17 Kaitlyn and telling her what had happened, what were you
18 referring to?

19 A. I was referring to him typing out on his phone and he
20 didn't actually send it but in my definition it was still a
21 text because he typed it out.

22 Q. Okay. And did Mr. Berry - You were asked about
23 mentioning at an exam that Mr. Berry had attempted to
24 perform oral sex on you or did perform oral sex on you.
25 Was there an incident where that happened?



1 A. I don't recall.

2 Q. You don't recall an incident where he tried to put his
3 mouth on your private?

4 A. No, sir.

5 Q. Okay. And why was it -- just going back, why was it
6 that after the first time he did this, or when you were in
7 counseling with Ms. Roseborough, why was it that you didn't
8 tell anyone about what Mr. Berry was doing?

9 A. I didn't want to lose my best friend.

10 Q. All right. And was there any other reason?

11 A. And I got to talk to Jason.

12 THE COURT: I'm sorry. What was the answer?

13 MR. DELANEY: We can't hear.

14 THE COURT: Speak in the microphone. Say that again.

15 A. And I got to talk to Jason.

16 Q. Okay.

17 SOLICITOR ANTHONY: If I can have one moment.

18 (PAUSE.)

19 SOLICITOR ANTHONY: All right. Thank you.

20 That's everything on redirect.

21 THE COURT: Recross?

22 MS. INZERILLO: No, Your Honor.

23 THE COURT: All right. You can step down. Thank you
24 for your time.

25 (WITNESS LEAVING WITNESS STAND.)

1 Q. Okay. And did he give you any kind of reason for why
2 he was coming?

3 A. Yes, sir. He stated that he was coming to check on
4 [REDACTED] and see if the house was clean.

5 Q. And during this period of time in the summer of 2010
6 and the fall of 2010 going into the early part of 2011,
7 aside - was [REDACTED] going to Mr. Berry's residence?

8 A. Yes, sir.

9 Q. Okay. And how frequent?

10 A. She would go some on weekends and stay. You know, it
11 wasn't every weekend but it was some weekends she would go
12 and stay.

13 Q. And what happened to the frequency that Jadea Berry
14 coming to your house to stay?

15 A. I would ask [REDACTED] when she would ask to go to
16 Stephen's, I would ask her to see if Jadea could come and
17 stay at our house and Jadea would ask and, you know, Jadea,
18 you know, rarely would come and stay at my residence.

19 Q. Now, after the move that Mr. Berry made up to [REDACTED]
20 [REDACTED], what did you notice about [REDACTED] behavior?

21 A. Prior to that, [REDACTED] was a well behaved child. She
22 did her chores. Each of my children have responsibilities
23 that they do. She started being rebellious. She wouldn't
24 do what she was asked. You know, talking back to me and my
25 mother and disrespecting her brothers.

1 Q. And did you notice any other physical problems, any
2 other kind of physical injuries on her?

3 A. Yes, sir. I did see some light scratches. A couple
4 of them were not really, really deep but you could see
5 marks and I addressed that with her and she said that, you
6 know, she had a lot going on. She tried to, you know,
7 injure herself on her arm.

8 Q. I want to take you now to March 18th of 2011. Did you
9 receive a call from anybody that day?

10 A. Yes, sir.

11 Q. And who did you receive a call from?

12 A. It was the guidance counselor at school. I think it
13 was Mrs. McGee.

14 Q. And what day of the week was that?

15 A. I'd say that on either a Tuesday or a Wednesday I
16 think.

17 Q. Okay. It wasn't a Friday?

18 A. It may have been a Friday. Yeah, because it was a
19 Friday that that took place.

20 Q. All right. And so after you got that call from her,
21 where did you go?

22 A. I went to the Union County High School to the guidance
23 office.

24 Q. And who did you see there?

25 A. I spoke to a Mrs. McGee. I also seen Roxie Belue

1 along with Michelle Shugart.

2 Q. And after having an initial conversation there at the
3 school - Well, was [REDACTED] in the office there at school as
4 well?

5 A. She wasn't in the office that I was taken to no, sir.

6 Q. Okay. Had she been taken out of class?

7 A. Yes, sir.

8 Q. Okay. And did you go anywhere that [REDACTED] was taken
9 later on that day?

10 A. Later on that day yes, sir.

11 Q. Okay. Where did you go?

12 A. We went to the Union County Sheriff's Department.

13 Q. Okay. And did [REDACTED] go there as well?

14 A. Yes, sir.

15 Q. How did [REDACTED] get there?

16 A. Roxie Belue transported [REDACTED]

17 Q. Okay. And then taking you over into the next week,
18 the Tuesday of that next week, did you see Jadea Berry that
19 day?

20 A. Yes, sir.

21 Q. And where did you see her?

22 A. I was sitting at my mom's back porch. She's got a
23 screened in porch and Jadea and her boyfriend came driving
24 up.

25 Q. And did anybody else come there to your grandmother's

1 house, not in the same vehicle as Jada and her boyfriend?

2 A. There was a van that pulled up with Julia Krasinski;
3 she was in it.

4 Q. Okay. And where did Jadea go after she arrived there
5 at your grandmother's house?

6 A. She walked up onto the back porch and opened the door
7 and spoke with me and my mother.

8 Q. Okay. And what was the conversation between you and
9 Jadea?

10 MR. DELANEY: Your Honor, I object to hearsay at this
11 time.

12 THE COURT: I sustain the objection.

13 SOLICITOR ANTHONY: Okay.

14 Q. Was [REDACTED] there when Jadea arrived?

15 A. No, sir.

16 Q. Okay. Did [REDACTED] eventually get -- Did she eventually
17 arrive from school that Monday?

18 A. Yes, sir.

19 Q. And what did you witness between [REDACTED] and Jadea
20 that, or I'm sorry, that Tuesday. What did you witness
21 between [REDACTED] and Jadea that Tuesday after [REDACTED] got home
22 from school?

23 A. [REDACTED] was brought home by one of her friends from
24 school. She walked up. She seen Jadea. Her and Jadea
25 started crying and hugging one another and Jadea told

1 [REDACTED] that she was sorry.

2 MR. DELANEY: Your Honor.

3 THE COURT: Yeah. Just strike what Jadea said. Jadea
4 would have to testify as to what Jada said.

5 BY SOLICITOR ANTHONY:

6 Q. And where did they go? Where did you see them go to
7 speak?

8 A. [REDACTED] and Jadea and Julia, they went up to my home.

9 Q. All right.

10 SOLICITOR ANTHONY: If I could have one second.

11 (PAUSE.)

12 SOLICITOR ANTHONY: That's everything on direct.

13 THE COURT: All right. Mr. Delaney.

14 MR. DELANEY: Thank you, Judge.

15 CROSS EXAMINATION

16 EDDIE WILLIAMS BY MR. DELANEY:

17 Q. Shortly after - Your family joined New Life Baptist
18 Church in 2009; is that right?

19 A. Yes, sir.

20 Q. [REDACTED] started lying to you around that time; is that
21 correct?

22 A. I never said she started lying.

23 Q. Well, didn't she start lying to you about contact she
24 was not suppose to be having with this guy named Jason
25 Smith?

1 Q. And then eventually you did end up letting her go?

2 A. I did but his family supposedly was there too.

3 Q. Okay. All right.

4 MS. INZERILLO: I have no further questions, Your
5 Honor.

6 THE COURT: Redirect.

7 SOLICITOR ANTHONY: One second, Judge.

8 (PAUSE AT 11:26 A.M..)

9 SOLICITOR ANTHONY: No redirect.

10 THE COURT: All right. You can step down. We
11 appreciate your time. You may be excused.

12 (WITNESS LEAVING WITNESS STAND.)

13 THE COURT: Call your next witness.

14 SOLICITOR ANTHONY: Next witness is Andrew [REDACTED].

15 THE CLERK: Place your left hand on the Bible and
16 raise your right hand.

17 (WHEREUPON: ANDREW [REDACTED]

18 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

19 THE CLERK: Have a seat over there.

20 DIRECT EXAMINATION

21 ANDREW [REDACTED] BY SOLICITOR ANTHONY:

22 Q. Would you state your name, please?

23 A. Andrew [REDACTED].

24 Q. Andrew, you might want to pull that microphone down
25 just a little bit. There. That might work a little

1 better. Okay.

2 Andrew, how old are you?

3 A. Fifteen.

4 Q. Okay. And where do you live?

5 A. [REDACTED]

6 Q. Okay. And who do you live with?

7 A. My father.

8 Q. All right. Who else lives with you?

9 A. My sister, [REDACTED] and my brother, Phillip.

10 Q. Okay. And do you also stay sometimes with somebody
11 besides your daddy?

12 A. Yes, sir.

13 Q. And who was that?

14 A. My Grandmother, Sherrie Tucker.

15 Q. And where does Mrs. Tucker live in relation to where
16 you live?

17 A. From my house down the hill.

18 Q. And back in the summer of 2010, was there anybody else
19 that would spend -- anybody else that's related to you that
20 would spend time up at your house?

21 A. Yes, sir.

22 Q. And who was that?

23 A. Marla Pridemore, my cousin.

24 Q. All right. Marla Pridemore?

25 A. Yes, sir.

1 Q. All right. Well going to the summer of 2010, where
2 did you and your family go to church then?

3 A. New Life Baptist.

4 Q. And who was the youth pastor there?

5 A. Stephen Berry.

6 Q. And back in the summer of 2010, what happened in
7 regards to Mr. Berry coming to your house?

8 A. He moved.

9 Q. Okay. All right. And where did he move in relation
10 to your house?

11 A. From the city of Union to the country.

12 Q. Okay. And so it was a lot closer to where you all
13 lived?

14 A. Yes, sir.

15 Q. And after he moved up close to your house, what did he
16 start doing?

17 A. Coming to my house more often.

18 Q. And when - When in your experience and recollection,
19 when would he normally come?

20 A. While my dad's gone and mostly at night.

21 Q. All right. And do you remember him coming one time
22 when Marla was there?

23 A. Yes, sir.

24 Q. And when he would come to the house, what would he
25 want to do?

1 A. He wanted to go see [REDACTED] and all in her room.

2 Q. Would he ever do anything else? Would he ever help do
3 anything else when he come up there?

4 A. He would help clean sometimes.

5 Q. And what -- When he would come, would he ever ask you
6 and your brother to do anything?

7 A. Yes, sir.

8 Q. What would he want you and your brother to do?

9 A. Stay in the living room or go outside.

10 Q. Okay. And when he come to talk to [REDACTED] where would
11 he want to talk to her?

12 A. In her room.

13 Q. And what would he do after the two of them went into
14 her room? What would he do?

15 A. ... the door.

16 MADAM COURT REPORTER: I'm sorry, Mr. Anthony. I
17 couldn't hear that remark.

18 Q. Could you repeat your answer please, Andrew.

19 A. He would shut the door.

20 THE COURT: You need to speak up just a little if you
21 would, young man.

22 Q. Now, on some of these occasions when he would come up
23 to your house, would there ever be a call come in after
24 that?

25 A. Yes, sir.

1 Q. And would the calls come from?

2 A. From my grandmother.

3 Q. Okay. And what would you or Phillip do in response to
4 these calls?

5 A. We would tell Stephen that he needed to leave.

6 Q. And if you were outside, if it was an occasion where
7 you'd gone outside, how would you get the call?

8 A. I would take the cordless phone out there with me.

9 Q. Okay. And so what did you do when - say when your
10 grandma called, what would you do?

11 A. Tell Stephen that he needed to leave and if he didn't
12 she was going to call the law.

13 THE COURT: You need to speak up a little bit. I'm
14 having trouble understanding you. Say that again.

15 Q. Just speak more clearer so everybody can hear you.

16 THE COURT: Answer the question again. Go ahead.

17 A. To tell Stephen that he needed to leave and if he
18 didn't, my grandmother was going to call the law.

19 Q. And normally if you would tell Mr. Berry that he
20 needed to leave, what would he do?

21 A. Stay for a few more minutes and talk.

22 Q. Okay. Well now I want to ask you about one particular
23 incident. Do you remember back in the summer of 2010 going
24 over to Mr. Berry's house to swim?

25 A. Yes, sir.

1 Q. And how many times do you recall going over there that
2 summer?

3 A. Once or twice.

4 Q. Okay. Okay. And on this one occasion, what - Well,
5 what did you go over there for? What would be going on to
6 cause you to go over there to swim? Was there other people
7 there as well?

8 A. Yes, sir.

9 Q. Okay. Where would they be from?

10 A. The church youth group.

11 Q. Okay. All right. And was there an occasion where Mr.
12 Berry came to your house after you had left a pool party?

13 A. Yes, sir.

14 Q. Okay. And how had you all gotten back and forth from
15 Mr. Berry's house?

16 A. We walked.

17 Q. And who had gone?

18 A. Me, my brother and my sister.

19 Q. And when you all left, when you left Mr. Berry's
20 house, were there still people there?

21 A. Yes, sir.

22 Q. And how long had you been home approximately when Mr.
23 Berry arrived?

24 A. Maybe four or five minutes.

25 Q. Okay. And how did he get to the house?

1 A. He drove.

2 Q. Okay. When he came in, did he do anything to announce
3 himself or how did he come in the house?

4 A. He just walked in.

5 Q. And what did he have on?

6 A. His swimming trunks.

7 Q. And did he have anything else on?

8 A. No, sir.

9 Q. Okay. What happened when he walked into the house?
10 What did he do?

11 A. Went in to talk to [REDACTED]

12 Q. Okay. And where did he and [REDACTED] go to talk?

13 A. Her room.

14 Q. And what was [REDACTED] wearing at that time?

15 A. Her two-piece bathing suit.

16 Q. And what did he do when he - When they walked in the
17 room, what did he do in regards to the door?

18 A. He shut the door.

19 Q. And after they had been in there, in her room for some
20 time, did a call come in?

21 A. Yes, sir.

22 Q. And who was the call from?

23 A. My grandmother.

24 Q. And who answered the call?

25 A. My brother.

1. Q. And after the call came in, what did you do?

2 A. I told Stephen he needed to leave and if not, my
3 grandma was going to call the law.

4 Q. Okay. You say you told him. Where did you go to tell
5 him?

6 A. Right next to the door.

7 Q. Okay. Did you actually open the door and go in the
8 room?

9 A. No, sir.

10 Q. Okay. You just said it from outside?

11 A. Yes, sir.

12 Q. Did you get a response?

13 A. No, sir.

14 Q. What did Mr. Berry eventually do?

15 A. He left.

16 Q. Okay. And when he came out of the room, did he speak
17 to you or what - How long did he stay after he came out of
18 the room?

19 A. Three or four more minutes.

20 Q. Well let me just ask you. About how long was it
21 before they came out of the room?

22 A. Not that long.

23 Q. And then he stayed a few minutes before he left?

24 A. Yes, sir.

25 Q. Okay. All right. And then did Mr. Berry coming up to

1 your house, did that continue after the summer of 2010,
2 like when you all started back to school that fall, was he
3 still coming?

4 A. Yes, sir.

5 Q. And when you started back to school, when would he
6 mostly come?

7 A. In the evening or at night.

8 Q. Okay. And when he would come at night, the times he
9 would come at night, where would your father be?

10 A. At work.

11 Q. Okay. And what was the arrangement if your dad was
12 working, who would be there sleeping at the house at night
13 if your daddy was working the night shift?

14 A. [REDACTED] my sister.

15 Q. Okay. And what about your other brother Phillip,
16 where would he normally be?

17 A. Sometime he would stay with my grandmother.

18 Q. All right. And did you observe Mr. Berry come take
19 [REDACTED] to church?

20 A. Yes, sir.

21 Q. All right. And when he would do this, would he take
22 you or your brother?

23 A. No, sir.

24 Q. All right. How many times do you recall him taking
25 you or your brother?

1 A. Once or twice.

2 Q. All right.

3 SOLICITOR ANTHONY: If I could have just one moment.

4 (PAUSE.)

5 SOLICITOR ANTHONY: All right. Thank you.

6 That's everything on direct.

7 THE COURT: All right.

8 Mr. Delaney.

9 CROSS EXAMINATION

10 ANDREW [REDACTED] BY MR. DELANEY:

11 Q. Andrew, Mr. Berry would come up to the house at times
12 when your dad was there. Correct?

13 A. Not that often.

14 Q. Okay. At times - you said not that often - at times
15 Mr. Berry would come up to the house when your dad was
16 there. Correct?

17 A. Very few.

18 Q. And these very few times that your dad would come up
19 to the house - that Mr. Berry would come up to the house
20 when your dad was there, he would meet with your
21 dad and your sister at the house. Correct?

22 A. Yes, sir.

23 Q. And these meetings would be about some problems,
24 issues, your sister was having. Correct?

25 A. Yes, sir.

1 Q. Do you recognize that?

2 A. Yes, sir.

3 Q. And what is that, Ms. Berry?

4 A. The statement I made.

5 Q. Okay. And would you say that - Is it accurate to say
6 that after your family moved to [REDACTED], did you
7 have any kind of concerns or worries about what you saw
8 happening between Mr. Berry and [REDACTED]

9 A. What do you mean?

10 Q. I'm sorry?

11 A. What do you mean?

12 Q. Well, did you - Seeing them interact, did you have any
13 worries that something inappropriate might be going on
14 between your father and [REDACTED]

15 A. Um, before all this no.

16 Q. I'm sorry?

17 A. No.

18 Q. Okay. All right now, I'll just call your attention to
19 the statement. The statement begins, "My name is Jadea
20 Berry. Me and [REDACTED] have been best friends for a
21 very long time." And then the next line is, "I have saw
22 some things that made me think about a lot." Is that
23 correct?

24 A. Yes, sir..

25 Q. All right. And is it your testimony that there was an

1 occasion where you would see [REDACTED] and your father
2 go in his bedroom and he had his boxers on?

3 A. Yes, sir.

4 Q. Okay. And you have seen that?

5 A. Yes, sir.

6 Q. Okay. And is it your testimony that you walked in on
7 them and they would be under the bed covers?

8 A. Yes, sir.

9 Q. Okay. And is it correct to say that your father
10 during this time after he moved would want to be around

11 [REDACTED] more than he would want to be around you?

12 A. If she needed to talk to mu dad yes.

13 Q. Okay. In the statement, the third sentence of the
14 statement reads, "My dad would always want [REDACTED] with him
15 instead of me." Is that correct?

16 A. Yes, sir.

17 Q. Okay. And then it goes on, "he would ask me to go to
18 the store and I would say [REDACTED] come on and my dad would
19 say no, [REDACTED] is staying here with me. Is that --

20 A. Yes, sir.

21 Q. And is that what would happen?

22 A. Yes, sir.

23 Q. And did you ever see Mr. Berry touch [REDACTED] in a way
24 that was inappropriate?

25 A. No, sir.

1 THE COURT: You can bring in the jury.

2 (JURY REENTERS COURTROOM AT 09:36 A.M..)

3 THE COURT: I had to ask Ms. Crocker to come in to
4 clear up some confusion which we cleared up. It's not
5 anything she did so I just wanted to make sure you
6 understand that. Sometimes these little things happen and
7 we have to check on them.

8 I'll turn it over to the State to go forward
9 with calling their first witness.

10 SOLICITOR ANTHONY: Thank you, Your Honor.

11 The next witness is Kim Roseborough.

12 THE CLERK: Ms. Roseborough, place your left hand on
13 the Bible and raise your right hand.

14 (WHEREUPON: KIM ROSEBOROUGH,
15 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

16 DIRECT EXAMINATION

17 KIM ROSEBOROUGH BY SOLICITOR ANTHONY:

18 Q. Would you state your name please?

19 A. Kimberly Rae Roseborough.

20 Q. And, Ms. Roseborough, how are you employed?

21 A. I am self-employed at a therapy practice called Turning
22 Leaves Therapy in Spartanburg, South Carolina.

23 Q. And what is your qualifications?

24 A. I am a psychotherapist.. I am a licensed, independent
25 social worker.

1 Q. In that practice, who do you primarily treat?

2 A. I have specialized in my practice working specifically
3 with adolescents and young children and their families.

4 Q. And could you tell the court and jury your education
5 in the field of therapy and provide therapy to children and
6 adolescents.

7 A. I'm sorry, the first part of that was?

8 Q. In the therapy field, could you just tell the
9 court and the jury your education and training?

10 A. Yes. I have a *Bachelor of Arts* degree in Psychology and
11 I have a master's degree in social work.

12 Q. And do you have any licenses?

13 A. Yes.

14 Q. Okay. How are you licensed?

15 A. I am licensed by the State of South Carolina as an
16 independent social worker which allows me to do clinical
17 practice independently and provide therapeutic services
18 to children and families:

19 Q. And are you also have some credentials in the field
20 of counseling children?

21 A. Yes, I do.

22 Q. Tell us about that.

23 A. I am a registered play therapist which means that after
24 I got my master's degree I went back and did three - I'm
25 sorry, three thousand hours' worth of training and

1 extra supervision and other educational requirements
2 to become a registered play therapist to work specifically
3 with children and adolescents.

4 I am also a supervisor in the play therapy field and
5 I also am a supervisor for licensed social workers for
6 people that are trying to get their social work degree.

7 I also have extensive training in child sexual abuse,
8 training experience, and experience. I have about eight
9 hundred extra hours in working with children and going
10 to training for child sexual abuse. One of those
11 specifically was in the area forensic counseling, which
12 which was a forty hour intensive training in Huntsville,
13 Alabama with one of the national children's advocacy
14 centers to become a forensic counselor.

15 After that I was able to be certified through the
16 American Counseling Association for Forensic Counselors.

17 Q. And so aside from just dealing with children and
18 adolescents in your practice, do you also deal - have sort
19 of something of a speciality dealing with children and
20 adolescents who have been sexually abused?

21 A. Yes. And I have worked in that field since 1984 working
22 with children who have been sexually abused. I started my
23 career working at a residential treatment facility where
24 a large percentage of the population of the girls there
25 had been sexually abused.

1 And then I went to the Department of Social Services and
2 there I worked with the sexual abuse unit. We had a
3 specialized unit at that time. I did child sexual abuse
4 investigations. I was a first responder with the police
5 department when initial complaints came in and I did
6 that and became the supervisor in that unit and worked
7 there for seven years.

8 After that I went back to get my master's degree and
9 I worked at Safe Homes Rape Crisis in Spartanburg and
10 helped start their child therapy program doing therapy
11 with children who had been sexual abused and worked there for
12 two years.

13 I also co-developed a training curriculum with the
14 College of Social Work in Columbia, South Carolina to
15 train DSS caseworkers statewide to diagnose and treat -
16 identify, diagnose and treat child sexual abuse. I did
17 that for three years. And then as I finished my master's,
18 I went into private practice in 1995 - Let me think of the
19 year. Sorry. 1995 I started my private practice and
20 have been there ever since

21 Q. And have you testified in court before ---

22 A. I have.

23 Q. --- as an expert in the field of child sexual
24 assessment and treatment?

25 A. I have.

1 Q. Okay.

2 A. Yes.

3 Q. Approximately how many times have you qualified as
4 an expert?

5 A. I have been qualified as an expert both in criminal
6 court, general sessions courts and family courts in about
7 eight or nine different counties in the State and have
8 probably testified over two hundred times.

9 SOLICITOR ANTHONY: Your Honor, at this time we submit
10 Ms. Roseborough to the Court as an expert in the field of
11 child sexual abuse assessment and treatment.

12 THE COURT: Any voir dire?

13 MS. INZERILLO: No, Your Honor.

14 THE COURT: I find she is qualified.

15 Members of the jury panel, I'll tell you more about
16 this when I charge you at the end of the case, but
17 generally witnesses can only testified to something they
18 have seen or heard or sensed with one of their five
19 senses. However where an individual has certain training
20 and experience and skill in a certain area, that person
21 can be qualified as an expert in that area. I have
22 found she is qualified in the area of expertise
23 as articulated by Mr. Anthony.

24 That means she can reach opinions rather than
25 state just facts; I saw something, I heard something.

1 She can take facts and from those render an opinion.

2 Now those opinions are given and I've allowed that evidence

3 to assist you; they are not binding on you. You judge

4 this witness just like you judge any other witness in the

5 case and you can accept her opinion, you can reject

6 her opinion or you can give it such weight as you deem.

7 But an expert witness differs from a non-expert

8 witness because a non-expert witness can't give an

9 opinion about something. They can only testify as to

10 actual facts; something they've heard, seen, et cetera,

11 whereas an expert can take facts and from those say its

12 my opinion, whatever her opinion may be. And again that's

13 to assist you or allowed into evidence to assist you.

14 BY SOLICITOR ANTHONY:

15 Q. Ms. Rosebough, have you in the course of your practice

16 at Turning Leaf Therapy counseled [REDACTED]

17 A. I have.

18 Q. And when were the days that you dealt with [REDACTED]

19 [REDACTED] and dealt with her family?

20 A. Originally this family came to see me back in 2005 and

21 I worked with them they around some divorce issues and

22 some visitation issues and worked with the entire family

23 at that point.

24 Q. And how long did that treatment last?

25 A. They were in therapy approximately two years.

1 There were so many court hearings during that time and we
2 were working on some specific treatment plans and some

3 things that needed to happen for the mother to regain
4 her normal regular standard visitation.

5 Q. So it ended in 2007?

6 A. Yes.

7 Q. Okay. And after that was there resumption of your
8 relationship with the [REDACTED] family?

9 A. There was.

10 Q. And when was that?

11 A. They called back sometime early in 2010 and wanted
12 to come back in and at that point I was full and was not able
13 to have them back as a regular client and they briefly saw
14 someone else at my office that I referred them to. But
15 in February of 2010, they asked to come back to see me and at
16 that point I did have an opening for their family that I
17 could see them. They came back in for the first time on
18 February the 19th 2010.

19 Q. And when you started seeing them in February 2010, what
20 was that initially in regards to?

21 A. It was specifically in regards to the issue of the
22 mother's visitation. There had been a treatment plan that
23 she was supposed to do certain things in order to
24 re-establish the standard visitation and she had not done
25 it until 2010 and at that point when she had completed

1 everything, she wanted to re-establish standard
2 visitation and part of the court order required that they
3 had to come back to therapy and that a therapist had to

4 review that she had done those things and then
5 gradually reinstate visitation. So when they came in
6 that was the only purpose of the therapy at that point.

7 Q. And during 2010 when you were seeing the [REDACTED]
8 children, what was the normal procedure you would follow
9 when you would have sessions with them?

10 A. Well it would depend, but basically I was treating -
11 [REDACTED] was the identified client which she had been
12 previously just in terms of that was the name that my file
13 was opened in. But I was working with the entire family
14 so I would see sometimes the children; sometimes the children
15 by themselves. I would sometimes have the father come
16 into my office and talk with him. I also met individually
17 some with the mom to kind of go over the treatment plan and
18 make sure that she had finished up what she needed to do and
19 then I started supervised visitation with the children and
20 the mom in my office.

21 You have to do it in a very slow, graduated process
22 before the regular visitation is just given back
23 unsupervised. So it would depend on who I brought into the
24 office that day but I did a variety of different types of
25 sessions with the family to get them prepared to move to

1 that unsupervised visitation.

2 Q. And on average when the counseling was resumed in

3 February of 2010, how often would you see the family?

4 A. I would see them at least once a month. Sometimes
5 twice a month. Just depending on my schedule and their
6 availability to come in.

7 Q. Okay. And then did anything change in March of 2011
8 as far as your relationship with [REDACTED] and the rest of the
9 family?

10 A. Yes. In March of 2011, there was a police report
11 where [REDACTED] disclosed sexual abuse and at that point
12 I was still working with the family around the visitation
13 issues and I also began to see [REDACTED] some individually
14 that was more specifically related to the sexual abuse
15 allegations even though I did continue to work with the
16 family and the other child with mom's visitation.

17 Q. And did you have individual sessions in March of
18 2011 just with [REDACTED] concerned with sexual abuse?

19 A. Yes. Those started March the 21st and that was at
20 the appointment that she disclosed the sexual abuse to me.
21 She had just made a police report at that time.

22 Q. And did she give you a time frame where the sexual
23 abuse incidents had occurred?

24 A. Yes. She reported that they had started in May or
25 early June of 2010.

1 Q. Okay. And did she give you a time frames for the
2 continuation of those acts, how long that it lasted?

3 A. It is my understanding, and I can go back and look
4 more thoroughly in my notes, but it had continued up
5 until just several weeks prior to her making the police
6 report.

7 Q. And where did she - When you talked to her where did
8 she report to you, what locations did she report to you that
9 these incidents had occurred?

10 A. She told me that they had occurred at her residence
11 and at the residence of Stephen Berry.

12 Q. And when you would - In the sessions where you
13 discussed these incidents with [REDACTED] [REDACTED] what
14 observations did you make about her demeanor?

15 A. About her demeanor?

16 Q. Yes, ma'am.

17 A. Over time, and I did see her for some time after that,
18 I noticed several things about her demeanor, including many
19 symptoms that related to trauma. She was very avoidant.
20 Many times of trying - of me trying to talk to her about what
21 happened she became increasing more agitated and depressed.
22 She became more angry. She had a lot of feelings of
23 guilt and hopelessness and was very hyper-vigilant, very
24 easily startled in my office and was very emotionally
25 distressed and that progressed and got worse over time after

1 the disclosure was made.

2 Q. And based on your experience and your training, were
3 the circumstances of her disclosure when she spoke to you
4 about these issues consistent with the disclosure of sexual
5 abuse?

6 MS. INZERILLO: Objection, Your Honor.

7 THE COURT: Let me ask the jury to go out just a
8 minute.

9 (JURY EXITS COURTROOM AT 10:30 A.M..)

10 THE COURT: Yes, ma'am.

11 MS. INZERILLO: Your Honor, my object to Ms.
12 Roseborough's comments on any consistency or inconsistency
13 is based on a case that has just recently been handed down by
14 the Supreme Court of our state which is the State versus
15 Kromah....

16 I have a copy for you.

17 MADAME COURT REPORTER: Yes, ma'am. Thank you

18 MS. INZERILLO: I will say at the outset of my
19 argument, Your Honor, this case is extremely new. I believe
20 it was just filed in January which would have been last
21 month and I don't think the time period has passed but I do
22 think it is instructive on this issue.

23 In the copy I handed to the State as well as up to
24 the Court, unfortunately they are not numbered but I will
25 point the court to which is essentially Subsection II which

1 is about six pages from the back.

2 In this case, Your Honor, the court expressly
3 addressed this forensic interviewer's comments regarding
4 her assessment of the demeanor of essentially in this
5 case what is a child victim's demeanor and how it
6 relates to whether that child was believable in a
7 disclosure of sexual abuse. It is an extensive
8 recitation of how that forensic interview was certified
9 as an expert in forensic interviewing and how even
10 though the person was qualified as an expert that does
11 not allow that person to comment on anything involving
12 the credibility of a witness.

13 It further does caution that there are certain
14 statements that should be avoided at trial, one of which
15 is any statement to indicate to a jury that the interviewer
16 believes the child's allegations in the current matter.

17 It is our concern, Your Honor, that should Ms.
18 Rosebough testify, as the State has ask her to do, that
19 her disclosure, to mean [REDACTED]'s disclosure is
20 consistent or inconsistent with her actions or
21 disclosures were consistent or inconsistent with the
22 disclosure of sexual abuse.

23 That is asking Ms. Rosebough to comment in a manner
24 that would require her to comment on whether she believes
25 [REDACTED] allegations in this matter involved in this

1 case when our Supreme has determined this an improper
2 comment.

3 This court does further - The Supreme Court does
4 further argue that it is within the sole providence of
5 the jury to determine the credibility of witnesses which
6 is where it says this caution to this - any question about
7 the statement at this point with Ms. Roseborough being
8 qualified as such as an expert in child sexual abuse
9 treatment in this line of questioning where she's
10 specifically asked about any interactions, any
11 conversations she's had if she's had anything involving her
12 assessment of any demeanor specifically after the
13 disclosure; specifically any specialized sessions regarding
14 the disclosure and her assessment on that disclosure we
15 would ask that that not be

16 THE COURT: Mr. Anthony, have you had a chance --

17 We'll take a break because I want to look at the
18 case too. I was just skimming over it. If you want to
19 address - are you familiar with this case?

20 SOLICITOR ANTHONY: No, sir.

21 THE COURT: All right. Let's take a short break.

22 Ms. Roseborough, you can step down and have water, use
23 the restroom if you want too, but I want a chance to look at
24 this myself.

25 It is a January 23rd - I never do math in public

1 That's where it gets a little gray because they used
2 the word indicated. You're asking whether behavior is
3 consistent with someone who ask was telling the truth.

4 SOLICITOR ANTHONY: Yes, sir.

5 THE COURT: Well I sustain the objection.

6 SOLICITOR ANTHONY: I can't really dispute that
7 assessment.

8 THE COURT: All right. Well I sustain the objection.

9 MS. INZERILLO: Thank you, Your Honor.

10 THE COURT: All right, bring in the jury.

11 (JURY REENTERS COURTROOM AT 10:23 A.M..)

12 THE COURT: You may proceed.

13 SOLICITOR ANTHONY: All right.

14 DIRECT EXAMINATION - CON'T

15 KIM ROSEBOROUGH BY SOLICITOR ANTHONY:

16 Q. Ms. Roseborough, just to kind of get us back to where
17 we were. When you spoke to [REDACTED] and she relayed
18 sexual abuse to you, what types of behavior did you notice
19 about her?

20 A. In my office that I observed specifically?

21 Q. Yes, ma'am.

22 A. I noticed that she was very hyper-vigilant, easily
23 started, became very emotionally distressed and distraught,
24 became very tearful on many occasions when I was attempting
25 to elicit information from her. She reported symptoms that

1 were obviously not occurring in my office that also indicated
2 trauma around not being able to sleep and having a lot of
3 intrusive thoughts about the sexual abuse that occurred and
4 about a lot of anger and agitation. She became having some
5 real violent outbursts that had not been typical of her. She
6 became so depressed that in September I was —

7 Q. I'll get - We'll get on to that in a minute.

8 A. Okay.

9 Q. I was just asking when you talked to her, I just
10 wanted to go back through the things you saw when you talked
11 to her. I want to move on now. Is there a term in your
12 field that, a common term called delayed disclosure?

13 A. Yes there is.

14 Q. All right. And what is it that people mean when they
15 talk about delayed disclosure?

16 A. In 1983, a physician named Roland Summit did a lot of
17 research around the area of child sexual abuse and wrote a
18 paper based on information through literature and what we
19 knew about children who had been sexually abused, and about
20 how they accommodate for that sexual abuse, and how they
21 disclose it if and when they do disclose it, and some of the
22 major tenants of child sexual abuse and it's called the Child
23 Sexual Abuse Accommodation Syndrome. And one of the tenants
24 of that syndrome that he identified is delayed disclosure.
25 What they saw when they were looking at cases of child sexual

1 abuse is that most of the kids who had been sexually abused
2 did not report it in a timely fashion.

3 Q. And what factors are thought to play a role in delayed
4 disclosure by a child of sexual abuse?

5 A. There are many but some of the major ones and the ones
6 that are most documented in the research and that I have seen
7 most in my practice have to do with children feeling like
8 that people won't believe them and usually that's because the
9 adult who is sexually abusing them convinces them of that.
10 They say, no one is going to believe you. I'm this or that
11 and, you know, people are going to say that you're lying,
12 that you made this up.

13 A lot of times there is bribing going on and sometimes
14 kids are in a situation where there has been a threat made to
15 them about what will happen if they tell. And a lot of kids
16 really think about what the consequences might be if they
17 tell and what it would do to their family and what it would
18 do to the other family that's involved.

19 A lot of times it really surprises me that kids are ever
20 brave enough to tell after they've had some of these kinds of
21 experiences based on what happens afterwards because then the
22 police are involved. There is usually court. There are a
23 lot of other circumstances then that they have to deal with.

24 Q. And how common is delayed disclosure?

25 A. It is incredibly common. With incestuous cases, it

1 happens quite a lot. As I said, it's one of the major
2 tenants of the Child Sexual Abuse Accommodation Syndrome
3 because it happens so often. You have to remember we're not
4 talking about a stranger rape and even those don't get
5 reported as we all know that those numbers are incredibly low
6 based on what actually occurs. But for many reasons people
7 don't report that and these kinds of sexual abuse cases, they
8 have the person who is the perpetrator has spent time
9 grooming the child, getting the child to accept the behavior
10

11 MS. INZERILLO: Objection, Your Honor.

12 THE COURT: I sustain the objection.

13 Go on to the next question.

14 BY SOLICITOR ANTHONY:

15 Q. And could you just give us some examples in your own
16 practice of time spans that you've seen from time of abuse
17 until the disclosure?

18 A. Certainly. I have had people that, kids who have not
19 told at all during their childhood. Many examples are kids
20 who don't tell until they're seventeen or eighteen and they
21 know that there's not going to be a police report or there's
22 not going to be the danger of them being taken out of their
23 home.

24 I work with a lot of adults who are adult survivors of
25 child sexual abuse and they come into my office in their

1 thirties and forties and fifties and are telling for the
2 first time. The longest person that I had to wait to
3 disclosure was a seventy-year-old woman who came into a
4 psychiatric hospital who had been sexual abused at the age of
5 five and that was the first time that she was telling anyone
6 was in her early seventies. So there is a lot of long spans
7 between when some of these events occur and people feel safe
8 enough to tell.

9 Q. And based on your experience with [REDACTED]
10 were there factors in her situation that you could identify
11 that might lead to a delayed disclosure of abuse?

12 A. Yes.

13 Q. And what were they?

14 A. Well, there were several. One was because she didn't
15 think anybody would believe her. That was the first one.
16 That she didn't believe that people would believe who this
17 person was, was actually abusing her. One of the major ones
18 that she --

19 MS. INZERILLO: Your Honor, I'm going to object.

20 THE COURT: I sustain the objection.

21 SOLICITOR ANTHONY: I'm sorry, Your Honor.

22 THE COURT: Let the jury go out again. Let the jury go
23 out again for a minute.

24 (JURY EXITS COURTROOM AT 10:30 A.M..)

25 SOLICITOR ANTHONY: Yes, sir. I would just like to be

1 (COURT AT EASE AT 10:38 A.M..)

2 (COURT BACK IN SESSION AT 11:26 A.M..)

3 THE COURT: Thank you. Take your seats.

4 Anything else from the State? I read the cases and I've
5 got an opinion of where I'm headed but I'll be glad to hear
6 anything else.

7 SOLICITOR ANTHONY: I handed up the law I found, Your
8 Honor.

9 THE COURT: Anything else?

10 MS. INZERILLO: No, Your Honor.

11 THE COURT: Well, we're getting into a thorny area and
12 the courts have ultimately got to carve out where
13 we're headed with all of this. This current line of
14 questioning which has to do with as I understand delayed -

15 Mr. Anthony, are you listening? The question about
16 what causes delayed reporting. That's the major issue that
17 we're dealing with right now. Correct?

18 SOLICITOR ANTHONY: Yes, sir. I think the objection
19 actually came in to a question about in the victim's
20 situation what factors were there that would be consistent
21 with delayed reporting. I think that was the words I used,
22 consistent with delayed reporting.

23 THE COURT: Well I still have trouble with the word
24 "consistent," and this is a very thorny issue. I find that,
25 like I say I have some concerns with the word "consistent,"

1 but I do find that based on the *Weaverling* case, a 1999
2 case, 337 S.C. 460, in there and this has not been changed to
3 my understanding, this was a rape trauma case and the court
4 citing *Frenzel F-r-e-n-z-e-l* versus *State of Wyoming*, 1993,
5 favorably and states and I hold that this testimony of this
6 extent is admissible and that it's approbative value
7 outweighs its prejudicial value, that is, expert testimony
8 concerning common behavior, behavioral characteristics of
9 sexual assault victims and the range of responses to sexual
10 assault encountered by experts is admissible.

11 The court went on citing *Frenzel* again, "Such testimony
12 is relevant and helpful in explaining to the jury the typical
13 behavior patterns of adolescent victims of sexual assault."
14 If this testimony is ultimately found by our appellant courts
15 to be not admissible, I think the courts would be closing a
16 door on numerous cases that we hear of all the time and
17 already been eluded to and that is cases of depressed memory.

18 If the testimony of this type is not allowed in the
19 context of typical, not consistent, typical, then I think
20 that delayed reporting cases would be much harder to present
21 to the jury and would not be presented with a complete
22 picture of the victim's rationale or reasoning, or that's
23 not the right word, but the underlying reason that one may
24 not report in a more timely fashion some sort of traumatic,
25 particularly sexually, or possibly physically sexual abuse,

1 so my ruling is that you can ask questions about typical
2 responses that may cause delayed reporting.

3 Anything further?

4 SOLICITOR ANTHONY: No, sir.

5 MS. INZERILLO: Yes, Your Honor, for clarification.

6 In terms of typical responses but nothing specific to
7 this case?

8 THE COURT: Well, it may. If they are typical nad they
9 relate to this case they are just typical and relate to this
10 case. I mean, I can't say that - As way of an example and I
11 don't know if she's going there, but that a typical reason
12 that an adolescent may not report is that the perpetrator is
13 someone associated with the church, if that's typical she can
14 testify to it. The fact that it may be also in line with the
15 facts of this case is just the fact that it's in line with
16 this case. She can't be - I'm not going to exclude her from
17 using - and I'm not saying that's an example.

18 MS. INZERILLO: Right.

19 THE COURT: That's an example in my mind. The fact that
20 a typical response parallels to the facts as the state has
21 developed them doesn't mean they can't go into it.

22 MS. INZERILLO: I think my question goes to what if by
23 way of response it is specific to the case in terms of she
24 was afraid of losing her best friend Jadea?

25 THE COURT: Well I think she can testify that she may be

1 losing - fear of losing a best friend or a close friend but
2 I think as far as naming that friend, I think that wouldn't
3 be typical because everybody doesn't have a best friend named
4 Jadea.

5 MS. INZERILLO: Thank you, Your Honor

6 THE COURT: I mean, my logic may be not the best but
7 that's the best - I'm the best you've got right now.

8 All right. Bring in the jury.

9 (JURY REENTERS COURTROOM AT 11:33 A.M..)

10 THE COURT: Go ahead.

11 SOLICITOR ANTHONY: All right.

12 DIRECT EXAMINATION - CON'T

13 KIM ROSEBOROUGH BY SOLICITOR ANTHONY

14 Q. Ms. Roseborough, I'm gonna back up just a little bit
15 and try to move forward.

16 You were testifying about delayed disclosures with child
17 abuse.

18 A. Yes.

19 Q. And could you tell the jury if there are any typical
20 factors that might lead a child to delayed disclosing?

21 A. Yes. What might have a child have delayed disclosure
22 would be things like not believing that someone would believe
23 him or her. A lot of times they, when we interview children
24 or talk to kids after a disclosure has been made, they will
25 say that they did not believe anyone would believe them

1 either because of the content of their disclosure or because
2 of who the perpetrator was.

3 A lot of times the perpetrator may be someone that they
4 know through other ways and that other people know and would
5 not believe on the surface that, that could be true so that
6 would be a reason that they might not would tell. Other
7 reasons for delayed disclosure center around the fear of the
8 unknow, what is going to happen next.

9 A lot of kids, especially teenagers, are savvy enough to
10 understand that there might be police involvement, a police
11 report. There might be court. They would have to make their
12 statement to numerous people. That they would have to be
13 talked to and interviewed by professionals. And when you
14 think that people wouldn't believe you, that's a really hard
15 thing to do.

16 If the perpetrator is someone that other people know or
17 is involved with your family, you are also very or maybe
18 concerned about what is going to happen to that person or how
19 people are going to react if you say that is the person that
20 offended against you. In some cases that I've worked on,
21 there may be friendships involved in these kinds of
22 situations. There may be - they may have friends that are
23 involved with that family or with that offender that they may
24 not want to put that family through, and their family
25 through, what they know what might happen if they make a

1 disclosure.

2 Q. And based on your work with [REDACTED] are any

3 of those typical factors present in her situation?

4 A. Yes, they are.

5 Q. And which factors are present?

6 A. Well, there are numerous factors present. The first
7 one was that not being believed because of the position —

8 MS. INZERILLO: Your Honor, I going to object.

9 THE COURT: Yeah. I sustain the objection.

10 BY SOLICITOR ANTHONY:

11 Q. Okay. The first factor is not being believed. What
12 else? Without going into the reason why she might not be
13 believed, what else would — well, insofar as she might not be
14 believed, without specifically saying what would be pertinent
15 to [REDACTED] case, what factors might a child consider in
16 delaying a disclosure because of a fear of not being
17 believed?

18 A. If they felt like their disclosure was going to hurt
19 someone that they really cared about or were very close to.

20 Q. And then aside from the fear of not being believed,
21 what other typical factors were present in [REDACTED] case
22 that might lead to a delayed disclosure?

23 A. That she was afraid that it would hurt her friendship.

24 MS. INZERILLO: Objection, Your Honor.

25 THE COURT: Yeah. I sustain the objection.

1 Disregard that question and answer.

2 BY SOLICITOR ANTHONY:

3 Q. Would that be a typical factor?

4 A. That their disclosure might hurt someone? Absolutely.

5 Q. And what else was present in regards to her?

6 A. Generally threats and being told to not tell, to
7 keeping it a secret.

8 MS. INZERILLO: Your Honor, I'm going to object. I
9 believe those questions --

10 THE COURT: I sustain the objection. I thought we
11 were going to keep it as to typical; not specific.

12 SOLICITOR ANTHONY: Well, --

13 THE COURT: Well I've ruled.

14 SOLICITOR ANTHONY: Okay. I'm sorry.

15 Q. All right. And moving on, are there any typical
16 symptoms of trauma that are exhibited by people who have been
17 -- by children who have been sexually assaulted?

18 A. Yes.

19 Q. Okay. And what are those?

20 A. There are certain symptoms of trauma that must be
21 present in order to diagnose someone with a traumatic
22 response or post traumatic stress disorder, and those include
23 certain things -- there are certain categories and the way
24 that it is written in the Diagnostic Statistical Manual, you
25 have to have a certain number under each category. The first

1 category is that there has to have been some type of
2 traumatic event where someone was harmed or felt like that
3 they were in danger in some way and that that caused them a
4 significant amount of distress.

5 MS. INZERILLO: Your Honor, I'm going to object.

6 May we approach at this point?

7 (SIDE BAR CONFERENCE OFF THE RECORD OUT OF THE
8 HEARING OF THE JURY AT 11:39 A.M..)

9 BY SOLICITOR ANTHONY:

10 Q. Okay. Are there any specific trauma symptoms that
11 children would tend to show following a sexual assault?

12 A. Yes.

13 Q. And what are those or some of those?

14 A. Some of those would be hyper-vigilance. A very
15 exaggerated, startled response. There could be distressing
16 intrusive thoughts about the event that occurred. These can
17 sometimes cause really significant problems with
18 concentration because they are having intrusive thoughts
19 and they are not able to get the event out of their mind.

20 A lot of people can have and one of the symptoms
21 certainly is agitation, outbursts of anger. They also can
22 have feelings of detachment that lead to very significant
23 depression and anxiety and the symptoms that would go along
24 with both of those; lack of sleep, problems with appetite.
25 Those types of things.

1 Q. And in regards to any of your treatment of [REDACTED]
2 [REDACTED] did you make observations and form opinions as to
3 specific symptoms of trauma suffered by her?

4 A. Yes.

5 Q. And were there trauma symptoms that you observed in
6 regards to her family relationships?

7 A. Yes.

8 Q. And what were those?

9 A. Over time [REDACTED] became much more agitated and had a
10 lot of feelings of guilt and separation and detachment from
11 her family. She became increasingly more angry and had
12 some —

13 MS. INZERILLO: Your Honor, I'm going to object.

14 THE COURT: I overrule your objection.

15 Go ahead.

16 A. Thank you. Had some very violent outbursts toward
17 people in her family, her dad and her brothers. And she
18 became more withdrawn. She had a lot of feelings of
19 loneliness and detachment. She became so clinically
20 depressed that I was concerned about her and referred her to
21 a psychiatrist.

22 Q. Okay. And when did you do that?

23 A. I referred her to the psychiatrist in September of
24 2011.

25 Q. Okay. All right. And then were there trauma

1 symptoms that you became aware of in regards to
2 concentration?

3 A. Yes.

4 Q. What were --

5 A. Yes. She was having a very hard time concentrating
6 because of the intrusive thoughts. She was not able to keep
7 her mind on her school work. She was not able to listen in
8 class. She was having very significant problems with sleep
9 patterns because of the intrusive thoughts. And her grades
10 significantly dropped during the period of time right before
11 I had referred her to the psychiatrist.

12 Q. And was there -- were there trauma symptoms that you
13 observed in regards to the infliction of physical harm?

14 A. Yes. There were reports of her cutting herself.

15 Q. Now, in your treatment of [REDACTED], the reports of
16 physical aggression on her part, when did that first start?

17 A. The most significant events that I documented began
18 in July of 2010. I'm not saying that there hadn't been
19 anything ever prior to that, but as far as my notes it was so
20 concerning that there is significant documentation about it.
21 They had come in that day and there was lots of anger. There
22 had been some hitting. There was a lot of acting out. A lot
23 of rebellion against her dad and some rules and some
24 boundaries that he was trying to put in place for her.

25 She was becoming increasingly more agitated and that

1 went on for several months. She became very belligerent.
2 There was an incident where the police had to be called.
3 because of a physical incident between her and her father and
4 her grandmother and her step grandfather.

5 Q. Okay. And this began to be reported to you in July
6 of 2010?

7 A. July of 2010, yes.

8 Q. Now, is there a condition - In your field is there a
9 condition that once you see a certain set of these symptoms
10 you attribute to a person, a diagnosis you give to a person
11 based on an accumulation of these symptoms?

12 A. Yes. Yes.

13 Q. Okay. What is that?

14 A. It is very important that if you start seeing these
15 symptoms as a therapist, and the person is having problems
16 functioning, you want to address it as quickly as possible if
17 medication is needed because of the likelihood of self harm
18 and the depression becoming more severe and more chronic.

19 When I was treating her, the symptoms that she was
20 exhibiting met the criteria for post traumatic stress
21 disorder, and because it was so severe I was worried about
22  and her functioning and just how depressed she had
23 gotten and whether she might engage in more self injury, so
24 I referred her to a psychiatrist at that time to assess her
25 for the possibility of that person making a diagnosis and

1 then being able to treat her with medication to help with her
2 symptoms.

3 Q. And did you form an opinion as to whether [REDACTED] [REDACTED]
4 suffered from post traumatic stress disorder?

5 A. Yes. That was my opinion when I referred her.

6 Q. And when you say or when the people in your field say
7 somebody has post traumatic stress disorder, what does that
8 mean has happened?

9 A. It means that they fit a certain number of criteria
10 that is listed in the *Diagnostic Statistical Manual* that
11 would indicate that they have that condition, and the first
12 one is that an event occurred that was traumatizing to that
13 person that made them feel for their sense of safety, and
14 that they felt helpless and they felt like it was something
15 that was out of their control.

16 Now some people can have that event and not develop the
17 rest of the symptoms. We don't know exactly why. We do know
18 there are factors involved but you can have an event and not
19 necessarily go on to start exhibiting all of those symptoms.
20 But if you do start exhibiting symptoms and there is a
21 certain number of them, and based on the severity, you can
22 make the diagnosis, and since it is a very serious disorder,
23 it often needs medical treatment in the form of a
24 psychiatrist and have an assessment for medication.

25 Q. And what kind of things would be sort of - typically

1 what are some stressful events that could lead to a person
2 having post traumatic stress disorder?

3 A. There are several categories, but certainly any kind
4 of physical attack, physical abuse, a crime is committed
5 against you, a sexual assault, being in a war situation.
6 Anywhere that you might fear for your life or your safety or
7 your sense of whether you are safe or not. Being in an
8 accident. Natural disasters can be -- can also be included in
9 that list.

10 Q. And so you began working with [REDACTED] in
11 regards to the assault allegations she made in March 2011;
12 is that accurate?

13 A. Yes. When that disclosure was made, I started working
14 with her specifically about the sexual assault.

15 Q. And what was her progress in the counseling with you?

16 A. Well, as I stated, she got -- her symptoms became much
17 more severe between probably July and September. That is
18 when the symptoms became very severe, acute, very concerning
19 to me about her safety.

20 After she saw the psychiatrist in October and started on
21 medication, she began to improve and that improvement -- that
22 progress was pretty significant and around January of the
23 next year she had been on the medication a couple of months
24 she began reporting and reporting much better functioning.
25 She was not as depressed. She -- I actually noted in my file

1 THE COURT: Call your next witness.

2 SOLICITOR ANTHONY: ~~The next witness is Lieutenant~~
3 Humphries.

4 THE COURT: Please come forward and be sworn.

5 (WHEREUPON, TERRY HUMPHRIES,

6 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

7 DIRECT EXAMINATION

8 LIEUTENANT TERRY HUMPHRIES BY SOLICITOR ANTHONY:

9 Q. Would you state your name, please?

10 A. Terry Humphries.

11 Q. Mr. Humphries, how are you employed?

12 A. Union County Sheriff's Office.

13 Q. How long have you worked with the sheriff's office?

14 A. Twenty-six years.

15 Q. And what's your position there now?

16 A. I'm an investigator.

17 Q. How long have you been an investigator?

18 A. Probably about twenty of those years.

19 Q. I want to take you back to March 21st 2011. Did you
20 become involved in a sexual assault investigation concerning

21  on that day?

22 A. I did.

23 Q. And how was it that you became involved in the case?

24 A. One of our other investigators, Roxie Belue, had came
25 to me and told me that she had talked to our captain, Captain

1 McNeal, and that she had expressed to him concern about a
2 ~~case she had been given where there might be a possible~~
3 conflict with a family, of knowing the family, of having some
4 kind of relationship with the family when she was younger.
5 And she told me that Captain McNeal had asked that I assist
6 her with the investigation.

7 Q. And so how did you get up to speed on what was going
8 on in the case involving Mr. Berry?

9 A. Investigator Belue and Michelle Shugart, a victim's
10 advocate, had already taken a statement from [REDACTED]
11 that previous Friday, and I saw the statement, and then I
12 requested that Investigator Belue get [REDACTED] back to
13 the sheriff's office so we could talk to her again.

14 Q. And what did you — did you talk to her again that day,
15 on the 21st?

16 A. Yes, sir.

17 Q. Okay. And what day of the week was that?

18 A. Monday.

19 Q. That was a Monday. Okay. And did she give you
20 another statement?

21 A. Yes, sir.

22 Q. Okay. And did that statement make a report of sexual
23 incidents?

24 A. Yes, sir.

25 Q. Where did they report of sexual incidents or where did

1 the statement —

2 A. The new statement at her house and at New Life Baptist.
3 Church.

4 Q. And what was the next thing you did after you spoke
5 with [REDACTED]?

6 A. After I spoke with [REDACTED], I remember that day
7 Ms. Shugart talked to me about getting an evaluation with the
8 Children's Advocacy Center and I told her to go ahead and at
9 least get the physical evaluation. And later on as a result
10 after we had looked over and talked about the statement, I
11 signed the warrant on Stephen Berry.

12 Q. And what was the charge that you requested a warrant?

13 A. Criminal sexual conduct with a minor, second degree.

14 Q. Okay. And when you did the warrant, what were the
15 offense dates placed in the warrant?

16 A. From May of 2010 to [REDACTED] the [REDACTED] of 2010.

17 Q. Okay. What was the significance of [REDACTED] of
18 2010?

19 A. It was [REDACTED] sixteenth birthday.

20 Q. Okay. So after the warrant was taken for Mr. Berry,
21 what efforts began to be made by the sheriff's office to find
22 him and place him under arrest?

23 A. At that time once I obtained the warrant it was
24 entered into our system in the sheriff's office in our CAD
25 system and I believe at that time I gave the warrant to

1 (JURY EXITS COURTROOM AT 02:32 P.M.)

2 THE COURT: Counsel for the defense.

3 MS. INZERILLO: Thank you, Your Honor, may it please the
4 court. Your Honor, before we get started with the DV Motions
5 with the Court's indulgence, during Ms. Roseborough's
6 testimony I did ask upon an objection to approach the bench,
7 I would just like briefly to put that objection on the
8 record.

9 THE COURT: Certainly.

10 MS. INZERILLO: At the time Ms. Roseborough was
11 testifying to a diagnosis of PTSD and my objection on that
12 was that there had been no testimony as to her qualification
13 to make that diagnosis she had been qualified. I believe the
14 testimony was that of a social worker but nothing in terms of
15 a M.D., or anything like that that would qualify her so that
16 was just the basis of my objection.

17 THE COURT: All right. And in the sidebar I determined
18 that you don't have to be an M.D., to diagnose post
19 traumatic stress disorder; that her qualifications were broad
20 enough to encompass that. And I did agree that it had not
21 been mentioned to that point and we had some concern that we
22 would be launching into that line of testimony without any
23 predicate. That was cured by counsel for the State and I did
24 overrule that objection. But it was entirely direct and it
25 was timely made and that's my ruling. That was my ruling and

1 is my ruling.

2 MS. INZERILLO: Thank you, Your Honor. Your Honor, at
3 this time the Defense makes a motion for a directed verdict
4 for the record. And we would renew all previous motions and
5 objections.

6 THE COURT: All right. Well, the motion is denied.
7 There is the evidence of the indictment. The elements are
8 basically that the defendant being over the age of eighteen
9 or being an adult and being older than the victim, [REDACTED]
10 [REDACTED] who was at least fourteen at the time by committing
11 criminal sexual conduct in the second degree in that he
12 digitally penetrate her and engage in sexual intercourse with
13 her, again, him being older than her at the time and she
14 being between fourteen and sixteen. At least fourteen but
15 less than sixteen. So I find that the elements have
16 certainly been presented. Of course, credibility and all the
17 other matters, that's not of course a finding of guilt but I
18 do find that there is evidence, direct evidence from which a
19 jury could reach a conclusion that Mr. Berry did in fact
20 commit the offense with which he is charged.

21 Mr. Berry, can you hear me?

22 MR. BERRY: Yes, sir.

23 THE COURT: We've reached the point of the trial where
24 you have a right to present a defense but you do not have to.
25 You are presumed innocent of this charge and you do not have

1 circumstantial.

2 THE COURT: Well I think - I mean I'll charge it but

3 I note your objection.

4 MS. INZERILLO: Thank you, Your Honor.

5 THE COURT: Anything else before we get the jury in?

6 SOLICITOR ANTHONY: No, sir.

7 MS. INZERILLO: No, Your Honor.

8 THE COURT: All right. Bring in the jury.

9 (JURY REENTERS COURTROOM AT 10:21 A.M..)

10 THE COURT: Counsel.

11 MR. DELANEY: May it please the Court.

12 THE COURT: Yes, sir.

13 MR. DELANEY: Stephen Berry was a easy mark. We're
14 not and we haven't from the beginning of this case hid
15 from anything. He did some stupid things. You can call it
16 odd and you can call it weird. You can say in your house
17 that wouldn't happen but what did you hear? You heard
18 that this was something that wasn't unusual for him to be
19 in his boxer shorts in the evening. You've heard that
20 ~~that this was something that wasn't unusual for him to be~~ was like a daughter to him. You heard
21 that from his daughters that this wasn't unusual. They
22 weren't taken back shocked.

23 You have to decide this case based upon what he's
24 charged with. He's not charged with being in bed on
25 different parts of the bed in his room watching TV.

1 Where you've heard, that was not unusual. At his house.

2 He's charged with sexually assaulting, having sex,

3 digitally penetrating [REDACTED] on all these

4 occasions. That's what he's charged with and that's

5 what you have to decide here today. He's not charged

6 with going over to someone's house wearing his bathing

7 suit. He's not charged with that.

8 The case against Stephen Berry is riddled with

9 inconsistencies. The things that don't add up, with

10 things that don't make sense, with stories that change.

11 From the very beginning of this case it is built - it was

12 based upon a lie and that lie triggered everything else.

13 [REDACTED] tells Kaitlyn Koepke that Stephen comes

14 down tells her to get under the covers. She says no. He

15 then forces her. Something then happens. Then she goes

16 to sleep then there's a text message to her saying you're

17 not a virgin any more. Kaitlyn Koepke takes that

18 information and you heard her testimony what she put

19 in her statement was true if what [REDACTED] told her. She

20 takes that information she goes to the high school to the

21 guidance counselor on March the 18th, 2011. Three days

22 later after talking to one person an arrest warrant is

23 issued.

24 The thing about the truth, ladies and gentlemen, the

25 truth stays the same. The truth is consistent. The truth

1 doesn't change. And what we heard from [REDACTED] in
2 this case from this stand and from other people that have
3 testified in this case is that her story changes and it
4 changes and it changes. Because what did she tell you?
5 What did she tell you about that night at the Berry
6 residence in the basement? She describes some type of
7 spooning that was going on; that Stephen was behind her
8 and she feels his hands on her hips. And then the next
9 thing she's not really sure what happens, what's going
10 on, but low and behold it's a penis inside of her. And
11 then she says the penis then is just laying on the floor.
12 And then you hear something after that that is never in
13 her statement that we never heard before. And what is
14 that? Then she says she didn't go to bed at that time.
15 She gets up, she goes and uses the bathroom to see if
16 she's bleeding.

17 You heard she said she received a text message saying
18 that she's not a virgin any more. That's what she told
19 in her statement, that's what Kaitlyn Koepke said. But
20 now, now the change. No I didn't send a text message. I
21 didn't receive a text message from Stephen Berry. I didn't
22 receive one saying I'm not a virgin any more. Now it was
23 just typed in the phone and showed to us. That's pretty
24 convenient when you know when you're phone gets taken into
25 evidence and you know your phone is going to be

1 analyzed to see what text messages are on there. That's
2 pretty powerful evidence that text message is on the
3 phone. But no, now her testimony is no I didn't receive
4 any test message he just typed it and showed it to me.

5 And doesn't it just sound a little bit better than
6 after this assault happened that she just didn't go to
7 bed. Doesn't it sound a little bit better now that after
8 wards she went to use the bathroom to check that she was
9 bleeding. It sounds a little better.

10 And I want you to remember yesterday when Courtney
11 [REDACTED] testified. And you're gonna hear well she couldn't
12 remember what month it was, what year it was. I think
13 its important how does she remember? How does she
14 remember? She's thirteen years old, she had an opportunity
15 to spend the night with her sister's older friend. She
16 was able to tell you exactly what movie was on that night.
17 She couldn't remember what month it was but she remembered
18 exactly what - You heard her say what movie was playing.
19 You heard her testimony that she did not leave [REDACTED]
20 [REDACTED] side that night. She said they left one time to
21 go get some water. She left with her, came back down
22 stairs with her. It's important that you remember that, to
23 think about how people remember things.

24 And now we heard the first incident that happened in
25 this case. The first allegations she's making is that

1 on Catherine Street Mr. Berry's old house they were
2 moving out but she says during that time - and you heard
3 what she said. She described I felt something pretty bad,
4 something pretty terrible that day. She's up there and
5 all of a sudden the next thing she knows Stephen Berry's
6 behind her grabbing on me. She pushes him away. No.
7 She looks at him like he's stupid. Comes back at her
8 again gets her pants down and fingers her. Attempts to
9 anally rape her. That's pretty brutal. That's pretty
10 brutal.

11 What did we hear? We heard she goes home. You heard
12 it's a residential neighborhood, neighbors all around, and
13 she goes home. She goes home where there is a police
14 officer at home. And then we hear about a week later
15 Stephen's calling her wanting her to go to his new house.
16 Her grandma won't let her go but she talks her grandma
17 into it to let her go one week after this brutal
18 attempted rape. Does that make sense? Does that make any
19 type of sense, ladies and gentlemen?

20 You heard her testify; we all heard about the
21 bathing suit. What I want you to think about that day
22 is this. She says he comes in goes directly into her
23 room and they stay in there for some time. You heard
24 testimony she changed her clothes; he was sitting on the
25 bed and then all of a sudden the next thing she knows

1 she's getting fingered so she stays in there some time.

2 You heard Andrew [REDACTED] her brother, what did he
3 say? He said she goes in, the room he comes in the house
4 they go down the hallway. [REDACTED] was showing him something
5 in her room some Bible versus. And I ask him, are you sure
6 Stephen didn't go in that room? No he went in. He went in
7 and shut the door. He stayed in there for a while. I
8 said what is a while? He said fifteen to twenty minutes
9 is a while. And then he says about another five minutes
10 or so passes and he says a phone call comes in. He says
11 after about fifteen or twenty minutes a phone call comes
12 in he goes to the door and tells Stephen he's got to leave.
13 Stephen stays in the room about another five minutes later
14 he leaves.

15 But what did Sherrie Tucker say? Sherrie Tucker said
16 that, and we all heard about how far away their house is
17 from the [REDACTED] house, she said that she called there.
18 That's the fastest I've ever seen him leave. He's out
19 that door so quick. I called right away. She got him
20 going out of the house almost as soon as he got there. But
21 then we got other people, we got [REDACTED] we got her
22 brother putting him in there for twenty, twenty-five
23 minutes at least. That doesn't add up, ladies and
24 gentlemen. That doesn't make sense.

25 You heard from the stand the first time she was ask

1 the question couldn't remember what she told the doctor,
2 Doctor Henderson regarding oral sex happening or not. Then
3 Mr. Anthony ask her was there any oral sex in this case?
4 Did he ever perform, Mr. Berry ever perform any type of
5 oral sex, any oral sex in this case? No. But what did
6 Doctor Henderson say here today? She reported to Doctor
7 Henderson that oral sex occurred in this case. The truth
8 stays the same it doesn't change. This story just keeps
9 changing. It's changed from the very beginning of this
10 trial. One of the first things she said until the very
11 last witness in this trial.

12 Now let's talk about this witness, Doctor Henderson,
13 because I'm gonna talk to you in a few minutes about the
14 burden, who's got the responsibility to present evidence
15 in this case? Who is the burden on? And the burden is on
16 the State. The State's got the burden to prove this case.
17 This is a doctor that treated her after these allegations
18 we made. We called the doctor. They didn't call the
19 doctor, we called the doctor. And you heard her testimony
20 [REDACTED] hymen was intact. Yes its possible that
21 sex can occur and the hymen can still be intact. It's
22 possible the reality is it's still medically the hymen
23 was intact.

24 The next thing I want to talk to you about is, is
25 Jason Smith. And you heard the lead investigator in this

1 case said as much, Jason Smith, he's the bigger piece of
2 this puzzle. He's the guy that makes it all make sense.
3 All of her stories make sense. Jason Smith, his testimony
4 doesn't corroborate anything. In fact it's the complete
5 opposite. [REDACTED] tells us that the reason she
6 doesn't report anything, the reason that she stays quiet
7 about this is because she's been promised in exchange for
8 relieving stress she can have contact with Jason Smith.
9 She can talk to Jason Smith. And what they are wanting you
10 to believe is this went on for ten months, ten months.
11 My math says forty-four weeks, approximately ten months.
12 You heard testimony that this was going on approximately
13 one time a week. So if you do the math we got over forty
14 incidents. And the deal is, hey, let me do this to you
15 you're gonna be able to talk to this guy. That's why you
16 gonna stay quite. Well what did we hear? We heard that on
17 March the 23rd, that on March the 23rd Jason Smith was
18 interviewed by Lieutenant Humphries.

19 And what did Jason Smith tell Lieutenant Humphries?
20 Only once, only one time he answered a call and it was [REDACTED]
21 [REDACTED] on the other end and it was Stephen Berry's cell
22 phone. One time. He said he wasn't interested in her.
23 Wasn't interested in her. One time. He testified it was two
24 or three times and it was maybe two to three minutes each
25 time so if you want to take that and you want to believe

1 that it's sixty-nine minutes. Is what the deal was she got
2 to talk to him sixty-nine minutes over then months? But you
3 heard what he said almost two years ago, Lieutenant
4 Humphries, one time.

5 And what did Jason Smith say? He said he was around
6 Stephen Berry quite a bit. He was very active in the
7 youth group at this time. He would go to all the things
8 at New Life. Wednesday night, Sunday, he would go to
9 the retreats, he would go to Mr. Berry's house. Not one
10 time did Mr. Berry do anything to try to put them together.
11 He said that. Nothing, nothing. But what did he also
12 say? Stephen Berry did everything he could to keep them
13 apart. That's what the evidence shows in this case. He
14 did what he could to keep them apart not put them
15 together. He kept them apart. That just doesn't add up.
16 That's their big piece of the puzzle. It makes no sense.
17 It doesn't add up.

18 Next we heard from Eddie Williams and Eddie Williams
19 testimony I would submit makes no sense. Eddie Williams'
20 testimony was full of inconsistencies, full of
21 contradictions from witnesses' that testified right after
22 him. Eddie Williams - I was asking him questions, Well
23 how many times did you call Stephen, how many times did
24 your grandmother call Stephen to have him come to the
25 house and meet with you all and sit down at the REDACTED s

1 having these arguments? No never. I didn't do that.
2 One thing I never made any calls. I'm not sure what my
3 grandma - I'm not sure what my mother did. But what did
4 Andrew the son say right after he testified? He said yeah
5 I was aware. My dad, my grandma, will be calling Stephen
6 after these fights and Stephen would come over there. I
7 submit he is not being truthful to you all. He was not
8 being truthful. And this doesn't make any sense the
9 information to what he wants us to believe?

10 And we heard that he had this concern, he had this great
11 concern going back to the summer of 2010 into the fall of
12 2010, information that he said that he had was that Stephen
13 Berry would keep coming to the house and he would get in
14 touch with him saying don't come back. Don't come back,
15 don't come there if I'm not there. And he says he had
16 three different conversations like that. And the
17 information he said he was getting at that time was that
18 his daughter was being taken to a bedroom by Stephen
19 Berry the doors being shut, the sons are having to go
20 outside and do whatever, play football. This is a guy that
21 - this is a dad that became so concerned over - I would
22 say it looks like - it sounds like a pretty minor incident
23 behavior that he was observing between Jason Smith and
24  He was seeing some stuff at church that
25 didn't quite set right. Some text messages. This guy

1 was eighteen, his daughter was younger than him. He
2 became so concerned about that contacted Stephen, had
3 conferences. Stephen went to go talk to Jason Smith's
4 parents. He had all of the concern about that.

5 Now what he wants us to believe is that a forty-year
6 old man is doing all these things and all he does is have
7 a couple of conversations with him. This is a police
8 officer. This is a police officer, ladies and gentlemen,
9 it makes no sense if that was really going down and Eddie
10 Williams is getting these calls when he's at work from
11 his mother, Stephen's up at the house kids are outside,
12 kids are telling me him and [REDACTED] are in the bedroom
13 with the door shut. Wouldn't he be hauling his butt
14 home to get to that house? Wouldn't something be done?
15 An attorney, very familiar with people that our trust - all
16 types of things that can be done to stop that. It
17 just doesn't add up. It doesn't make sense.

18 And Sherrie Tucker she told you how concerned she
19 was about the situation. That she would call and she was
20 threatening to call the law. Well her son's the law. Her
21 son's a police officer. And we heard how close Sherrie
22 Tucker residence is to where Eddie Williams' house is.
23 We didn't hear anything that she went over there, walked
24 over there. A hundred yards. She was so concerned. We
25 heard nothing about that. All you heard is Oh we trusted

1 him, we put our trust in him. We trusted him so much.

2 They're speaking out of both sides of their mouth. They

3 saying how much they trust him but then Eddie Williams
4 gets up here and tells you Oh I had him do this one thing
5 to keep [REDACTED] and Jason separated. Nothing else though.
6 Other than that he was just coming by all the time and
7 I didn't want him there. But oh he trusted him so much.
8 It just doesn't make sense.

9 Now, you heard [REDACTED] and you heard Ms. Tucker,
10 [REDACTED] grandmother, say and you heard her testimony, we
11 finally got our [REDACTED] back. And we heard and the State has
12 made -- and they're gonna make a big deal to you in a
13 little bit I'm pretty sure about her behavior and how
14 Mr. Berry moved to [REDACTED], moved to Jonesville,
15 that's when her behavior took this turn. I ask when she
16 just started acting out and it makes all the sense in the
17 world now because of this behavior. But what did we
18 hear? We heard she was cutting herself before he ever
19 came to Jonesville. That was her testimony. She was
20 cutting herself before then. I'm not a psychiatrist, I'm
21 not a psychologist. Obviously it takes one to sit here
22 and say to you all someone's cutting their self you got
23 some issues. You got some problems and those problems were
24 there long before my client went to Jonesville. She was
25 cutting herself before then.

1 And what else was going on during that time when this
2 bad behavior was supposed to be supposedly happening? What
3 was going on? What was going on is she wasn't being
4 allowed to be with the guy she loved. You think that
5 may have something to do with the way she was acting? You
6 heard all about that. You heard the things that was
7 going on at that time, who she wanted to be with, what
8 Eddie Williams testified to. She didn't want to be with
9 this guy no matter what she was gonna be with him. Who is
10 that one person that was in the way? Who kept them apart?
11 That man. That man kept them apart. What was the last
12 thing Jason Smith testified to yesterday? They're
13 together now. She got what she wanted.

14 And one thing I want you to think about is, well,
15 during all the conversations you heard about how concerned
16 the [REDACTED] family was with [REDACTED] and what was going on
17 with Stephen Berry. Do we hear anything that one time,
18 just one time, Eddie Williams, Sherrie Tucker, the
19 counselor Ms. Roseborough, anybody ask her is everything
20 all right? Anything going on? Do we need to know about
21 something? Is something going on with Mr. Berry? We
22 didn't hear that one time. All this concern, all this
23 concern and we didn't hear one thing. Did they ask her?
24 No. And why is that? Because there was nothing going on.
25 There was nothing going on. A dad wants to believe

1 his daughter.

2 And I anticipate the State -- How did she make this up?

3 I'll ask you. Why would she lie? I think that's what you
4 need to think about is why would she lie? I think there
5 is a lot of things out there of why she would lie. And
6 sometimes it just can't be explained. People lie. People
7 tell lies. And we've already seen this girl will tell a
8 lie. It started at the very beginning of the case. It
9 changes and it changes and it changes.

10 And Ms. Roseborough, and who is Ms. Roseborough? She
11 is the [REDACTED] family counselor. She is paid by the
12 [REDACTED]. She said well I'm not sure exactly how I'm
13 paid if it's insurance or if they pay some. She's paid
14 by the [REDACTED] she's their family counselor. And what
15 is some of the things she said? She said well, I have
16 this note I made it in here back in 2010 that she would
17 confine - she felt comfortable with Stephen Berry. That was
18 it. That's it, one note.

19 Now she's gonna come up here a couple of years later and
20 say oh that made me raise my eyebrows. She wasn't concerned.
21 You heard all of the qualifications she's had and the
22 thousand of hours of qualifications and she's an expert in
23 child abuse, child sexual abuse and she's recognizing these
24 signs. She's an expert. [REDACTED] went back to see her
25 starting in February of 2010. A couple of months before this

1 supposedly happened and saw her through that entire time.
2 She's an expert picking up on these signs. She didn't pick
3 up on anything. She says oh well after March I started
4 seeing signs. After the disclosure was made I started seeing
5 signs of trauma. But nothing before that though. This
6 expert is recognizing these signs. She didn't recognize
7 any signs. Oh after the disclosure was made I began
8 treating her for the next how many months and that's when
9 all this trauma was happening and her behavior was so
10 bad.

11 Could that be based on some guilt, that you're
12 lying and you're caught in a really bad situation?
13 Couldn't that behavior have something to do with that?
14 And she tells you that this delayed reporting is not
15 uncommon. It's very common someone would delay, people
16 of this age will delay reporting. It's not uncommon. And
17 some of the reasons of that is, you know, they feel, the
18 victim feels they won't be believed. The victim feels,
19 you know, they don't want to go to the police and have to
20 talk about it. [REDACTED] - that's not why, that's
21 not what happened. What did she tell you the reason she
22 didn't say anything is she wanted to keep having contact
23 with Jason Smith. Which obviously we already heard that
24 was totally contradicted. She didn't want to lose her
25 best friend. And she wanted to keep having contact with

1 Jason Smith. None of this no one will believe me or
2 anything like that.

3 And I'll submit to you, ladies and gentlemen, there
4 is a delay in reporting because there's nothing to report.
5 Nothing was going on. And she talked about sometimes there
6 is this delayed reporting because the offender is
7 grooming the victim, is getting the victim in, you know,
8 just to take some small steps, you know, and they're
9 grooming them to keep quite and things just happen slowly
10 over the course of time. Well what did we hear here? The
11 first incident, the first alleged incident the grooming.
12 There was no grooming going on. What she described is
13 the first alleged incident. As I said to you earlier,
14 no grooming, there is no grooming going on in this case,
15 ladies and gentlemen.

16 And what did we hear from Jadea Berry in this case?
17 The State's gonna talk - they gonna get up here and say
18 to you I expect look what his daughter said, look what
19 Jadea said. His own daughter said she put it together,
20 she put the pieces together. You heard Jadea testify and
21 I'll submit to you Jadea was truthful with everything she
22 said good and bad, good and bad, she told you. She
23 thought she had [REDACTED] back. She said she had [REDACTED]
24 back. She believed what [REDACTED] was saying. Why was that?
25 She said she went and met with the police. She heard some

1 things. She talked to [REDACTED] about it. She had [REDACTED]
2 back. She is someone that is consistent with a lot of

3 things in this case. You heard her say a few days after
4 this, a few days after giving her statement, things began
5 to change. The more time she spent around [REDACTED]
6 the more she began to began to reconsider things.

7 And you heard well your dad had you over for Christmas
8 and got you a Christmas present this year and you had a new
9 baby at that time. This wasn't Christmas. Her dad was still
10 in jail. She didn't - And she described what she saw and
11 she said it, it was nothing that shocked her at the time.
12 It was something that happened in the house and it was not
13 that unusual they would go in his bed and sit in his bed,
14 get in his bed. It wasn't that unusual. And she testified
15 that she saw anything inappropriate.

16 Now what are they trying to do because I think one of
17 the last witnesses you heard from the State, Lieutenant
18 Humphries, says that oh there was a lot of things she
19 said to us that wasn't in the statement. And you heard
20 the question, you heard how they're trained to put in their
21 reports things that are important and being accurate to
22 a detail and put things in the case, the important things
23 to document them. And what did he tell you? There was
24 no documentation to that. No documentation that Jadea
25 Berry saw them pulling up their clothes in the bedroom.

1 None of that. Jadea told you what she saw. She told you
2 what she saw in that room. Nothing about clothes or
3 anything like that, then all of a sudden two years
4 later that's the testimony we get, Oh that's all she
5 said. We didn't bring her in to get another statement;
6 we didn't document anything, I don't have anything in
7 my notes about this. But yeah two years later this is
8 what she saw. I didn't testify about this before under
9 oath. Why didn't you? Oh I was never asked. Where is
10 he sitting? He's sitting right next to the solicitor. You
11 think he tells them everything he knows about the case?

12 That's desperation, ladies and gentlemen. That's the
13 State's version of the Hail Mary pass. Let's just try to
14 throw what we can out there now. And that's kind of
15 what happened quite a bit during this trial. From a
16 lady Julia Krasinski who all of a sudden you heard she
17 testified under oath or she gave a statement before, Oh,
18 now two years later Oh I saw this in the recliner and it
19 looked inappropriate to me. There's a lot of that going
20 on in this case.

21 In this investigation, what investigation? They
22 talked to one person and they took out a warrant. And then
23 they talked to everybody else. That wasn't much of an
24 investigation. They took [REDACTED] cell phone into
25 evidence. And what did you hear about that cell phone

1 that they took into evidence? Not a peep. Not a peep
2 about that cell phone. There was something on that cell
3 phone, something on that cell phone that they could use
4 against this man don't you think you would have heard
5 about it? And if their in this - And if he's - And this
6 is going on for ten months and you heard her talk about
7 the calls she'd get from Stephen, text that she would get.
8 Wouldn't a phone back that up. Did you hear any evidence
9 about that? No. You heard excuses. You heard well I'm
10 not, I don't know anything about phones. Lieutenant
11 Humphries don't test - he didn't test the phone. They
12 sent it to SLED. They sent it to experts to look at the
13 phone. It's 2013, we can check someone's phone for text
14 messages and calls to corroborate what someone's saying.
15 It's not there, there's no corroboration. It doesn't add
16 up. They didn't take his phone. They didn't take
17 Jason Smith's phone. And that's where the investigation
18 stopped.

19 In a little while you're gonna hear from the judge and
20 what you're gonna hear is - I mentioned it a little
21 earlier, you heard it earlier in this case, the State
22 has the burden; they have the burden of proof. Stephen
23 Berry is presumed innocent. I say until he came into this
24 courtroom he was presumed innocent. What I'm asking you,
25 ladies and gentlemen, don't make that same mistake. He's

1 presumed innocent and that presumption can only be taken
2 away by you all. They have the burden to prove their case
3 beyond a reasonable doubt. That is the standard of proof
4 in this case.

5 And what is a reasonable doubt? You're gonna hear a
6 reasonable doubt is the kind of doubt that would cause you
7 to hesitate to act. It is the kind of doubt that would
8 not leave you firmly convinced. For you to find my
9 client guilty you have to be firmly convinced of his
10 guilt, ladies and gentlemen, firmly convinced. And I
11 contend what you heard in this case has got to make you
12 hesitant to act. It can't leave you firmly convinced with
13 all of the inconsistencies that we've heard throughout
14 this case, all of these things that just don't add up.
15 Yeah we got him and they are gonna get up here and I
16 expect in a few minutes and jump up and down and say,
17 He was under the covers with [REDACTED] They've
18 got to prove their case. That doesn't prove anything. It
19 doesn't. It wasn't that unusual, it was common; at the
20 Berry house they treated her like family. I'm not saying
21 that's normal for everyone else. That house you heard
22 it wasn't that normal. He was an easy mark.

23 I ask you at the beginning of this case to please
24 listen to everything. Listen to all of the testimony;
25 hear all of the evidence and don't make a rush to judgment

1 because these kind of cases - And we're human, we hear
2 a fifteen year old sexually assaulted over a ten month

3 span by a forty year old man, it's a tough case. It's
4 tough to hear about that type stuff. But I ask you, don't
5 make that rush to judgment. Look at everything see if it
6 adds up, see if it makes sense.

7 The system we have it's not perfect but it is the
8 best system in the world. This system of a trial unlike
9 many other countries this is the best. Perfect? No. This
10 system demands more. Stephen Berry deserves better than
11 to have these type of allegations brought against him
12 without some type of consistency and corroboration. Some
13 thing that makes sense without lies, without stories that
14 change. It just doesn't add up.

15 And what do we hear because we got and you'll hear,
16 well Stephen Berry's daughters they testified and of course
17 they love their dad. They're gonna testify for their dad
18 but again remember, remember how people remember things.
19 How does Jadea remember that she was at the Catherine
20 Street address with Stephen and [REDACTED] How does she
21 remember that? She said she remembers that because
22 [REDACTED] was helping her move things out of her room, her
23 room. And she was there every trip to get stuff out of
24 her room her and [REDACTED] and Stephen together.

25 How does Courtney remember? And if you look at the

1 witnesses for the State they are all family members of

2 [REDACTED]. And their stories just don't add up. They

3 are full of inconsistencies. But then there is a few

4 people that testified I submit to you are neutral.

5 Jason Smith. How much time did he spend in the youth
6 group during that summer into the fall? Sounds like a whole
7 lot. Spent a lot of time at Stephen Berry's house.

8 Spent a lot of time in the youth group. He never observed
9 any type of behavior that was inappropriate, any special

10 attention that was paid to [REDACTED] You heard Chris

11 Cochran testify he was in this youth group. He was one

12 of the guys that assisted Stephen in the youth group. You
13 heard what he saw and what he didn't see.

14 Forty-four weeks, forty-four weeks this is
15 supposedly going on. And the big piece of the puzzle is

16 Jason Smith. Forty-four weeks. One phone call. This
17 system demands better. Stephen Berry deserves better.

18 At the end of this case, ladies and gentlemen, when you
19 go back into that jury deliberation and Judge Hayes gets done
20 charging and telling you the law that applies to this case
21 that's when you're gonna have to start talking about things
22 and talking about things and talking about what you heard
23 and what you didn't hear in this trial. And that's when
24 you're gonna have to ask yourselves you're firmly
25 convinced beyond a reasonable doubt. Its not all doubt,

1 it's a reasonable doubt, and that's what we've got here,
2 ladies and gentlemen. Thank you.

3 THE COURT: We'll take a short break. We'll take a
4 break before we get into the next argument. Follow
5 the bailiff to the jury room.

6 (JURY EXITS COURTROOM AT 11:14 A.M..)

7 (COURT IN RECESS AT 11:14 A.M..)

8 (COURT BACK IN SESSION AT 11:27 A. M..)

9 THE COURT: Thank you. Take your seats.
10 Is the State ready?

11 SOLICITOR ANTHONY: Yes, sir, we are.

12 THE COURT: Defense ready?

13 MR. DELANEY: Yes, Your Honor.

14 THE COURT: Tell them - If any of them are in the
15 restroom wait until they get out. When all thirteen are
16 ready bring them on in but don't bring them in and leave
17 two in the restroom. Tell them when we know they all are
18 ready to come in.

19 (JURY REENTERS COURTROOM AT 11:27 A.M..)

20 THE COURT: You may proceed.

21 SOLICITOR ANTHONY: Thank you, Your Honor.

22 The decision that you all are going to be ask to make
23 here in just a few minutes really just boils down to
24 common sense. Okay. That's what we ask jurors is that
25 you use your common sense. And there are really two

1 possibilities in this case. Either [REDACTED] told
2 you the truth and Stephen Berry did these things to her.

3 Or she just lied. She just made the whole thing up and
4 somehow despite all of the evidence that you've heard that
5 verifies her testimony Stephen Berry didn't do anything to
6 her. And it's one or the other. And so what I would ask
7 you to do just to try and give you a frame work for
8 evaluating this case, is I would ask you to just look
9 at this evidence and use your common sense and decide
10 which one it is.

11 And I think a useful way to do that would be to just
12 think about all the stuff that you have to believe if Mr.
13 Berry didn't do any of this. Just think about all the
14 things you're gonna have to believe about this case if
15 Mr. Berry is not guilty.

16 First of all you're gonna have to believe that Mr.
17 Berry and [REDACTED] got in the bed together when
18 Mr. Berry just having his boxer's on and no shirt for a
19 completely innocent reason. And you're gonna have to
20 believe that [REDACTED] in bed with Mr. Berry in his
21 underwear for a complete innocent reason. A thirty-eight
22 year old man at the time takes a fifteen year old girl
23 in his bedroom shuts the door gets in the bed with nothing
24 on but his underwear and that's completely innocent
25 because that's what happened. Even Jadea Berry, Mr.

1 Berry's own daughter, says that she walked in on them in
2 the bed together under the covers. This didn't get in
3 the statement because of the calls that she told Terry
4 Humphries and that she told Investigator Belue that
5 she saw them pulling their clothes up when she walked in.
6 But she actually signed a statement saying that she walked
7 in on them in the bed under the covers and him with his
8 boxer's on. She says some other things too. She said
9 Mr. Berry would make [REDACTED] stay at the house with him
10 when Jadea left. She said he wouldn't let the two of them
11 be together. She said he would make Jadea move in the
12 bed so that he could be close to [REDACTED] in the bed. She
13 wrote all of those things down, ladies and gentlemen. She
14 wrote them all down.

15 And really the first juror in this case was Jadea
16 Berry. And when Jadea Berry. - -

17 THE COURT: Not the first juror, the first witness.

18 SOLICITOR ANTHONY: First - Well the first person -
19 I'm sorry. The first person to make a judgment about
20 what happened in this case was Jadea Berry. And when
21 Jadea Berry assessed the evidence she heard, she knew
22 that Stephen Berry was guilty and she told Eddie
23 Williams that. She told Eddie Williams that on the day
24 that she wrote her statement. That she came up there to
25 Mr. Williams and Ms. Tucker and Ms. Tuckers house and

1 they went to Mr. Williams house and she had this
2 emotional meeting with [REDACTED] and she told Eddie Williams

3 and Ms. Tucker, she said, I put the pieces together, I
4 know he did it. And that's what she said the day after
5 she wrote her statement.

6 Now it didn't take too long for Jadea Berry to
7 realize that Stephen Berry could do an awful lot more for
8 her than [REDACTED] And [REDACTED] is not
9 gonna be able to support Jadea Berry. [REDACTED]
10 isn't gonna be able to buy Christmas gifts for Jadea
11 Berry's child so in pretty short order Jadea Berry went
12 back to Stephen Berry and that's how we get this story
13 about Al Black convincing her that her daddy was guilty
14 and how she claims that Julia Krasinski wasn't even there
15 when she was writing the statement. That's how we get
16 now this account about what happened that day. But the
17 fact remains the truth really doesn't change.

18 And on March 22nd, 2011 Jadea Berry knew that [REDACTED]
19 [REDACTED] was telling the truth about her daddy and she knew
20 that because she used her common sense. She said that in her
21 statement as well. She used her common sense and she put
22 together the only explanation for what she had seen, and knew
23 the only explanation she had seen was that [REDACTED]
24 was telling the truth.

25 And it's interesting how when Jadea testified there

1 were always questions on cross examination about how she
2 changed her mind because of [REDACTED] But she never said

3 any reason why she changed her mind. It was well I
4 watched [REDACTED] and I decided my daddy must not a done it.
5 Well why? They could have ask her why but I never heard
6 a why. I never heard any reason, any explanation for
7 why now she believed her dad and she doesn't believe
8 [REDACTED] But I do know that now that she's got a child
9 and now her daddy's back to take care of her. And she's
10 back so tight, so tight with Mr. Berry that when Terry
11 Humphries called her last summer about meeting with me,
12 Mr. Berry was with her.

13 Now Mr. Berry just happened to get on the phone and he
14 told Terry Humphries stop calling his daughter. And you know
15 there's just no way that you're gonna get the truth out of
16 Stephen Berry's daughters. I don't want to say that they are
17 bad girls or anything. I mean they are probably under a lot
18 of pressure, you know, when you're living with your daddy
19 and his lawyer's show up at your house you probably are
20 gonna feel, you're sixteen years old, you're probably
21 gonna feel like you need to say something for your daddy.
22 So I'm not saying anything bad about them. I guess it's
23 perfectly natural what you saw yesterday from Courtney.
24 But you're just not gonna be able to get reliable evidence
25 out of them. And when it comes to what happened in

1 that house, you know, we brought you the two witnesses
2 that we could bring you. You know we had [REDACTED]

3 who was there and we got that statement from Jadea
4 Berry so we called her to testify, and that's who we
5 could call. And those witnesses both say that Mr.
6 Berry was in bed with [REDACTED] and Mr. Berry was wearing
7 his underwear. So that's the first thing you have to
8 believe, that's just a coincidence.

9 The second thing you have to believe is that Mr.
10 Berry left a pool party to go to [REDACTED] [REDACTED] house
11 wearing nothing but a bathing suit and that that was
12 completely innocent. Okay. You just have to believe
13 that was innocent too. And we had four people describe
14 that incident. We had [REDACTED] we had her two brothers,
15 and we had her grandmother. And you know one thing you
16 can say about the [REDACTED] family, and I know you heard a
17 lot a few minutes ago about how stuff they say doesn't
18 add up and they all say something different and all these
19 kind of things. Well you know one thing you can say
20 about them is they are not programed. You know they all
21 said what they remembered. Their details vary a bit but
22 the essence of what they said was all the same.

23 Mr. Berry was at the party, they left the party to go to
24 the house, he walked in the house, he had his bathing suit
25 on, he took [REDACTED] back to her room and he shut the door.

1 And then the grandma called and the grandma told him to leave
2 and he left. So giving your common sense, you know, just

3 use your common sense, given your common sense what do
4 you think happened in the bedroom? You know what do you
5 think happened? What innocent reason does a grown man
6 have for going to a fifteen year old girl's house where
7 there aren't any adults, wearing a pair of swimming
8 trunks, taking her in her bedroom, shutting the door and
9 while she's wearing a bikini. Okay. What innocent reason
10 is there for that?

11 So when [REDACTED] says yeah he took me in there and he
12 pulled down my swim suit and he stuck his finger in my
13 vagina, well, that makes common sense because all the stuff
14 you know leading up to that is consistent to what she says.
15 And so when you put those pieces together, you know that
16 he's guilty.

17 All right, the third thing. If all of this is
18 innocent, then you just have to believe [REDACTED]
19 just made it up for no reason and that's what you're
20 gonna have to believe. Made it up for no reason. Just
21 think about the cost of what this has cost [REDACTED]
22 She and Jadea Berry were best friends; they did everything
23 together. And Kim Roseborough told you, she told you that
24 this was just traumatic for [REDACTED] to loose Jadea
25 Berry her best friend. And I'm sure all of you can think

1 back to when you were a teenager and how at that time in
2 your life the most important people in your life were

3 probably your friends. And the kind of attachments that
4 you make to close friends of yours when you're a teenager
5 and [REDACTED] lost that. You know Stephen Berry
6 he didn't just ruin [REDACTED] life by having sex
7 with her. You know he ruined her life by taking her
8 best friend away from her. Okay. That's the other cost
9 of this to her. So what you have to ask yourself is
10 if this is just totally innocent, you know, if this is
11 totally innocent why would she be saying it? And you know
12 during the course of the trial I kept thinking you all -
13 that we'd hear something like - We'd hear some explanation
14 why she would make this up.

15 And I submit to you there has been no persuasive
16 reasonable explanation as to why she would make this up. As
17 a matter of fact as much as the defense wants to claim that
18 Mr. Berry was helping [REDACTED] [REDACTED] you would think that
19 Mr. Berry would be the one person she would want to keep
20 around. You know you'd think that if she - she would be the
21 last person she would say anything about it because they was
22 so tight and everything. And, you know they try to make her
23 daddy sound pretty bad, she fought with him all the time.
24 And Mr. Berry was the one that was always called to fix
25 things but why in the world would she say anything about him?

1 And then you know the one explanation I heard in closing
2 argument was well she said it because she wanted to see Jason

3 Smith. Well that's ridiculous. You think Mr. Williams is
4 gonna be more likely to let her around Jason Smith just
5 because she accused Stephen Berry of doing something
6 to her? I mean really that's the only thing that Mr.
7 Williams liked less control of his daughter? I mean come
8 on, that makes no sense at all.

9 And the thing is there is no reason. You know there's
10 no reason why [REDACTED] [REDACTED] would make this kind of thing
11 up. They want to talk about this incident where [REDACTED]
12 [REDACTED] claims that Mr. Berry put his penis in her while
13 she was watching a movie. And I have to say that sounds
14 like a pretty bold move. You know it sounds like a pretty
15 bold move by Mr. Berry. But I just want you to think about
16 this. Now [REDACTED] [REDACTED] is not a stupid person, and if
17 she really wanted to frame Mr. Berry the last thing she
18 would describe would be that incident with the movie where
19 she says three of his daughters are all in a room. You
20 know she could have just kept telling Terry Humphries
21 and Roxie Belue he'd get me alone and stick his finger in
22 me. You know she could a just kept saying that. Actually
23 that would be almost easier, you know, to present it that
24 way. But she didn't do that and she didn't do that
25 because she just told the truth. You know she told what

1 Mr. Berry did even when it might sound a little hard to
2 believe. She just told the truth.

3 And the other thing you have to think about is, you
4 saw [REDACTED] testify. And you heard Ms. Roseborough
5 testify about how she's doing good now. You know she
6 graduated high school early and then college. She's
7 doing good. Well, if - Did she really strike you as a
8 person that would be willing to go through all this over
9 a lie? You know and they would talk about well there was
10 suggested in closing - Or she was having all these
11 behavioral problems because of guilt. Well good grief, if
12 she was feeling guilt back then just think what she
13 would probably have to be going through now. You know
14 when she come to court all week and testified against this
15 man; I mean she'd probably be ready for an asylum right
16 now.

17 You know if this was guilt weighing on her. But she
18 wasn't being weighed on by guilt after she made that
19 disclosure. She was suffering, you know, she was
20 suffering from what this man over here had done to her.
21 And so there's just no reason to think from what you've
22 seen and heard this week that she is a type of person who
23 would come to court and make these kind of allegations
24 against somebody and then just do it for no reason at all,
25 or just some malicious reason. That's just not - That's

1 just not realistic. And the other thing is if she's
2 not lying there's no reason to think that her family is lying
3 either.

4 And that's the next thing. If this is - If Mr. Berry
5 didn't do any of this then what you have to believe is all
6 of this coming to her house, the things that her grandma
7 testified about, and the things that her brother's
8 testified about where he would come at night and all
9 those kind of things, and come whenever Mr. Williams was
10 working; you would have to believe that that was all
11 just innocent too you know. But all the people in the
12 [REDACTED] family said he started coming when he moved up
13 there to [REDACTED] and was real close to where they
14 lived. He just kept on coming.

15 And it's also very interesting, and I hope you
16 caught this, when Ms. Roseborough testified she said that
17 the first time the family reported really bad behavior
18 from [REDACTED] was in July of 2010. And that's significant
19 because first of all that's what Mr. Williams and Ms.
20 Tucker said. They said that's when it got really bad and
21 of course that's when he moved up there. He moved up
22 there in May. He started coming over that summer. So
23 guess what happens when he starts showing up at the house
24 all the time? Her behavior gets bad. And you know that
25 because it got reported. You know it did, it got reported

1 to that counselor they was seeing because of the visitation
2 situation. And at the time nobody connected the dots and

3 said, Oh, well that's because of what he was doing, but
4 that's what it was.

5 And the other thing is, Mr. Williams obviously would
6 not have wanted Mr. Berry up there all by himself. He
7 may have called Mr. Berry at times but there is no way
8 that you tell a man who is coming to your house wearing
9 what Mr. Berry was wearing that day, ha, just come on
10 up anytime. You know that's just not realistic.

11 So that's the other thing. If he didn't do anything,
12 all these visits, then they're just innocent. You know
13 this is just - there is no - you have to believe that
14 the visits don't have anything to do with what [REDACTED]
15 said they did. But that's just not realistic.

16 So the next thing, Jason Smith. You have to believe
17 that Jason Smith getting those calls from [REDACTED] on Mr.
18 Berry's phone don't have anything to do with this. No,
19 Jason Smith testified, he said at trial he got three or
20 four calls from [REDACTED] and talked to her and then he
21 screened out two or three. He told Terry Humphries he
22 actually took on call and he says he screened out seven.
23 But either way you look at it he got a number of calls
24 from [REDACTED] on Stephen Berry's phone. And that's
25 just exactly what you'd expect because [REDACTED] telling

1 the truth. Cause [REDACTED] said, well there were a few
2 times that he let me contact Jason Smith in return for
3 me letting him put his finger in me. That's what she
4 said. And the testimony that you got from Jason Smith
5 was basically what you'd expect. There were a lot of calls
6 because there were some other reasons that this was
7 going on. But that's just one part of it and so you have
8 to think that this has nothing to do with what Jason
9 Smith said was going on when [REDACTED] used Mr. Berry's phone
10 to call him that had anything to do with [REDACTED]
11 allegations if this ever happened. And once again, that
12 just doesn't make any sense.

13 And the other thing that's important is, everybody
14 testified like Jadea, Kaitlyn, Julia Krasinski; everybody
15 said [REDACTED] liked Jason Smith the whole time. And it's
16 not really all that important back then what Jason Smith
17 thought about [REDACTED] although they're seeing each other
18 now. So apparently there was a little something there,
19 but that's not really what's important. It's not that
20 important what Jason thought of her; it's important what
21 she thought of him. And she liked him and she wanted
22 access to him, that would be something that Mr. Berry
23 could use and Mr. Berry would know that regardless of
24 Mr. Smith's attitude he could still use her own
25 access to Mr. Berry.

1 One other thing, I think one last thing that you've
2 got to think about doesn't have anything to do with [REDACTED]

3 allegations, and that there is just a complete coincidence
4 if Mr. Berry didn't do anything; is you have to think that
5 Mr. Berry running off to Cherokee County the day the
6 police started looking for him. It's just - There's
7 some explanation for that and you just have to ask yourself,
8 you know, why would you do that if you hadn't done
9 anything? Wouldn't you be wanting to find out what
10 when the sheriff's office is calling around looking
11 for you? Wouldn't you want to find out what was being
12 said about you?

13 But this is a man, Mr. Berry is a man who got
14 accused of something and his reaction was to leave the
15 county, go up to Cherokee County and spend the night in
16 Cherokee County and the next day he gets on the phone
17 with his daughter and starts threatening to kill himself.
18 You know that was the testimony. The next day, that
19 Tuesday when they were taking Jadea's statement he kept
20 calling her threatening to kill himself. Wouldn't tell
21 her where he was; wouldn't tell her that he was gonna
22 turn himself in, wouldn't tell her that he wasn't gonna
23 hurt himself you know. And that's what he put his
24 daughter through that day, that day in the sheriff's
25 office when they were having that conversation. That's

1 what he put her through.

2 Now I would submit to you that's the real Stephen

3 Berry. That's about as good a insight as you can get
4 into the man that's over there on trial as you're gonna
5 have in this case. That when he was on - and the
6 sheriff's office was looking for him, he was calling
7 his girls threatening to kill himself saying this is the
8 end I got so much on me. And they're begging, Daddy
9 please don't hurt yourself, Daddy please come in, please
10 tell me where you are. Can you imagine that? His own
11 daughters. And that's how he was doing them. Because
12 what's he thinking about that day? You know is he
13 thinking about trying to clear his name? Is he thinking
14 about, you know gosh, somebody said something about me you
15 know I need to face this. I need to stand up and be a
16 man, you know I'm supposed to be a leader, I'm supposed to
17 - I've got a role in the community I need to stand up. No.
18 Yeah, he's somewhere up in Cherokee County making calls.
19 Why? Threatening to kill himself to the girls that he's
20 supposed to be taking care of, he's supposed to love, he's
21 supposed to be taking care of them.

22 Think about that. When you go back there think
23 about that. That's your picture. You know we don't
24 always - Sometimes its hard to get a good picture in a
25 case, but I think that's a picture for you all. Think

1 about that in the jury room. A couple of more things. I
2 just want to mention the things that were testified about
3 during the case and I feel like I just need to cover, try to
4 cover them as quickly as I can.

5 Doctor Henderson did testify this morning, she said
6 that [REDACTED] hymen was intact when she examined her.
7 There is only one report from [REDACTED] of penile penetration
8 from Mr. Berry, the rest of it's digital. And it is
9 certainly possible - and this is what Doctor Henderson
10 said, it's certainly possible to have an occasion of
11 penile penetration and still have a hymen. That's what
12 she said. She said she sees it all the time. She sees
13 girls that she knows have had sexual intercourse because
14 they've got STD but they still got a hymen. And she also
15 said that if you don't have damage to a hymen you wouldn't
16 expect any bleeding and [REDACTED] didn't report
17 any bleeding. She also - I mean [REDACTED] there was this
18 thing in her notes that [REDACTED] reported oral sex to her
19 but I think - I didn't hear [REDACTED] testimony wasn't
20 that she didn't have oral sex; I think it was that she
21 didn't remember having oral sex with Mr. Berry but that's
22 up to you to make that judgment.

23 But anyway, there's nothing, there's nothing from
24 what Doctor Henderson said that would prove that what
25 [REDACTED] said isn't true. What [REDACTED] said is still

1 consistent with her having a hymen. She could have a
2 hymen and still have had Mr. Berry do exactly the things
3 that she says that Mr. Berry did to her.

4 There was some mention of a phone. Well let me just
5 do one other thing before I go to that. I thought this
6 might help you all just a little bit. There's - You
7 know this is - This case has got a pretty wide time
8 period. You know it covers about I guess the testimony
9 you heard it probably covers a couple of years. It's
10 been a couple of years since it happened. So I put this
11 together but I want to run through this with you. I
12 thought it might help you in the jury room just to have
13 the key dates and times laid out for you. So we start
14 this in the spring of 2009 and that's when the [REDACTED]
15 family goes to New Life where Mr. Berry's the pastor,
16 youth pastor.

17 And then we go to the summer of 2009 and that's when Mr
18 Williams testified that there was this meeting with him and
19 Mr. Berry and Jason Smith because of the attraction between
20 the two of them. So that's the summer of '09. And then of
21 course everybody says [REDACTED] keeps liking Jason the whole
22 time, but then the next real significant incident is May of
23 2010. And that's when the Berry family moves up to [REDACTED]
24 [REDACTED] and that's when you have the first incident
25 between [REDACTED] and Stephen Berry at the ole Berry house on

1 Catherine Street. And then that is also the time Mr. Berry
2 starts coming to the [REDACTED] house is May of 2010. Then
3 throughout the summer of 2010 the evidence is we have
4 some pretty frequent, frequent visits. Summer of 2010
5 we have the incident with the bathing suit. And then of
6 course you go into the fall of 2010 the next school year
7 the visits continue; [REDACTED] going over to their house and
8 Mr. Berry coming to [REDACTED] house. [REDACTED], 2010
9 [REDACTED] turned sixteen; that's also significant and I'll
10 talk about that in just a minute. Late January 2011 Mr.
11 Berry leaves his position at the church then the next
12 significant event, March 18th 2011, that's when [REDACTED]
13 made her disclosure, on March 18th, 2011. March 21st,
14 2011, that's when the warrants taken out for Mr. Berry
15 and then the next day March 22nd, 2011, that's when
16 Jadea Berry gave her statement at the sheriff's office. I
17 hope that is a helpful frame work for you as far as when
18 things happened in the case.

19 Let me just mention a couple of other things about
20 the evidence, just try to answer a couple of questions you
21 might have in your mind. There was a mention made of the
22 phone. Investigator Belue testified when they got the
23 phone back from SLED it had four days worth of messages.
24 Okay. So we're talking about four days out of about ten
25 months over the course of conduct. So she said there was

1 nothing relevant on that phone so it's not like the
2 sheriff's office didn't try. They tried to collect the

3 evidence and they only had four days worth and there was
4 nothing there to present.

5 There's not gonna be any DNA in a case like this. You
6 just think about it, I mean this is digital penetration
7 okay. It's not gonna leave DNA. That's just the way it
8 is. So - You know I'd love to have DNA in a case like
9 this. I'd love to be able to call them people from SLED
10 and talk about DNA results. But we have to take the case
11 we're brought and the case we're brought doesn't lend
12 itself to that kind of physical evidence. This is a
13 delayed reporting case where the incidents charged just
14 don't leave physical evidence so we're not gonna have it.
15 We're gonna have to present you the evidence we have and
16 you're gonna have to make your judgment based on the
17 evidence that's presented, so that's what's happened here.

18 So once again you just have to ask yourself which
19 possibility is more likely? You know one is true and one
20 is not. So when you go back there I just ask you to
21 stack up the likelihood of what we say happened being
22 true against the likelihood of it not being true. And I
23 think its pretty clear when you do that you're gonna find
24 Mr. Berry guilty.

25 A couple of other things I want to mention to you.

1 The charge: He's charged with criminal sexual conduct with
2 a minor in the second degree. And that charge does not
3 require force. You don't have to hold the victim down
4 and forcibly rape her. That's actually a separate crime.
5 You would be charged with something else if he were accused
6 of doing that. All Mr. Berry had to do was to commit a
7 sexual battery, and that's defined as any kind of
8 penetration with a finger, with a penis, or whatever. All
9 he had to do was to commit a sexual battery against
10 [REDACTED] and if you do that to a fifteen year old then
11 you're guilty. That's what the law says unless when
12 she turned sixteen you're not guilty of that just by
13 virtue of committing a battery against somebody based on
14 their age any more. But as long as you're under sixteen
15 it's a sexual battery.

16 So one thing that they talked about that you heard in
17 closing was that it doesn't make sense for [REDACTED] to have let
18 Mr. Berry do this kind of thing to her and not tell anybody
19 like that first incidence on Catherine Street. Well why
20 didn't she tell somebody about that? Well one thing that I
21 think you all know and this is what we count on jurors for is
22 common sense. I think you all know that life's kind of messy
23 and, you know, single parents go through a lot. The
24 relationships between teenagers and their friends and their
25 friends parents and sometimes their youth ministers, you

1 know, those relationships are complicated and why people do
2 things and why they don't do things in those relationships

3 are those explanations sometimes are complicated. And
4 being a single parent is hard and why a single parent
5 might just trust a youth pastor may be a little more than
6 somebody would suggest they should in a courtroom when
7 in real life that's - that becomes a whole different thing
8 when you having to do it day to day and work for days and
9 work nights and raise three kids all by yourself. So you
10 can't always just wrap, wrap life up in a package and put
11 it in front of a juror. You know sometimes people have
12 complicated lives and sometimes it's not - it's not easy
13 just to put it in a box and say oh yeah these people
14 behave just like them, just like we think they ought to
15 when we put our clothes on and sit in a nice courtroom
16 and try to dissect everything. And these cases you know
17 they're very different. It's one thing when a nineteen
18 year old is charged with having sex with a fifteen year
19 old. But it's a whole different thing when a thirty-
20 eight year old person in the position of trust and has
21 sex with a fifteen year old girl.

22 You're gonna have another option in the jury room
23 aside from the criminal sexual conduct second degree
24 charge. The judge is also gonna charge you on the offense
25 of high and aggravated assault and battery. If for some

1 reason you believe that there was a sexual touching of

2 [REDACTED] short of penetration, then you have an

3 option of convicting Mr. Berry of that. If you find that
4 the assault and battery occurred and that there was some
5 other what's called aggravated circumstances, the touching
6 between a male and a female or taking indecent liberties
7 with a minor then at that point in time you can convict
8 him of assault and battery of a high and aggravated nature.
9 I would submit to you that's not the right answer in this
10 case and I would submit to you this is criminal sexual
11 conduct that has been proven by the evidence.

12 If you go back to the jury room and you deliberate a
13 while and you can't agree, can agree on a unanimous
14 verdict, that does not mean - I want to make this clear to
15 you all - that does not mean that you have to find him
16 not guilty. Okay. If you go back there and there is a
17 disagreements about what your verdict ought to be, the
18 right thing to do is just let the judge know. Okay. And
19 you'll get further instructions. But he is not
20 automatically found not guilty just because you all can't
21 reach a unanimous verdict.

22 Okay. I really appreciate you all's attention. I'm
23 just about done. I just want to say one last thing to
24 you. This case reminds me of a story and it's a story, old
25 story about a king and a leader of people. And this king

1 led a group of people and he was trusted by them to work in
2 their best interest. And there was a soldier who worked

3 for this king and this man dedicated himself to try to
4 keep the people safe. And the man trusted the king to
5 look out for the people. But the man had something, the
6 soldier had something that the king wanted. The soldier
7 had a wife and the king saw the soldier's wife and he
8 decided he had to have this man's wife. So he betrayed
9 that soldier. He had the soldier placed in the battle
10 where the king knew the soldier would be killed so that
11 he could take the soldier's wife.

12 Now, Stephen Berry did not order Eddie Williams into
13 battle like King David did Uriah. And he did not take
14 his wife. But what he did while Eddie Williams was out
15 working trying to keep us safe, Stephen Berry took
16 something from him that was even more precious than
17 Bathsheba was to Uriah. He betrayed Eddie Williams and
18 he took Eddie Williams' daughter. And when I think of
19 that story and King David looking at Bathsheba bathing,
20 I can't help but think of Stephen Berry looking at
21  in that swimming pool in her bikini, you
22 know, just being a fifteen year old at a little church
23 pool party having a good time not doing anything wrong,
24 and after a few hours watching and that obsession he had
25 with her started to kick in; starting to kick in, just

1 sitting there at the pool party watching this little
2 fifteen year old girl that you got this really sick

3 obsession with and it kicks in and as soon as this little
4 girl and her brothers leave the pool party, there he goes
5 up the road up to her house to relieve some stress.

6 And you know in spite of all the good things that he
7 had done King David came under judgment for what he did.
8 But to judge him it took a special person. It took a
9 prophet, it took a man who came to him and told him that
10 he had done wrong. And after that the restoration was
11 possible for King David. But, ladies and gentlemen, you
12 can't have restoration until you've had justice. What
13 Union County needs today is twelve people, we need
14 twelve prophets, we need twelve people to speak the truth
15 to Stephen Berry and tell him that we know what you did
16 to ~~STEPHEN BERRY~~ and we're not gonna let you get away
17 with it because we're twelve people who are gonna do
18 justice today. And, ladies and gentlemen, I'm gonna tell
19 you something. I know sometimes it's hard, it's hard, to
20 be a prophet. It's hard to speak the truth. It's hard
21 to judge a man who's got a family and whose got to
22 support but, ladies and gentlemen, sometimes you just
23 got to stand up and do the right thing. And everyone
24 of you all know what the right thing to do is in this
25 case. And I'm just standing here asking you please, please

1 do it. Find him guilty of second degree criminal sexual
2 conduct with a minor. Thank you all being here.

3 THE COURT: Members of the jury panel, I appreciate
4 the attention you've given me and the witnesses and the
5 attorneys. I now am going to charge you the law that you
6 are to apply to the facts in this case.

7 The indictment here charges Mr. Berry with criminal
8 sexual conduct with a minor in the second degree. It's
9 alleged that this occurred between May 1st, 2010 and
10 [REDACTED], 2010. It's alleged that at that time he
11 on one or more occasions committed a sexual battery -
12 which I'll define for you later - upon the victim [REDACTED]
13 [REDACTED] who was at that time a minor who was at least
14 fourteen but less than sixteen years of age by digitally
15 penetrating her or engaging in sexual intercourse with her
16 and that at the time he was older than her.

17 Now the fact that he is charged, the fact that he
18 is arrested, the fact that he is on trial is not evidence.
19 That's just the way our system works.. When someone is
20 thought to have committed an offense, a warrant is
21 issued, they are arrested, their case is processed through
22 our court system and they are tried. But that is not any
23 indication they committed the offense. The trial is to
24 determine that. This does not create, that is, the fact
25 that he is on trial any inference that he committed this

1 that.

2 THE CLERK: Yeah.

3 In the State of South Carolina versus Stephen Douglas
4 Berry we find the defendant guilty of criminal sexual
5 conduct with a minor in the second degree.

6 THE COURT: If this be your verdict so say you all by
7 raising your right hand.

8 All twelve jurors affirmed the verdict by raising
9 their right hand.

10 Anything from the State before the jury is dismissed?

11 SOLICITOR ANTHONY: Not the jury, Your Honor.

12 THE COURT: Anything from the Defense before the jury
13 is dismissed?

14 MR. DELANEY: No, Your Honor.

15 THE COURT: All right, members of the jury panel, I
16 appreciate your work. It's been a long week. I'm going to
17 allow you to leave. The sheriff's deputies will escort
18 you out and not that I think that needs to happen but
19 just it's getting dark and that's what we usually do when
20 we are here after the usual closing time because the
21 building is basically locked up except when people are
22 working. So have a - You will be mailed a check and I
23 surely appreciate your time and thank you so much.

24 Madame Forelady, Jill or Julie, which ever, both; if
25 you'll come up and sign something and everyone else can

1 is the best daddy. And I understand him going to court
2 because he told me he said I can't put my children
3 through it no more. I'll never be able to get a job
4 just like the plea bargain you know he'd be still a
5 sex offender so he can't get a job. In fact he had one
6 in Spartanburg and they found that he had allegations
7 and they said no we can't hire you. And this has been
8 going on for two years. And like I said he's digged
9 ditches and cleaned commodes and everything for those
10 little children trying to do it. And he just got fed up with
11 it all, you know, putting the children through this.

12 THE COURT: I understand.

13 STEPMOTHER: He's needed at home very bad. He is
14 needed at home with those children to help with them.

15 THE COURT: How many days - How much time has he
16 already spent in jail? I know he's been out on bond
17 but I remember I did the bond hearing at one time so I
18 know he was in for a while.

19 SOLICITOR ANTHONY: Approximately thirteen days.

20 THE COURT: House arrest don't count.

21 MR. DELANEY: Thirteen days.

22 THE COURT: The sentence of the court is a sentence
23 of fifteen years in jail. We stand adjourned.

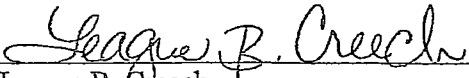
24 (WHEREUPON: COURT'S EXHIBITS ONE AND TWO IN EVIDENCE.)

25 (COURT ADJOURNED AT 06:30 P.M..)

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

September 4, 2014



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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM UNION COUNTY
Court of General Sessions

John C. Hayes, III, Circuit Court Judge

Case No. 2011-GS-44-0413

The State of South Carolina,.....Respondent,

v.

Stephen Douglas Berry,.....Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN ALLOWING THE VICTIM TO TESTIFY REGARDING ALLEGED OTHER ACTS WHICH EXCEEDED THE SCOPE OF THE INDICTMENT AND WHICH WERE NOT CRIMINAL IN NATURE?
- II. DID THE TRIAL COURT ERR IN FAILING TO SUPPRESS TWO INADMISSIBLE ASPECTS OF THE STATE'S EXPERT'S TESTIMONY?

STATEMENT OF THE CASE

In July of 2012, a Union County Grand Jury indicted Stephen Douglas Berry (Berry) for Criminal Sexual Conduct with a Minor, Second Degree, Indictment #2011-GS-44-0413. (R. pp. 1-2).

On July 17, 2012, Berry proceeded to jury trial before the Honorable Edward Miller. Attorney Melinda Butler represented Berry at trial. Assistant Solicitor John C. Anthony represented the State. The jury could not reach a unanimous verdict.

On February 5, 2013, Berry again proceeded to jury trial, this time before the Honorable John C. Hayes. Attorney Erik Delaney of the Union County Public Defender's office and Attorney Melissa Inzerillo of the York County Public Defender's office represented Berry at trial. John C. Anthony again represented the State.

The jury returned a guilty verdict and Judge Hayes sentenced Berry to fifteen (15) years. Berry timely served a Notice of Appeal on February 11, 2013. (R. pp. 4-5).

STATEMENT OF FACTS

The July 2012 indictment states as follows:

That in Union County, South Carolina, between on or about May 01, 2010 and on or about _____ 2010, Stephen Douglas Berry did commit the crime of Criminal Sexual Conduct with a Minor in the Second Degree, in that the Defendant, on one or more occasion, did commit a sexual battery upon the victim, a minor who was at least fourteen years of age but who was less than sixteen years of age, by digitally penetrating or engaging in sexual intercourse with the victim, and the Defendant was in a position of familial, custodial, or official authority to coerce the victim to submit or the Defendant was older than the victim, in violation of Section 16-03-655, Code of Laws of South Carolina (1976, as amended). (R. p. 2).

Before the trial started, Berry's counsel moved to limit the testimony regarding any alleged sexual acts to the dates contained in the indictment. (R. p. 10, lines 20-23).

The State sought to introduce testimony that the alleged acts continued to occur beyond the dates set forth in the indictment. (R. p. 11, lines 17-23). The judge decided to allow the parties to start the trial and, at the appropriate time, the State would be allowed to proffer testimony regarding acts occurring after _____ 2010. (R. p. 17, line 19 – p. 18, line 7).

The State's first witness at trial was the victim. The victim testified that she began attending New Life Baptist Church in 2009 and that Berry was the youth pastor there at that time. (R. p. 27, lines 13-16, 22-24). She testified that she became close friends with Berry's daughter, Jadea Berry (Jadea), who was the same age. (R. p. 30, line 22 – p. 31, line 3). Around May of 2010, Berry and his family moved to a house which was three houses down from the victim's house. (R. p. 35, lines 7-9). She testified that shortly following this move, Berry digitally penetrated her. (R. p. 38, lines 6-23). She went on to testify that this type of activity occurred with regularity thereafter. (R. p. 48, line 25 – p. 49, line 18). She testified that, on one occasion while she was still fifteen, she and Berry engaged in sexual intercourse. (R. p. 53, line 13; p. 56, line 8 – p. 57, line 12).

In _____ 2010, the victim turned sixteen years old. (R. p. 59, lines 16-18). During an *in camera* review, she testified that the sexual relationship between Berry and her continued after she turned sixteen in _____ 2010 until March of 2011. (R. p. 60, lines 3-8). Over the objection of Berry's counsel, the judge allowed the State to present this testimony to the jury. (R. p. 65, line 24 – p. 66, line 1; p. 66, lines 16-17).

During the trial, the State also called Kim Roseborough, a psychotherapist and social worker, as a witness. (R. p. 106, lines 14-25). The judge found Ms. Roseborough

qualified to testify as an expert in the field of child sexual abuse assessment and treatment. (R. p. 110, lines 9-14). In the course of her practice, Ms. Roseborough counseled the victim. (R. p. 111, lines 15-17). During Ms. Roseborough's testimony, Berry's counsel objected to any statements relating to Ms. Roseborough's opinion that the circumstances of the victim's disclosure were consistent with a disclosure of sexual abuse. (R. p. 116, lines 2-15). Following a lengthy discussion with counsel outside the jury's presence, the judge sustained the objection. (R. p. 119, line 8). Shortly thereafter, Berry's counsel again objected to similar testimony of Ms. Roseborough and the judge overruled the objection. (R. p. 132, lines 1-21). The judge also overruled an objection by Berry's counsel that Ms. Roseborough was not qualified to diagnose the victim with PTSD. (R. p. 140, lines 3-25).

ARGUMENTS

I. THE TRIAL COURT ERRED IN ALLOWING THE VICTIM TO TESTIFY REGARDING ALLEGED OTHER ACTS WHICH EXCEEDED THE SCOPE OF THE INDICTMENT AND WHICH WERE NOT CRIMINAL IN NATURE.

It is well settled under South Carolina law that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE; *State v. Lyle*, 125 S.C. 406, 415-16, 118 S.E. 803, 807 (1923) (noting the rule "universally recognized and firmly established in all English-speaking countries, that evidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged").

Under Rule 404(b), SCRE, such evidence may be admissible to show "motive, identity, the existence of a common scheme or plan, the absence of mistake or accident,

or intent.” Prior to considering whether the evidence satisfies one of the above exceptions, “the trial court must determine whether the proffered evidence is relevant as required under Rule 401, SCRE.” *State v. Cope*, 405 S.C. 317, 748 S.E. 2d 194 (2013) (citing *State v. Clasby*, 385 S.C. 148, 682 S.E.2d 892 (2009)).

During the hearing on pre-trial motions, the judge correctly noted that the age of consent in South Carolina is sixteen and that any sexual acts occurring after the victim turned sixteen were not crimes. (R. p. 11, lines 12-16). The judge went on to state that he failed to “see how a continuing relationship is a commission of a crime and it may be reversible. *Lyle*: It’s kind of *Lyle* in reverse that this continued pattern of bad acts afterward the how [sic] she reached the age of consent.” (R. p. 12, lines 10-13).

In the present case, the issue is first whether the testimony pertaining to events beyond those set forth in the indictment was relevant. Relevant evidence is defined as “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. This testimony cannot be relevant because, even if the allegations are true, any activity occurring after the victim reached the age of consent was not criminal.

Alternatively, even if the testimony in question were relevant, it is inadmissible because, even if the allegations are true, any activity occurring after the victim reached the age of consent was not criminal. Furthermore, even if the testimony in question were relevant, it is inadmissible because it does not relate to an exception set forth in Rule 404(b), SCRE. Relying on *State v. Weaverling*, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999), *State v. Whitener*, 228 S.C. 244, 89 S.E.2d 701 (1955), and *State v. Richey*, 88

S.C. 239, 70 S.E. 729 (1911) the judge allowed the testimony “based on the exception to the admission of evidence prior or subsequent bad acts under the common scheme or plan exception.” (R. p. 83, lines 20-22).

These three cases are distinguishable from the case at bar because, as Berry’s counsel correctly argued at trial, this case is not one which concerns a common scheme or plan. (R. p. 16, lines 15-17). Therefore, even if the testimony passed the first prong of the test and was relevant, it certainly would not meet the second prong. The admission of the testimony was error. Berry’s counsel correctly submitted to the judge that in the

Weaverling case:

there were common scheme of [sic] plan in terms of other witnesses, I believe some other siblings that were testifying to other abuse. We don’t have that in this case. Essentially we have one alleged victim that would testify to some acts falling outside of the terms of the indictment which would be the position of the defense that that is not the common scheme of [sic] plan and would not fall under that exception.

(R. p. 16, line 22 – p. 17, line 4).

In *Weaverling*, the issue was whether the trial court erred in admitting evidence of uncharged sexual misconduct allegedly committed by the defendant. *Id.* at 467, S.E.2d at 790. The *Weaverling* Court held that the evidence at issue fell within the *Lyle* exception. Here, unlike *Weaverling*, the testimony concerning acts after the victim reached the age of consent were not criminal acts, and therefore were unchargeable acts, not just “uncharged” acts.

Finally, even if the testimony in question were relevant *and* related to an exception set forth in Rule 404(b), SCRE, it is inadmissible because any probative value is substantially outweighed by the danger of unfair prejudice. According to South Carolina law, “even though the evidence is clear and convincing and falls within a *Lyle*

exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant.” *State v. King*, 334 S.C. 504, 514 S.E.2d 578 (1999); Rule 403, SCRE; *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996). Certainly, in this case, it is unfairly prejudicial to allow testimony of events that do not even constitute criminal acts to bolster evidence of alleged criminal acts.

The judge erred in allowing the victim to testify to alleged non-criminal events occurring after the dates set forth in the indictment and Berry should be granted a new trial.

II. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS TWO INADMISSIBLE ASPECTS OF THE STATE’S EXPERT’S TESTIMONY.

While “experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others.” *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013). Specifically, “it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter.” *Id.* at 358, 727 S.E.2d at 499 (citing *State v. Hill*, 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011)).

In an effort to clarify what constitutes proper subject matter of a forensic interviewer’s testimony in cases involving children, the *Kromah* Court set forth examples of “the kinds of statements forensic interviewers should avoid at trial.”

that the child was told to be truthful; a direct opinion as to a child’s veracity or tendency to tell the truth; any statement that indirectly vouches for the child’s believability, such as stating the interviewer has made a ‘compelling finding’ of abuse; any statement to indicate to a jury that the interviewer believes the child’s allegations in the current matter; or an opinion that the child’s behavior indicated the child was telling the truth.

Id. at 360, 727 S.E.2d at 500. Expert witnesses also cannot give opinion testimony on matters exceeding the scope of their expertise. *State v. Commander*, 396 S.C. 254, 721 S.E.2d 413 (2011) (citing *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001)).

During this trial, the State called Kim Roseborough, a psychotherapist and social worker, as a witness. (R. p. 106, lines 14-25). The judge found Ms. Roseborough qualified to testify as an expert in the field of child sexual abuse assessment and treatment. (R. p. 110, lines 9-14). In the course of her practice, Ms. Roseborough counseled the victim. (R. p. 111, lines 15-17). During Ms. Roseborough's testimony, Berry's counsel objected to any statements relating to Ms. Roseborough's opinion that the circumstances of the victim's disclosure were consistent with a disclosure of sexual abuse. (R. p. 116, lines 2-15). Following a lengthy discussion with counsel outside the jury's presence, the judge sustained the objection. (R. p. 119, line 8).

Shortly thereafter, the following exchange took place:

BY SOLICITOR ANTHONY:

Q: All right. And moving on, are there any typical symptoms of trauma that are exhibited by people who have been – by children who have been sexually assaulted?

A: Yes.

Q: Okay. And what are those?

A: There are certain symptoms of trauma that must be present in order to diagnose someone with a traumatic response or post traumatic stress disorder, and those include certain things – there are certain categories and the way that it is written in the Diagnostic Statistical Manual, you have to have a certain number under each category. The first category is that there has to have been some type of traumatic event where someone was harmed or felt like that they were in danger in some way and that that caused them a significant amount of distress.

MS. INZERILLO: Your Honor, I'm going to object. May we approach at this point?

(SIDE BAR CONFERENCE OFF THE RECORD OUT OF THE HEARING OF THE JURY AT 11:39 A.M.)

BY SOLICITORY ANTHONY:

Q: Okay. Are there any specific trauma symptoms that children would tend to show following a sexual assault?

A: Yes.

Q: And what are those or some of those?

A: Some of those would be hyper-vigilance. A very exaggerated, startled response. There could be distressing intrusive thoughts about the event that occurred. These can sometimes cause really significant problems with concentration because they are having intrusive thoughts and they are not able to get the event out of their mind. A lot of people can have and one of the symptoms certainly is agitation, outbursts of anger. They also can have feelings of detachment that lead to very significant depression and anxiety and the symptoms that would go along with both of those; lack of sleep, problems with appetite. Those types of things.

Q: And in regards to any of your treatment of the victim, did you make observations and form opinions as to specific symptoms of trauma suffered by her?

A: Yes.

Q: And what were those?

A: Over time the victim became much more agitated and had a lot of feelings of guilt and separation and detachment from her family. She became increasingly more angry and had some ---

MS. INZERILLO: Your Honor, I'm going to object.

THE COURT: I overrule your objection. Go ahead.

A: Thank you. Had some very violent outbursts toward people in her family, her dad and her brothers. And she became more withdrawn. She had a lot of feelings of loneliness and detachment. She became so clinically depressed that I was concerned about her and referred her to a psychiatrist.

(R. p. 130, line 15 – p. 132, line 21)

Later, Berry's counsel was allowed to put her objection on the record. The basis of this objection was that "Ms. Roseborough was testifying to a diagnosis of PTSD and...there had been no testimony as to her qualification to make that diagnosis... I believe the testimony was that of a social worker but nothing in terms of a M.D., or anything like that that would qualify her..." (R. p. 140, lines 10-15). The judge "determined that you don't have to be an M.D., to diagnose post traumatic stress disorder; that her qualifications were broad enough to encompass that. And I did agree that it had not been mentioned to that point and we had some concern that we would be launching into that line of testimony without any predicate." (R. p. 140, lines 17-23).

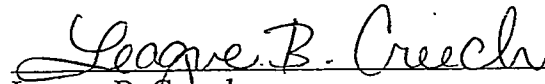
There can be no other conclusion than that this testimony prejudiced Berry. While "an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts." *Kromah* at 357, 737 S.E.2d at 499. Furthermore, allowing Ms. Roseborough to testify that the victim developed PTSD due to the trauma of sexual abuse tells the jury that an expert finds the victim credible, which is precisely what the *Kromah* case forbids an expert to do. In this case, where no physical evidence exists linking the Defendant to the crime, the jury's decision comes down solely to the veracity of the victim. Ms. Roseborough was the only expert witness for the State. Qualification "as an expert clothes the witness with an air of authority that does not attach to 'ordinary' witnesses." *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009) (Pleicones, J., dissenting).

Berry should be granted a new trial given the prejudicial nature of Ms. Roseborough's expert testimony.

CONCLUSION

Based on the foregoing, Berry's conviction should be reversed and this case remanded to the Union County Court of General Sessions for a new trial.

Respectfully submitted,



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October 8, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM UNION COUNTY
Court of General Sessions

John C. Hayes, III, Circuit Court Judge

Case No. 2011-GS-44-0413

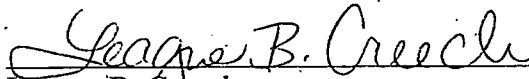
The State of South Carolina,.....Respondent,

v.

Stephen Douglas Berry,.....Appellant.

CERTIFICATE OF COUNSEL

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


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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Union County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case Tracking No. 2013-000435

The State,

Respondent,

vs.

Stephen Douglas Berry,

Appellant.

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SEP 16 2014

SC Court of Appeals

STATE OF SOUTH CAROLINA

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STATEMENT OF ISSUES ON APPEAL

- I. The trial court properly allowed in the subsequent bad act testimony as it was clearly relevant, highly probative, and was evidence of a common scheme or plan.
- II. The trial court did not err in allowing the State's expert to testify regarding behaviors she observed in the victim and her concerns regarding those behaviors. The expert did not impermissibly bolster or vouch for the child and did not testify outside her area of expertise.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

The victim lived with her father and siblings after her parents divorced. She also spent time with her grandmother. (T.101-102; R. 28-29). The victim began attending New Life Baptist Church. Appellant served as the youth pastor for the church. (T.102; 142; R. 29; 69). After the victim got to know Appellant, he and his daughter, with whom the victim had become good friends, moved to a home very close to the victim's father.

After church one Sunday in May 2010, the victim intended to ride home with Appellant. Instead, he took her to his previous residence telling her he had to pick up some items and make sure his daughter got everything. (T.107-108; R. 34-35). Once inside, the victim went to Appellant's daughter's room and verified she got everything. (T.108-109; R.35-36). Appellant then came up behind the victim, hugged her, and touched her behind. (T.109-110; R. 36-37). After a brief conversation, Appellant again approached the victim, hugged her, and told her she was beautiful. He then began rubbing her legs and unbuttoned and unzipped her pants. The victim pushed him away, but he came right back and pulled her pants and underwear down. He then placed his finger inside her vagina. (T.110-111; R. 37-38).

After briefly walking away, Appellant began walking toward the victim again while unbuttoning and unzipping his pants. Appellant turned the victim around and attempted to sodomize the victim. After the victim was able to prevent him from doing so on several occasions, Appellant went to another part of the room and masturbated until he ejaculated. (T.112-113; R. 39-40).

On a second occasion, Appellant lured the victim to his new house under the guise of showing her where all the bedrooms would be and letting her see the newly

refurbished house. Once inside, they sat on the floor to talk about the boy the victim liked. Appellant attempted to stick his finger inside the victim's vagina. She resisted several times and "eventually gave in because there was no use in even trying to stop it." (T.116-117; R. 43-44).

The victim testified to several more incidents of sexual battery by Appellant at his house and at her house. (T.117-122; R. 44-49). She testified the incidents would occur at least once a week during the 2010-2011 school year. She further testified the incidents occurred in her room at her father's house, or over at Appellant's house. (T. 122-125; R. 49-52). The victim then explained one incident went farther than Appellant putting his finger inside her vagina. She explained while lying on the floor watching a movie, Appellant came up behind her and put his penis inside her vagina. Later he told her that she "wasn't a virgin anymore." (T.129-131; R. 56-58).

After an in camera hearing, the victim continued testifying and explained Appellant continued to put his finger in her vagina at various times after she turned sixteen. She explained the continuing incidents occurred at her house, in his house, or in his car. (T.141; R.68).

ARGUMENT

I. The trial court properly allowed in the subsequent bad act testimony as it was clearly relevant, highly probative, and was evidence of a common scheme or plan.

Appellant contends the trial court erred in allowing the victim to testify to the non-consensual sexual assaults committed by Appellant after the victim turned sixteen and which were outside the range of the charges in the indictment for criminal sexual conduct with a minor in the second degree. He maintains the testimony regarding the incidents was not relevant, the acts were not criminal in nature, the testimony was inadmissible under Rule 404(b), SCRE, and the testimony's probative value was substantially outweighed by its prejudicial effect. The testimony regarding the acts occurring after the victim's sixteenth birthday was properly admitted by the trial court as it was highly relevant and probative in explaining what took place between the time the victim turned sixteen and when she finally disclosed the continuous illicit abuse. Further, the testimony was admissible under Rule 404(b), and described clearly criminal conduct which the court found was established by clear and convincing evidence.

The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001); 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."). An abuse of discretion occurs when the trial court's ruling lacks any evidentiary support or is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000).

Relevance

“‘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.” Rule 401, SCRE. “Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy.” See e.g., In re Care and Treatment of Corley, 353 S.C. 202, 205, 577 S.E.2d 451, 453 (2003). “Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent.” State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986). Determination of relevancy is largely within the discretion of the trial court and will not be reversed absent an abuse of that discretion. See State v. Saltz, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001) (“The trial court is given broad discretion in ruling on questions concerning the relevancy of evidence, and its decision will be reversed only if there is a clear abuse of discretion.”). Further, “[t]he mere fact that the ‘other acts’ at issue occurred after the events charged in the indictment does not render them irrelevant.” United States v. Whaley, 786 F.2d 1229 (4th Cir. 1986).

The testimony in this case regarding the continued illegal sexual batteries by Appellant was clearly relevant. As the solicitor explained, the testimony established the basis for the delay between the victim turning sixteen and the date she finally disclosed the abuse. (T.70-71; R. 11-12). If the testimony was prohibited, the jury would be lead to believe the contact between the victim and Appellant ended when she turned sixteen, a fact which is clearly in dispute, and the victim then waited several months to disclose the abuse. Any question regarding the delay in the disclosure or in the nature of their

relationship is eliminated by allowing the testimony to explain what took place from when she turned sixteen in November until her disclosure in March. The trial court properly admitted the relevant testimony to explain the events surrounding Appellant's abuse of the victim and the victim's disclosure.

Rule 404(b)

Generally, evidence of prior bad acts is inadmissible to prove the specific crime charged; however, an exception exists for evidence tending to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, or (5) the identity of the person charged with the present crime. See Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923).

"The common scheme or plan exception 'is generally applied in cases involving sexual crimes, where evidence of acts prior and subsequent to the act charged in the indictment is held admissible as tending to show continued illicit intercourse between the same parties.'" State v. Weaverling, 337 S.C. 460, 469, 523 S.E.2d 787, 791 (Ct. App. 1999) (quoting State v. Whitener, 228 S.C. 244, 265, 89 S.E.2d 701, 711 (1955) (emphasis added)); see also, State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) (holding the "prosecutrix's testimony regarding prior attacks was admissible under [the common scheme] exception to show the continued illicit intercourse forced upon her by Appellant.").

Additionally, the South Carolina Supreme Court and this Court have both upheld the continuing illicit conduct standard to admit other bad acts as part of a common scheme or plan. See State v. Clasby, 385 S.C. 148, 157, 682 S.E.2d 892, 897 (2009);

State v. Kirton, 381 S.C. 7, 36, 671 S.E.2d 107, 121-22 (Ct. App. 2008). As this Court explained in Kirton: “All of Kirton’s alleged activity was directed toward the same victim. The six to seven year pattern of escalating abuse of Victim by Kirton is the essence of grooming and continuous illicit activity.” Kirton, 381 S.C. at 36, 671 S.E.2d at 121-22 (emphasis added). Similar conduct occurred on multiple occasions in Clasby and the Court found the admission of the uncharged prior bad act evidence “consistent with our jurisprudence.” Clasby, 385 S.C. at 158, 682 S.E.2d at 897.

The testimony in this case, as specifically found by the trial court, was properly admitted as common scheme or plan. The court found the victim’s testimony established the other acts by a clear and convincing standard and this has not been challenged. Further, the victim’s testimony indicated Appellant continued the same conduct, digitally penetrating the victim. The testimony established the incidents happened in the same manner and in the same locations as the conduct forming the basis of the charge of criminal sexual conduct with a minor brought against Appellant. (T.138; R. 65). The testimony verified the other bad acts were similar in nature, State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), and demonstrated a continued illicit conduct in which Appellant digitally penetrated the victim without her consent. Clasby, 385 S.C. at 156-157, 682 S.E.2d at 896.

Appellant also contends the court erred in failing to exclude the testimony because the subsequent acts of digital penetration were not criminal in nature. First, this argument completely ignores the facts testified to by the victim. She specifically stated he digitally penetrated her without her consent. (T.139; R. 66). Even though she could have consented because she was over sixteen, she did not. As a result, the actions of

Appellant were criminal. See e.g., S.C. Code Ann. § 16-3-654 (Criminal Sexual Conduct Third Degree); S.C. Code Ann. § 16-3-600 (C)(1)(a)(i) (Assault and Battery First Degree); S.C. Code Ann. § 16-3-600 (D)(1)(b) (Assault and Battery Second Degree).

Even if the acts were not criminal, the testimony would still be admissible under Rule 404(b), which specifically applies to “[e]vidence of other crimes, wrongs, or **acts**.” Rule 404(b), SCRE (emphasis added). The testimony need not be criminal to be admissible to demonstrate the common scheme or plan. As long as the trial court found the acts established by clear and convincing evidence, the testimony is admissible. The court in this case found the victim credible, found the acts established by clear and convincing testimony, and this finding has not been challenged on appeal. (T.139-141; R. 66-68).

Prejudice

Even if the evidence is clear and convincing and falls within a Rule 404(b) exception, the trial judge must exclude the evidence if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Weaverling, 337 S.C. at 468, 523 S.E.2d at 791. In the present case, the probative value of the demonstrated continuous illicit intercourse substantially outweighs any prejudice resulting from its admission. As the Supreme Court explained in Clasby: “Given there was no physical evidence to corroborate [the victim’s] testimony regarding the indicted offenses of CSC with a minor, first degree and lewd act upon a child, we find her testimony of Clasby’s sustained illicit conduct was extremely probative to establish the charged criminal sexual conduct underlying the offense of lewd act upon a child.” Clasby, 385 S.C. at 158-59, 682 S.E.2d at 898.

The testimony of the continuous contact and illegal conduct in this case was extremely probative to establish the criminal sexual conduct with a minor charge. Further, as discussed above, without the testimony the jury would be lead to believe contact ended upon the victim's sixteenth birthday and would have a question regarding why disclosure took several months given the apparent lack of contact. The testimony indicating the contact of the exact same nature continued until nearly the time of disclosure is highly probative. Accordingly the trial court properly admitted the testimony of Appellant's prior sexual acts as a common scheme or plan.

II. The trial court did not err in allowing the State's expert to testify regarding behaviors she observed in the victim and her concerns regarding those behaviors. The expert did not impermissibly bolster or vouch for the child and did not testify outside her area of expertise.

Appellant maintains the trial court erred in allowing the State's expert to testify regarding behaviors observed in the victim and symptoms of post-traumatic stress disorder (PTSD). He also argues the testimony constituted vouching and was a violation of State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). His arguments regarding vouching and violating the directives of Kromah are not preserved for review on appeal. Further, the testimony by the expert was not improper as she did not vouch for the victim. She testified to concerns she had related to behaviors she personally witnessed through her treatment of the victim, and as a result, all her testimony was properly admitted.

Preservation

First, any argument regarding vouching or the State violating the directives of Kromah is not preserved for review on appeal. During the testimony of the State's expert, Appellant objected several times relying on Kromah. The trial court sustained those objections and prohibited the State from exploring areas which could result in vouching or impermissible bolstering of the victim. (T.454; 459; 462; 463; 469-472; 474; 475; R.116; 119; 122; 123; 124-127; 129; 130). The State then explored the symptoms of trauma seen in child victims, and possible PTSD. At this point, Appellant objected in an off the record conference. (T.475-476; R. 130-131). Later, counsel placed her objection on the record, indicating her objection went to the qualification of the State's expert to discuss PTSD because she was a social worker and not a medical doctor. (T.522; R.140). Nothing in her objection addressed vouching, bolstering, or Kromah. As

a result, the issues related to vouching and Kromah are not preserved for review on appeal because a party may not argue one ground at trial and another on appeal. State v. Brockmeyer, 406 S.C. 324, 355, 751 S.E.2d 645, 661 (2013); see also, State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue not preserved when one ground is raised to the trial court and another ground is raised on appeal); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (same).

Additionally, Appellant only other objection during the testimony in question was a very generic objection; Appellant's counsel stated: "Your Honor, I'm going to object." (T.477; R. 132). This generic objection did not preserve any issues for review on appeal. See State v. Jennings, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011) ("An objection must be made on a specific ground."); State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007) (finding a broad generic objection not sufficient to preserve issue for review on appeal); State v. Varvil, 338 S.C. 335, 340, 526 S.E.2d 248, 251 (Ct. App. 2000) (finding [a] general objection is ordinarily insufficient to preserve an issue for appeal.).

Merits

On the merits, the State's expert merely discussed behavioral changes in the victim, which was properly admitted as rape trauma evidence. Further, her discussion of PTSD and its symptoms were appropriate in light of her qualifications. Finally, none of her testimony vouched for or otherwise impermissibly bolstered the victim's testimony.

Rape Trauma Testimony

First, the State's expert did not diagnose the victim with PTSD. She merely identified behaviors and characteristics witnessed in the victim during her treatment with the State's expert that caused the expert concern. This testimony did not indicate the

cause of her trauma or behavioral changes, but merely indicated what the new behaviors were and that changes had occurred.

The Courts of this state have examined behavioral testimony in several cases. Initially in State v. Hudnall, 293 S.C. 97, 359 S.E.2d 59 (1987), the South Carolina Supreme Court held expert testimony regarding common behavioral characteristics exhibited by child victims of sexual abuse was not admissible to establish abuse had occurred. The Court held this evidence admissible only to rebut a defense claim that the victim's response was inconsistent with such a trauma. Id. at 100-101, 359 S.E.2d at 61. The Supreme Court changed direction in State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991), holding trauma testimony of a rape victim is relevant to prove the elements of criminal sexual conduct since such evidence makes it more or less probable that the offense occurred.

In State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993), the South Carolina Supreme Court considered expert testimony regarding rape trauma syndrome. The expert testified to characteristics commonly found in sexual assault victims. Id. at 505, 435 S.E.2d at 861. The Supreme Court overturned its holding in Hudnall, and specifically found: "both expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect."

This Court had a chance to address similar behavior testimony in State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999). In Weaverling, an expert testified regarding behavior and characteristics of a sexually abused victim. This Court stated: "Expert testimony concerning common behavioral characteristics of sexual assault

victims and the range of responses to sexual assault encountered by experts is admissible.” Id. at 474-475, 523 S.E.2d at 794 (citing Frenzel v. State, 849 P.2d 741 (Wyo.1993); State v. Lujan, 192 Ariz. 448, 967 P.2d 123 (1998) (opinion testimony describing behavioral characteristics outside jurors’ common experience is permitted as long as it meets other admissibility requirements)). This Court explained:

Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault. Frenzel, *supra*. It assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child’s often strange demeanor. Id. See also Lujan, *supra* (when facts of case raise questions of credibility or accuracy that might not be explained by experiences common to jurors—like reactions of child victims of sexual abuse—expert testimony on general behavioral characteristics of such victims should be admitted).

Id. at 475, 523 S.E.2d at 794.

Numerous other states which have considered the issue have also found it admissible, finding the behavioral traits appropriate testimony for an expert. See State v. J.Q., 617 A.2d 1196, 1206 (N.J. 1993) (“There does not appear to be a dispute about acceptance within the scientific community of the clinical theory that CSAAS identifies or describes behavioral traits commonly found in child-abuse victims.”); State v. Reser, 767 P.2d 1277, 1282 (Kan. 1989) (“There are numerous cases from other jurisdictions where expert testimony regarding characteristics of sexually abused children has been held properly admitted as providing helpful background information to the jury.”); Keri v. State, 347 S.E.2d 236, 238 (Ga. App. 1986) (finding expert testimony assisted jury in understanding why sexually abused children are secretive, why they were frightened, why they act out and become disciplinary problems, and why the children could not give

specific dates for the acts they say were committed by the defendant); see also John E. B. Meyers, Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol'y 1, 45-46 (2010).

The testimony by the State's expert merely explained the common behaviors and characteristics of a trauma victim and in particular a sexual trauma victim. Such testimony is clearly proper under Schumpert and Weaverling. Her further testimony regarding behaviors she witnessed in the victim was also proper testimony as it was based on her personal observations. The expert's concern that resulted from the behaviors is well within the gambit of Schumpert and is not impermissible. As a result, the testimony from the State's expert was properly admitted.

Qualification of Expert

The trial court properly found the State's expert qualified to discuss PTSD and its symptoms. The expert testified she was a psychotherapist and a licensed, independent social worker. Her practice specialized in working with adolescents, young children, and their families. She testified she had a Bachelor of Arts degree in psychology, and a master's degree in social work. She further testified to her extensive training beyond her master's degree to enable her to work specifically with children. (T.444-445; R. 106-107).

The expert testified she had over 800 hours of training regarding child sexual abuse and working with abused children. She testified she has worked with sexually abused children since 1984 when she started at a residential treatment facility. She then worked for the Department of Social Services (DSS) in their sexual abuse unit handling child sexual abuse investigations and became a supervisor in the unit. After obtaining her

master's degree, she worked at Safe Homes Rape Crisis in Spartanburg and developed their child therapy program for children who had been sexually abused. She has co-developed training curriculum with the College of Social Work to train DSS caseworkers to identify, diagnose, and treat child sexual abuse. Since 1995 she has been in private practice also working with child victims of sexual abuse. (T.446-447; R. 108-109). Finally, the expert testified she has been qualified in family and general sessions court as an expert in child sexual abuse assessment and treatment in eight or nine counties, and she has testified at trial as an expert over two hundred times. (T.447-448; R. 109-110).¹

Appellant contends because she does not have a medical degree, the State's expert was not qualified to render an opinion regarding the victim's symptoms of and suffering of PTSD. This same argument was made and rejected in State v. Henry, 329 S.C. 266, 495 S.E.2d 463 (Ct. App. 1997). In Henry, this Court analyzed the appropriateness of a social worker rendering an opinion regarding PTSD without being a medical doctor. The Court found a medical background was not necessary as long as the expert demonstrated the requisite training and experience in the subject field. Id. at 277-278; 495 S.E.2d at 468-469. Specifically, the Court enounced:

Henry does not challenge the substance of Badger's testimony. Rather, he argues the State failed to present evidence she was qualified to give the diagnosis of PTSD. Henry cites her lack of a medical degree. The challenge mounted by Henry blithely ignores the recognized principle of law that a witness is competent as an expert provided the witness has acquired by reason of study or experience or both such knowledge and skill in a business, profession, or science that she is better qualified than the jury to form an opinion on the particular subject of testimony. See Botelho v. Bycura, 282 S.C. 578, 320 S.E.2d 59 (Ct. App. 1984). Luculently, in the case *sub judice*, Coles Badger possessed

¹ She was qualified by the trial court without *voir dire* or objection from Appellant.

the requisite skill, training, experience, learning, and knowledge to render an opinion in regard to PTSD.

Henry, 329 S.C. at 277-278, 495 S.E.2d at 468-469.

The Henry Court referenced its prior opinion in Honea v. Prior, 295 S.C. 526, 369 S.E.2d 846 (Ct. App. 1988). While a civil case, the Court in Honea analyzed the propriety of a social worker offering testimony regarding a sexual assault victim's psychiatric diagnosis. The Court explained:

To qualify as an expert, a person must have acquired by study or practical experience such special knowledge of the subject matter of his or her testimony as would enable the person to give guidance and assistance to the jury in solving a problem about which the jury's good judgment and average knowledge is inadequate. Botelho v. Bycura, 282 S.C. 578, 320 S.E.2d 59 (Ct.App.1984); Allen v. State, 365 So.2d 456 (Fla.Dist.Ct.App.1978), dismissed 368 So.2d 1373 (1979). There is no exact requirement concerning how knowledge or skill must be acquired. Hopkins v. Comer, 240 N.C. 143, 81 S.E.2d 368 (1954). A witness may be competent to testify as an expert although the witness acquired his or her knowledge through practical experience and not by scientific study, training, or research. 31 Am.Jur.2d Expert and Opinion Evidence § 27 at 526 (1967). Even where the problem presented may be one that usually requires some scientific knowledge or training, a person with long experience may testify as an expert although he or she did not pursue a special study of the matter. Id. at 526-27.

Honea, 295 S.C. at 530-531, 369 S.E.2d at 849. The Court concluded:

Considering each social worker's education, her post-graduate training, her clinical experience with victims of sexual assault, and her opportunities to observe Honea, we hold the trial judge committed no abuse of discretion in determining that each social worker was qualified as an expert to give opinion evidence regarding Honea's mental condition.

Id. at 531, 369 S.E.2d at 849. The Court reiterated its opinion in its ruling on the Petition for Rehearing:

In our decision, we also have acknowledged that one other than a psychiatrist may give an expert opinion concerning a person's mental condition. See Commonwealth v. Gallagher, 353 Pa.Super. 426, 510 A.2d 735 (1986) (wherein the court upheld the trial court's admission of expert testimony on rape trauma syndrome from a witness who did not have a medical degree and listed cases supporting its conclusion that an expert witness need not hold a medical degree in order to testify that a complainant exhibits symptoms of rape trauma syndrome).

Honea, 295 S.C. at 537, 369 S.E.2d at 852.

Considering the State expert's education, training, clinical experience, and years of treating and observing the victim in this case, the trial court in the case *sub judice* did not commit an abuse of discretion in allowing testimony regarding the child's behavior and the concern the expert had that the behaviors were symptomatic of PTSD.²

Vouching or Bolstering

Finally, even if Appellant's contention the expert's testimony violated the dictates of Kromah and constituted vouching was preserved, it is without merit. The Supreme Court in Kromah explained: "Our courts have previously held that '[t]he assessment of witness credibility is within the exclusive province of the jury,' and that witnesses generally are 'not allowed to testify whether another witness is telling the truth.' Kromah, 401 S.C. at 358, 737 S.E.2d at 500 (quoting State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)).

This Court recently stated:

² It is important to note no actual diagnosis of PTSD was rendered by the State's expert. She expressed concerns but referred the victim to a psychiatrist. (T.477; 479-480; R. 132; 134-135).

“Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror.” State v. Douglas, 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct. App. 2006), *rev'd in part on other grounds*, 380 S.C. 499, 671 S.E.2d 606 (2009). Generally, the prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain “the assessment of witness credibility . . . within the exclusive province of the jury.” State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012).

State v. Taylor, 404 S.C. 506, 514-515, 745 S.E.2d 124, 128 (Ct. App. 2013). Any time an expert testifies or provides evidence which supports the underlying charge levied by the victim, it does not result in improper or impermissible bolstering or vouching. It is only when the testimony invades the province of the jury and makes a comment on the credibility or veracity of the victim.

The expert in this case testified extensively to observed behaviors, testimony specifically allowed under Kromah. Kromah, 401 S.C. at 360, 737 S.E.2d at 500 (allowing witness to testify to “any personal observations regarding the child's behavior or demeanor”). At no time did the State’s expert indicate the child was telling the truth regarding her victimization at the hand of Appellant. Further, as discussed above, this testimony was specifically admitted under Alexander and Schumpert.

Additionally, the testimony regarding generally observed characteristics did not impermissibly bolster or vouch for the victim. The Georgia Court of Appeals found testimony about child sexual abuse syndrome admissible. McCoy v. State, 629 S.E.2d 493, 494 (Ga. Ct. App. 2006); *see also*, Keri v. State, 347 S.E.2d 236, 238 (Ga. App. 1986) (finding expert testimony assisted jury in understanding why sexually abused

children are secretive, why they were frightened, why they act out and become disciplinary problems, and why the children could not give specific dates for the acts they say were committed by the defendant). Relying on its longstanding supreme court precedent, the Court found:

The expert witness testified as to common characteristics of child sexual abuse syndrome, such as secrecy, delayed disclosure, helplessness, and accommodation. He offered no opinion, however, as to whether the victims in this case were being truthful. He left that determination for the jury. Since “[l]aymen would not understand this syndrome without expert testimony, nor would they be likely to believe that a child who denied a sexual assault, or who was reluctant to discuss an assault, in fact had been assaulted.”

McCoy, 629 S.E.2d at 494 (quoting Allison v. State, 535 S.E.2d 805 (Ga. 1987)).

The Montana Supreme Court recently stated:

We have consistently upheld the use of experts to explain the complexities of child sexual abuse. Child sexual abuse is a topic that many or most jurors have no common experience with. This is particularly so when the alleged victim and perpetrator are family members. Child sexual abuse victims often respond to the abuse with seemingly puzzling and contradictory behavior. The expert's testimony educates and enlightens the jury. The jury can then make a more informed decision when it assesses the victim's credibility.

State v. Robins, 297 P.3d 1213, 1217 (Mont. 2013) (emphasis added).

The information provided by the State's expert enables the jury to make an informed decision; it does not in any way remove the determination from the jury of whether the child is being truthful. Accordingly, nothing in the State's expert's testimony regarding the victim's behavior or the characteristics of PTSD removed the determination of credibility from the jury. The expert did not usurp the jury's role as fact finder and

determiner of the truth. Accordingly, the trial court properly admitted the testimony as it did not vouch for or impermissibly bolster the victim's testimony.

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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September 16, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Union County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case Tracking No. 2013-000435

The State,

Respondent,

vs.

Stephen Douglas Berry,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filing."

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September 16, 2014

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SC Court of Appeals

P237

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Union County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case Tracking No. 2013-000435

The State,

Respondent,

vs.

Stephen Douglas Berry,

Appellant.

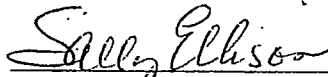
PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent on Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM UNION COUNTY
Court of General Sessions

John C. Hayes, III, Circuit Court Judge

Case No. 2011-GS-44-0413

The State of South Carolina,.....Respondent,

v.

Stephen Douglas Berry,.....Appellant.

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STATEMENT OF THE CASE

Appellant adopts and incorporates by reference the Statement of Case and Facts presented in his Initial Brief. The factual history discussed below is limited to reply to the issues raised in the Respondent's Statement of the Case.¹

During Appellant Stephen Berry's trial, the victim testified as to sexual acts occurring between Berry and her between May 2010 and _____ 2010, which is the date range set forth in the Indictment. In _____ 2010, the victim reached the age of sixteen. (R. p. 59, lines 16-18). Over the objection of Berry's counsel, the trial court allowed the victim to testify further as to alleged acts between Berry and her occurring after her sixteenth birthday. (R. p. 65, line 24 – p. 66, line 1; p. 66, lines 16-17).

During the trial the State also called Kim Roseborough, a psychotherapist and social worker, as a witness. (R. p. 106, lines 14-25). During Roseborough's testimony, Berry's counsel objected to any statements relating to Ms. Roseborough's opinion that the circumstances of the victim's disclosure were consistent with a disclosure of sexual abuse. (R. p. 116, lines 2-15). Following a lengthy discussion with counsel outside the jury's presence, the judge sustained the objection. (R. p. 119, line 8). Shortly thereafter, Berry's counsel again objected to similar testimony of Ms. Roseborough and the judge overruled the objection. (R. p. 132, lines 1-21).

INTRODUCTION

The parties are in agreement regarding much of the law related to the issues at bar, including the law governing the admission or exclusion of trial testimony. The admission or exclusion of evidence is a matter within the discretion of the trial court and

¹ Similarly, under the Argument section of this Reply Brief, Appellant adopt and incorporates by reference those arguments raised in his Initial Brief. For the sake of brevity, Appellant offers the arguments herein as a limited reply to those issues presented in Respondent's Initial Brief.

will not be reversed on appeal absent an abuse of that discretion. *State v. Saltz*, 346 S.C. 114, 551 S.E.2d 240 (2001). Furthermore, the parties agree that an abuse of discretion occurs when the trial court's ruling lacks any evidentiary support or is based on an error of law. *State v. McDonald*, 343 S.C. 319, 540 S.E.2d 464 (2000). The parties disagree, however, as to whether an error of law occurred relating to the admission of the victim's trial testimony.

The parties further agree that the admission of expert testimony must not violate the requirements of *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013). However, the parties disagree as to whether this issue was properly preserved for review and whether the admission of the State's expert's testimony violated *Kromah*.

For the reasons set forth below, the arguments raised by Respondent should be rejected, Berry's conviction should be reversed, and this case remanded to the Union County Court of General Sessions for a new trial.

ARGUMENTS

I. RESPONDENT'S ARGUMENT THAT THE VICTIM'S TESTIMONY WHICH EXCEEDED THE SCOPE OF THE INDICTMENT WAS PERMISSIBLE UNDER *LYLE* IS UNAVAILING.

Before his trial started, Appellant Berry's counsel moved to limit the testimony regarding any alleged sexual acts to the dates contained in the indictment. (R. p. 10, lines 20-23). The State was later allowed to introduce testimony that the alleged acts continued to occur beyond the dates set forth in the indictment. (R. p. 11, lines 17-23).

It is well settled law that a defendant has a right to be tried only for the crimes set forth in the indictment. *State v. Thompson*, 230 S.C. 473, 96 S.E.2d 471 (1957). Because of this fundamental right, there are only limited circumstances where testimony that

exceeds the scope of the indictment may be admitted. The circumstances are firmly established in *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). According to *Lyle*, "evidence of other crimes is competent to prove the specific crime charged when it tends to establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial." *Id.* at 416, 118 S.E. at 807. *Lyle* specifically states that "evidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged." *Id.* at 415-16, 118 S.E. at 807.

The State argued at trial that the testimony in question established the basis for the delay between the victim turning sixteen and the date she finally disclosed the abuse. (R. p. 11, line 17 – p. 12, line 2). Respondent argues that if the testimony had been prohibited, the jury would have been lead to believe that the contact between the victim and Berry ended when she turned sixteen.

Immediately prior to trial, during the hearing on Berry's motion *in limine* regarding this testimony, the following exchange took place between the solicitor and the trial court:

Solicitor Anthony: Yes, sir. She – The case is not going to make really any sense if it is portrayed to the jury that these acts stopped right at her sixteenth birthday, four months passed before she ever told anybody.

The Court: Well it's not the Court's responsibility to make the case make sense. I mean it's got the facts; the facts are the facts and the allegations are for a certain time period – I'll give it some thought but I don't see how a continuing relationship is a commission of a crime and it may be reversible. *Lyle*: It's kind of *Lyle* in reverse that this continued pattern of bad acts afterward the how [sic] she reached the age of consent."

(R. p. 12, lines 2-13).

As evidenced above, any testimony related to alleged acts occurring after the victim turned 16 served no other purpose than to corroborate the prosecution's theory of Berry's guilt, in direct violation of the requirements of *Lyle*. Without the testimony, the solicitor worried that the State's case would not "make sense."

This testimony was improperly admitted and reversal is required.

II. RESPONDENT'S ARGUMENT THAT THE ISSUE OF WHETHER THE TRIAL COURT'S ALLOWANCE OF THE STATE'S EXPERT TO IMPROPERLY BOLSTER THE VICTIM'S TESTIMONY WAS NOT PRESERVED FOR REVIEW IS WITHOUT MERIT.

The trial court erred in allowing the State to offer testimony which vouched for and bolstered the victim's assertions, through its expert psychotherapist and social worker Kim Roseborough, who had previously counseled the victim. This testimony violates *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013). In contrast to the State's argument on appeal, this issue was properly preserved for review. During Ms. Roseborough's testimony, Berry's counsel specifically referenced the *Kromah* case to the trial court, outside the jury's presence. Berry's counsel stated as follows:

I will say at the outset of my argument, Your Honor, this case is extremely new. I believe it was just filed in January which would have been last month and I don't think the time period has passed but I do think it is instructive on this issue...

In this case, Your Honor, the court expressly addressed this forensic interviewer's comments regarding her assessment of the demeanor of essentially in this case what is a child victim's demeanor and how it relates to whether that child was believable in a disclosure of sexual abuse. It is an extensive recitation of how that forensic interview [sic] was certified as an expert in forensic interviewing and how even though the person was qualified as an expert that does not allow that person to comment on anything involving the credibility of a witness.

It further does caution that there are certain statements that should be avoided at trial, one of which is any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter.

It is our concern, Your Honor, that should Ms. Roseborough testify, as the State has ask [sic] her to do, that her disclosure, to mean the victim's disclosure is consistent or inconsistent with the disclosure of sexual abuse.

That is asking Ms. Roseborough to comment in a manner that would require her to comment on whether she believes [the victim's] allegations in this matter involved in this case when our Supreme [sic] has determined this an improper comment.

(R. p. 116, line 18 – p. 118, line 2). The trial court sustained the objection. (R. p. 119, line 8).

Later, and in spite of the trial court sustaining Berry's counsel's *Kromah* objection, the court then allowed the precise type of testimony prohibited by *Kromah*. Following a discussion by Ms. Roseborough of typical symptoms of trauma that are exhibited by children who have been sexually assaulted, she was allowed to testify as to which of those symptoms were exhibited by the victim. Specifically, Ms. Roseborough stated as follows:

BY SOLICITOR ANTHONY:

Q: Okay. Are there any specific trauma symptoms that children would tend to show following a sexual assault?

A: Yes.

Q: And what are those or some of those?

A: Some of those would be hyper-vigilance. A very exaggerated, startled response. There could be distressing intrusive thoughts about the event that occurred. These can sometimes cause really significant problems with concentration because they are having intrusive thoughts and they are not able to get the event out of their mind. A lot of people can have and one of the symptoms certainly is agitation, outbursts of anger. They also can have feelings of detachment that lead to very significant depression and anxiety and the symptoms that would go along with both of those; lack of sleep, problems with appetite. Those types of things.

Q: And in regards to any of your treatment of the victim, did you make observations and form opinions as to specific symptoms of trauma suffered by her?

A: Yes.

Q: And what were those?

A: Over time the victim became much more agitated and had a lot of feelings of guilt and separation and detachment from her family. She became increasingly more angry and had some ---

MS. INZERILLO: Your Honor, I'm going to object.

THE COURT: I overrule your objection. Go ahead.

A: Thank you. Had some very violent outbursts toward people in her family, her dad and her brothers. And she became more withdrawn. She had a lot of feelings of loneliness and detachment. She became so clinically depressed that I was concerned about her and referred her to a psychiatrist.

(R. p. 131, line 10 – p. 132, line 21)

Respondent argues that this issue is not properly preserved for review because trial counsel's objection was not made on a specific ground. The South Carolina Rules of Evidence provide that an objection must state a specific ground "**if the specific ground was not apparent from the context,**" SCRE 103(a)(1) (emphasis added). Here, the specific ground was apparent from the context, given the line of questioning contained in the above exchange and the previous in-depth discussion of *Kromah*. Allowing Ms. Roseborough to testify first as to examples of specific trauma symptoms that children would tend to show following a sexual assault, and then to testify as to which of those symptoms the victim exhibited, constitutes an improper bolstering of the victim's allegations. The above testimony is tantamount to allowing Ms. Roseborough to testify that she believes the victim. It is in direct violation of *Kromah* "for a witness to testify as

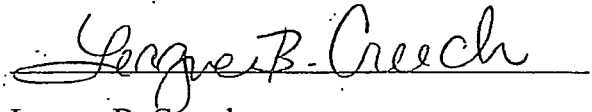
to his or her opinion about the credibility of a child victim in a sexual abuse matter.”
Kromah at 358, 727 S.E.2d at 499 (citing *State v. Hill*, 394 S.C. 280, 715 S.E.2d 368 (Ct.
App. 2011)).

This testimony was improperly admitted and reversal is warranted.

CONCLUSION

For the reasons set forth herein and in Appellant’s Initial Brief to this Court,
Berry respectfully requests that his conviction be reversed and this case remanded to the
Union County Court of General Sessions for a new trial.

Respectfully submitted,



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October 8, 2014

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM UNION COUNTY
Court of General Sessions

John C. Hayes, III, Circuit Court Judge

Case No. 2011-GS-44-0413

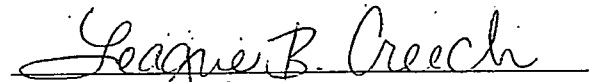
The State of South Carolina,.....Respondent,

v.

Stephen Douglas Berry,.....Appellant.

CERTIFICATE OF COUNSEL

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



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October 8, 2014

ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Stephen Douglas Berry, Appellant.

Appellate Case No. 2013-000435

Appeal From Union County
John C. Hayes, III, Circuit Court Judge

Opinion No. 5329
Heard April 14, 2015 – Filed July 15, 2015

AFFIRMED

League B. Creech, of Peters Murdaugh Parker Eltzroth & Detrick, PA, of Hampton, and Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blich, Jr., both of Columbia, for Respondent.

LOCKEMY, J.: Stephen Douglas Berry appeals his conviction for second-degree criminal sexual conduct (CSC) with a minor. Berry argues the trial court erred in (1) allowing subsequent bad act testimony and (2) failing to suppress expert testimony regarding the victim's behavior and symptoms of post-traumatic stress disorder. We affirm.

FACTS/PROCEDURAL BACKGROUND

Berry was indicted by the Union County Grand Jury for second-degree CSC with a minor in July 2012. A jury trial was held February 5-8, 2013.

At trial, the victim testified she met Berry at New Life Baptist Church where he served as a youth pastor. In May 2010, Berry and his daughter, a friend of the victim, moved to a home near the then fifteen-year-old victim. The victim testified that after church one Sunday in May 2010, she accepted a ride to her home from Berry. Instead, Berry took her to his previous residence telling her he had to pick up some items. The victim stated that once inside, she went to Berry's daughter's room. According to the victim, Berry then came up behind her, hugged her, and touched her behind. After a brief conversation, the victim testified Berry again approached her, hugged her, and told her she was beautiful. He then began rubbing her legs and unbuttoned and unzipped her pants. The victim stated she pushed Berry away, but he came back and pulled her pants and underwear down and placed his finger inside her vagina. Thereafter, the victim testified that after briefly walking away, Berry began walking toward her again while unbuttoning and unzipping his pants. The victim stated Berry turned her around and attempted to sodomize her. The victim further explained that after she was able to prevent him from doing so several times, Berry went to another part of the room and masturbated.

The victim testified that one week later, Berry invited her to his new home. Once inside, the victim stated Berry placed his finger inside her vagina. She testified she resisted several times and "eventually gave in because there was no use in even trying to stop it."

The victim testified to more incidents of sexual abuse by Berry at his home and at her home. She testified these incidents occurred at least once a week during the 2010-2011 school year. The victim then explained that in the fall of 2010 Berry put his penis inside her vagina while she was watching a movie at his home and told her she "wasn't a virgin anymore." Over defense counsel's objection, the victim testified Berry continued to digitally penetrate her at various times for four months after she turned sixteen. The victim stated the incidents which took place after she turned sixteen occurred without her consent.

The State called Kim Roseborough, a psychotherapist and social worker, as a witness. The trial court found Roseborough qualified to testify as an expert in the field of child sexual abuse assessment and treatment. Roseborough testified she counseled the victim following the victim's disclosure of sexual abuse. According

to Roseborough, she "noticed several things about [the victim's] demeanor, including many symptoms related to trauma." Roseborough testified the victim was avoidant, agitated, depressed, angry, and had feelings of guilt and hopelessness. The State asked Roseborough whether, based on her experience and training, the victim's disclosure was consistent with the disclosure of sexual abuse. Citing *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013), Berry's counsel objected, arguing that asking Roseborough to comment in such a manner would require her to comment on whether she believed the victim. Following a discussion with counsel outside the jury's presence, the judge sustained the objection. Later in Roseborough's testimony, Berry's counsel objected to testimony regarding the typical symptoms exhibited by children who have been sexually abused and are suffering from post-traumatic stress disorder (PTSD). The court overruled the objection off the record. Later in the trial, Berry's counsel placed his prior objection on the record, arguing Roseborough was not qualified to diagnose PTSD. Roseborough testified it was her opinion that the victim suffered from PTSD and referred her to a psychiatrist.

The jury found Berry guilty, and he was sentenced to fifteen years' imprisonment. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless the findings are clearly erroneous." *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *Id.* "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Id.*

LAW/ANALYSIS

I. Bad Act Evidence

Berry argues the trial court erred in allowing the victim to testify as to the acts of sexual abuse committed after she turned sixteen. Berry maintains these acts exceeded the scope of the indictment for second-degree CSC with a minor. Berry also contends (1) the victim's testimony regarding the acts was not relevant; (2) the acts were not criminal in nature; (3) the testimony was inadmissible under Rule

404(b) SCRE; and (4) the testimony's probative value was outweighed by its prejudicial effect.

Generally, South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged. *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923); *see also* Rule 404(b), SCRE (evidence of other crimes, wrongs, or acts is not admissible to prove character of person in order to show action in conformity therewith). To admit evidence of prior bad acts, the circuit court must first determine whether the proffered evidence is relevant. *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "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." Rule 401, SCRE. If the trial court finds the evidence is relevant, the court must then determine whether the bad act evidence is admissible under Rule 404(b) of the South Carolina Rules of Evidence. *Clasby*, 385 S.C. at 154, 682 S.E.2d at 895. Rule 404(b) precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged, except to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; or (5) the identity of the perpetrator. *See* Rule 404(b), SCRE.

"Once bad act evidence is found admissible under Rule 404(b), the trial court must then conduct the prejudice analysis required by Rule 403, SCRE." *State v. Wallace*, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009). Pursuant to Rule 403, "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. "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." *State v. Gilchrist*, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App. 1998).

Berry first argues the victim's testimony regarding abuse that occurred after she turned sixteen is not relevant because any acts which occurred after she turned sixteen were not criminal. We disagree. The victim testified Berry digitally penetrated her without her consent after she turned sixteen. As a result, Berry's actions were criminal.

Berry also argues the trial court erred in allowing testimony that the abuse continued beyond the dates set forth in the indictment. Berry notes testimony that

exceeds the scope of the indictment is only permitted if it satisfies one of the exceptions found in Rule 404(b), SCRE. Berry asserts that assuming the victim's testimony was relevant; it was inadmissible because it did not relate to an exception set forth in Rule 404(b), SCRE. He contends the trial court erred in finding the victim's testimony was admissible as evidence of a common scheme or plan. The State argues the victim's testimony established the basis for the delay between the victim turning sixteen and the date she reported the abuse. The State also contends the victim's testimony was properly admitted as evidence of a common scheme or plan.

We believe the trial court properly admitted the victim's testimony as evidence of a common scheme or plan. *See Clasby*, 385 S.C. at 155, 682 S.E.2d at 896 ("Where there is a close degree of similarity between the crime charged and the prior bad act, both this [c]ourt and the [c]ourt of [a]ppeals have held prior bad acts are admissible to demonstrate a common scheme or plan.") (quoting *State v. Gaines*, 380 S.C. 23, 30, 667 S.E.2d 728, 731 (2008)). The victim's testimony in this case established the incidents of abuse occurred in the same manner and in the same locations as the conduct that formed the basis of the charge of CSC with a minor brought against Berry. *See State v. Whitener*, 228 S.C. 244, 265, 89 S.E.2d 701, 711 (1955) (recognizing that the common scheme or plan exception "is generally applied in cases involving sexual crimes, where evidence of acts prior and subsequent to the act charged in the indictment is held admissible as tending to show continued illicit intercourse between the same parties"); *State v. McClellan*, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) (concluding that victim's testimony regarding prior attacks by defendant, which were not the subject of an indictment, was properly admitted under the common scheme or plan exception in trial for CSC with a minor, second degree where testimony showed "the continued illicit intercourse forced upon her by [defendant]"); *State v. Weaverling*, 337 S.C. 460, 471, 523 S.E.2d 787, 792-93 (Ct. App. 1999) (finding victim's testimony regarding pattern of sexual abuse he suffered by the defendant was properly admitted as part of a common scheme or plan exception in trial for CSC with a minor and disseminating harmful material to a minor where the "challenged testimonial evidence of [defendant's] prior bad acts show[ed] the same illicit conduct with the same victim under similar circumstances over a period of several years").

Finally, Berry maintains that assuming the victim's testimony is relevant and falls within an exception in Rule 404(b), SCRE; it is still not admissible because any probative value is substantially outweighed by the danger of unfair prejudice. The trial court stated that after balancing the probative value of the victim's testimony and its prejudicial effect, it found the probative value was not substantially

outweighed by any prejudicial effect. Berry argues it is unfairly prejudicial to allow testimony regarding non-criminal acts to bolster evidence of alleged criminal acts. We disagree. As discussed above, Berry's actions were criminal. Furthermore, the victim's testimony need not be criminal to be admissible to demonstrate a common scheme or plan. Rule 404(b), SCRE, specifically applies to "[e]vidence of other crimes, wrongs, or **acts**." Rule 404(b), SCRE (emphasis added). We agree with the trial court's finding that the probative value of the victim's subsequent bad act testimony was not substantially outweighed by any prejudice resulting from its admission. The testimony regarding the continuous and similar illegal conduct in this case was probative to establish the CSC with a minor charge. *See Clasby*, 385 S.C. at 158-59, 682 S.E.2d at 898 ("Given there was no physical evidence to corroborate [the victim's] testimony regarding the indicted offenses of CSC with a minor, first degree and lewd act upon a child, we find her testimony of Clasby's sustained illicit conduct was extremely probative to establish the charged criminal sexual conduct underlying the offense of lewd act upon a child.").

Accordingly, we find the trial court did not abuse its discretion in admitting the victim's testimony regarding Berry's subsequent bad acts. The victim's testimony was relevant, probative, and evidence of a common scheme or plan.

II. Expert Testimony

Berry argues the trial court erred in admitting testimony from Roseborough, the State's expert witness, regarding behaviors observed in the victim and the symptoms of PTSD. He contends Roseborough's testimony constituted vouching or bolstering and was a violation of *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013).

Rule 702, SCRE, which governs the admission of expert testimony, provides:

If 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.

"[E]ven though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others." *Kromah*, 401 S.C. at 358, 737 S.E.2d

at 499. "The assessment of witness credibility is within the exclusive province of the jury." *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). Consequently, "it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter." *Kromah*, 401 S.C. at 358-59, 737 S.E.2d at 500.

In *Kromah*, our supreme court held forensic interviewers should avoid (1) stating the child was instructed to be truthful; (2) offering "a direct opinion on the child's veracity or tendency to tell the truth"; (3) indirectly vouching for the child, "such as stating the interviewer has made a 'compelling finding' of abuse"; (4) indicating "the interviewer believes the child's allegations in the current matter"; or (5) opining "child's behavior indicated the child was telling the truth." 401 S.C. at 360, 737 S.E.2d at 500. The *Kromah* court held forensic interviewers may testify regarding, among other things, the following: (1) "the time, date, and circumstances of the interview"; (2) "any personal observations regarding the child's behavior or demeanor"; or (3) "a statement as to events that occurred within the personal knowledge of the interviewer." *Id.*

A. Preservation

The State maintains any argument regarding vouching or a violation of the directives in *Kromah* is not preserved for our review.

During Roseborough's testimony, Berry's counsel objected to the State's question of whether "the circumstances of [the victim's] disclosure . . . [were] consistent with the disclosure of sexual abuse." Berry's counsel referenced *Kromah* and stated:

In this case, Your Honor, the court expressly addressed this forensic interviewer's comments regarding her assessment of the demeanor of essentially in this case what is a child victim's demeanor and how it relates to whether that child was believable in a disclosure of sexual abuse. It is an extensive recitation of how that forensic interview [sic] was certified as an expert in forensic interviewing and how even though the person was qualified as an expert that does not allow that person to comment on anything involving the credibility of a witness.

It further does caution that there are certain statements that should be avoided at trial, one of which is any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter.

It is our concern, Your Honor, that should Ms. Roseborough testify, as the State has ask [sic] her to do, that her disclosure, to mean the victim's disclosure is . . . consistent or inconsistent with the disclosure of sexual abuse.

That is asking Ms. Roseborough to comment in a manner that would require her to comment on whether she believes [the victim's] allegations in this matter involved in this case when our Supreme [sic] has determined this an improper comment.

The trial court sustained the objection. The trial court continued to sustain the same objection based on *Kromah* and prohibited the State from exploring areas which could result in vouching or impermissible bolstering of the victim.

Thereafter, the State questioned Roseborough regarding symptoms of trauma seen in child sexual abuse victims and the symptoms of PTSD. Berry's counsel objected and an off the record conference was held. Later, counsel placed her objection on the record, stating her objection went to Roseborough's qualifications to diagnose PTSD because she was a social worker and not a medical doctor. The trial court overruled the objection.

Subsequently, the following exchange occurred:

The State: Okay. Are there any specific trauma symptoms that children would tend to show following a sexual assault?

Roseborough: Yes.

Q: And what are those or some of those?

A: Some of those would be hyper-vigilance. A very exaggerated, startled response. There could be

distressing intrusive thoughts about the event that occurred. These can sometimes cause really significant problems with concentration because they are having intrusive thoughts and they are not able to get the event out of their mind. A lot of people can have and one of the symptoms certainly is agitation, outbursts of anger. They also can have feelings of detachment that lead to very significant depression and anxiety and the symptoms that would go along with both of those; lack of sleep, problems with appetite. Those types of things.

Q: And in regards to any of your treatment of [the victim], did you make observations and form opinions as to specific symptoms of trauma suffered by her?

A: Yes.

Q: And what were those?

A: Over time [the victim] became much more agitated and had a lot of feelings of guilt and separation and detachment from her family. She became increasingly more angry and had some ---

Defense Counsel: Your Honor, I'm going to object.

The Court: I overrule your objection. Go ahead.

Roseborough: Thank you. Had some very violent outbursts toward people in her family, her dad and her brothers. And she became more withdrawn. She had a lot of feelings of loneliness and detachment. She became so clinically depressed that I was concerned about her and referred her to a psychiatrist.

The State argues Berry's counsel did not address vouching, bolstering, or *Kromah* in her objection regarding Roseborough's testimony as to trauma symptoms and PTSD. Therefore, the State contends Berry's argument on appeal is not preserved. *See State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue not preserved when one ground is raised to the trial court and another ground

is raised on appeal). Berry maintains the specific ground of his objection was apparent from the context, given the line of questioning contained in the above exchange and the previous discussion of *Kromah*. We agree with Berry and find his argument is preserved for our review.

B. Merits

We find the trial court did not abuse its discretion in allowing Roseborough to testify regarding behaviors she observed in the victim and the symptoms of PTSD. *See State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009) ("A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion."). Furthermore, we find Roseborough's testimony did not impermissibly vouch for or bolster the victim's testimony.

Our courts have examined behavioral testimony in several cases. Initially, in *State v. Hudnall*, 293 S.C. 97, 359 S.E.2d 59 (1987), our supreme court held expert testimony regarding common behavioral characteristics exhibited by child victims of sexual abuse was not admissible to establish abuse had occurred. The court held this evidence was admissible only to rebut a defense claim that the victim's response was inconsistent with such a trauma. *Id.* at 100-01, 359 S.E.2d at 61-62. In *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993), our supreme court considered expert testimony regarding rape trauma syndrome. The supreme court overturned its holding in *Hudnall*, and found: "both expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect." 312 S.C. at 506, 435 S.E.2d at 862.

This court addressed similar behavior testimony in *State v. Weaverling*, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999). In *Weaverling*, an expert testified regarding behavior and characteristics of a sexually abused victim. This court found "[e]xpert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible." *Id.* at 474-75, 523 S.E.2d at 794 (citing *Frenzel v. State*, 849 P.2d 741 (Wyo.1993); *State v. Lujan*, 967 P.2d 123 (Ariz. 1998) (opinion testimony describing behavioral characteristics outside jurors' common experience is permitted as long as it meets other admissibility requirements)). This court explained:

Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault. *Frenzel, supra*. It assists the

jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child's often strange demeanor. *Id.* See also *Lujan, supra* (when facts of case raise questions of credibility or accuracy that might not be explained by experiences common to jurors-like reactions of child victims of sexual abuse-expert testimony on general behavioral characteristics of such victims should be admitted).

Weaverling at 475, 523 S.E.2d at 794.

Roseborough's testimony explained the common behaviors and characteristics of a child sexual trauma victim. We find such testimony is admissible under *Schumpert* and *Weaverling*. Furthermore, Roseborough's testimony regarding behaviors she witnessed in the victim was proper because it was based on her personal observations.

As to Berry's argument that Roseborough's testimony constituted vouching or bolstering and was a violation of *Kromah*, we disagree. The supreme court in *Kromah* explained: "Our courts have previously held that '[t]he assessment of witness credibility is within the exclusive province of the jury,' and that witnesses generally are 'not allowed to testify whether another witness is telling the truth.'" 401 S.C. at 358, 737 S.E.2d at 499-500 (quoting *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)). This court recently found:

Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is, telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror. *State v. Douglas*, 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct. App. 2006), *rev'd in part on other grounds*, 380 S.C. 499, 671 S.E.2d 606 (2009). Generally, the prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain 'the assessment of witness credibility . . . within the exclusive province of the jury.' *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012).

State v. Taylor, 404 S.C. 506, 514-15, 745 S.E.2d 124, 128 (Ct. App. 2013).

We find Roseborough's testimony did not invade the province of the jury or serve as a comment on the credibility or veracity of the victim. Roseborough testified to observed behaviors; testimony which is specifically allowed under *Kromah*. *Kromah*, 401 S.C. at 360, 737 S.E.2d at 500 (allowing witness to testify to "any personal observations regarding the child's behavior or demeanor"). Roseborough never indicated in her testimony whether she believed the victim was telling the truth regarding the sexual abuse.

CONCLUSION

The trial court did not abuse its discretion in admitting subsequent bad act testimony and allowing expert testimony regarding the victim's behavior.

SHORT and McDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM UNION COUNTY
Court of General Sessions

John C. Hayes, III, Circuit Court Judge

Case No. 2011-GS-44-0413

RECEIVED

AUG 14 2015

SC Court of Appeals

The State of South Carolina,.....Respondent,

v.

Stephen Douglas Berry,.....Appellant.

APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR
REHEARING *EN BANC*

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Appellant Stephen Douglas Berry respectfully petitions the Court for Rehearing and/or to Alter its Opinion number 5329 of July 15, 2015.¹ This Opinion affirmed the trial court's decisions to admit subsequent bad act testimony and expert testimony regarding the victim's behavior and how that behavior evidenced symptoms of Post-Traumatic Stress Disorder. Appellant also respectfully petitions and suggests the desirability of rehearing by this Court *en banc* because the proceeding involves questions of exceptional importance.

¹ Appellant requested, and was granted by Order of this Court, an extension of time until August 14, 2015 to file and serve his Petition for Rehearing and Suggestion for Rehearing *En Banc*.

Specifically, the Opinion's ruling on the issue of expert testimony regarding the victim's behavior is fundamentally flawed and will have ramifications to many other cases beyond the one at bar. Concerning the limitations of the scope of expert testimony, the Opinion deviates from binding case law.

I. The Opinion Misapplies the Specific Holdings of *State v. Kromah* that Limit the Scope of Testimony Provided by an Expert Witness

While "experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others." *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013). Specifically, "it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter." *Id.* at 358, 727 S.E.2d at 499 (citing *State v. Hill*, 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011)). After *Kromah*, it is no longer acceptable for an expert witness to indicate in any way that he or she believes the victim. The *Kromah* Court specifically discussed the impropriety of this type of testimony and how it attempts to "convert the interviewer into a human truth-detector whose opinions of the truth are valuable and suitable for the jury's consumption." *Id.* at 356, 727 S.E.2d at 498.

As discussed during the oral argument of this case, after *Kromah*, the old line of cases addressing the proper scope of testimony by a forensic interviewer are no longer good law. In Mr. Berry's case, the Court's Opinion relies altogether on *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993) and *State v. Weaverling*, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999).

Schumpert held that "expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect." 312 S.C. at 506, 435 S.E.2d at 862. The

Weaverling court also found that expert testimony “concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible.” *Weaverling* at 474-75, 523 S.E.2d at 794 (citing *Frenzel v. State*, 849 P.2d 741 (Wyo. 1993); *State v. Lejun*, 967 P.2d 123 (Ariz. 1998)).

It is impossible to reconcile these findings with the specific holding of *Kromah* that it is improper to admit “any statement to indicate to a jury that the interviewer believes the child’s allegations in the current matter; or an opinion that the child’s behavior indicated the child was telling the truth.” *Kromah* at 360, 727 S.E.2d at 500.

In Mr. Berry’s trial, Kim Roseborough, a psychotherapist and social worker, was deemed qualified to testify as an expert in the field of child sexual abuse assessment and treatment. During her testimony, she was allowed to state, first, that there are specific trauma symptoms that children would tend to show following a sexual assault; second, what some of those symptoms are; third, that the alleged victim exhibited some of those symptoms, and; finally, Ms. Roseborough began listing those symptoms exhibited by the alleged victim. The sole purpose of this portion of Ms. Roseborough’s expert testimony was to illustrate her expert opinion that the alleged victim’s behavior indicated truthfulness, exactly what *Kromah* seeks to prevent because of its potential for prejudice.

The relationship between *Kromah* and the line of cases referenced above is of utmost importance and should be reconsidered by the Court. In cases like Mr. Berry’s, where the sole basis of conviction is the believability of the victim, all the prosecution will need to do to secure a conviction is present testimony from an “expert” who interviewed that alleged victim and who will aver that the alleged victim appeared to be distressed. While “an expert’s testimony theoretically is to be given no more weight by a

jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts.” *Kromah* at 357, 737 S.E.2d at 499.

In Mr. Berry’s case, Ms. Roseborough was the only witness deemed qualified to provide expert testimony. There can be no other conclusion than that her testimony prejudiced him.

This issue is also critical because it is another example of how the law does, and must, change with the times. When *Schumpert*, *Weaverling*, and their progeny were decided, the Court did not possess the gatekeeping function now required of it. This mindset of the 1980s and 1990s that science was not necessary and that experts did not necessarily need to be educated to any precise degree in order to give opinion testimony changed dramatically in recent years. *Kromah* seeks to specify in precise detail what constitutes permissible expert testimony, and this Court must follow the terms it provides. This is another reason an *en banc* hearing is essential in this matter. This Court, while it cannot overrule these older cases, must acknowledge that they no longer embody the appropriate standard for expert testimony in cases involving alleged sexual abuse.

II. The Opinion Contradicts Recent Supreme Court Precedent

Since the Court issued the Opinion in Mr. Berry’s case, the Supreme Court addressed this issue again in the case of *State v. Anderson*, Op. No. 27558 (S.C. Sup. Ct. filed August 5, 2015) (Shearouse Adv. Sh. No. 30 at 39). In *Anderson*, the Court held that a forensic interviewer vouched for a minor when she testified only to those characteristics which she observed in the minor. *Id.* at 44.

This is exactly what happened in the current case. In fact, this is the identical rationalization that the Court employed in Mr. Berry's Opinion when it found that Ms. Roseborough's testimony was admissible: "Roseborough testified to observed behaviors; testimony which is specifically allowed under *Kromah*, 401 S.C. at 360, 737 S.E.2d at 500 (allowing witness to testify to 'any personal observations regarding the child's behavior or demeanor'). Roseborough never indicated in her testimony whether she believed the victim was telling the truth regarding the sexual abuse." See, Opinion, p.12.

In actuality, Ms. Roseborough's testimony went beyond just discussing observed behavior and also contained testimony that the behavior demonstrated the medical condition of Post-Traumatic Stress Disorder, a medical opinion that only a medical doctor should have been allowed to assert; however, according to *Anderson*, even if Ms. Roseborough truly did solely relate her observations regarding the alleged victim's behavior to the jury, it is nevertheless improper. The *Anderson* Court held that:

To allow the person who examined the child to testify to the characteristics of victims runs the risk that the expert will vouch for the alleged victim's credibility.⁴ Compare *State v. Brown*, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015) (distinguishing improper bolstering cases because in *Brown* the behavioral expert did not examine the victim). Here, Witness Smith vouched for the minor when she testified only to those characteristics which she observed in the minor.

⁴The separate writing erroneously equates the testimony of an expert who offers his opinion on a fact in issue, such as whether a product was defectively designed or manufactured, with that of an expert whose testimony may intrude upon the jury's sole province to determine the credibility of a witness. E.g., *State v. Taylor*, 255 S.C. 268, 178 S.E.2d 244 (1970).

Anderson, Opinion No. 27558, p. 44, n.4.

Additionally, as in the current case, *Anderson* is one in which the outcome “turned solely on the credibility of the minor and of the Appellant.” *Id.* at 45. This was plainly stated during the oral argument for Mr. Berry’s case.

CONCLUSION

With regard to the issue of the proper scope of expert testimony, the Opinion radically contradicts the new, binding precedent on this subject. Especially in light of the new Supreme Court decision in *State v. Anderson*, filed 21 days after Mr. Berry’s Opinion, this Court must reconsider its position on this point. No longer can the litigants, lawyers, and the bench afford not to acknowledge that, after *Kromah*, the older cases of *Schumpert* and *Weaverling* do not set forth the appropriate boundaries for expert testimony in cases involving sexual abuse. The Opinion in Mr. Berry’s case, through its misapplication of *Kromah*, creates potential for further misunderstanding and confusion if it stands without reconsideration.

The Court should reconsider the Opinion and alter it to follow the correct, binding precedent. Furthermore, due to the far-reaching implications of the Opinion, Mr. Berry respectfully requests rehearing *en banc*.

Respectfully submitted,

By: Rymc

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ATTORNEYS FOR APPELLANT

August 14, 2015
Hampton, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Union County
John C. Hayes, III, Circuit Court Judge

RECEIVED

AUG 14 2015
SC Court of Appeals

STATE OF SOUTH CAROLINA,

RESPONDENT,

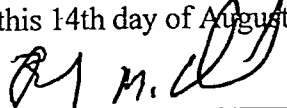
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STEPHEN DOUGLAS BERRY,

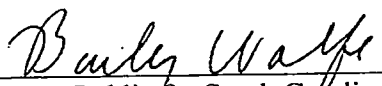
APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of appellant's petition for rehearing and suggestion for rehearing *en banc* in the above referenced case has been served upon Suzanne H. White, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 14th day of August, 2015.


Robert M. Dudek
Appellate Defender

SUBSCRIBED AND SWORN TO before me
this 14th day of August, 2015.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021



ALAN WILSON
ATTORNEY GENERAL

RECEIVED
SEP 21 2015
SC Court of Appeals

September 21, 2015

VIA HAND DELIVERY

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State v. Stephen Douglas Berry.
Appellate Case Tracking No. 2013-000435

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of a Return to Petition for Rehearing along with proof of service for filing in the above-referenced appeal.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General

Enclosures

cc: League B. Creech, Esquire
Robert M. Dudek, Esquire
Victim Services

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

SEP 21 2015

Appeal from Union County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case Tracking No. 2013-000435

SC Court of Appeals

The State,

Respondent,

vs.

Stephen Douglas Berry,

Appellant.

RETURN TO PETITION FOR REHEARING

On July 15, 2015, this Court properly affirmed Appellant's conviction and sentence. The Court properly held the testimony of the State's expert was admissible and did not impermissibly bolster or vouch for the victim. Further, this Court should find the issue is not preserved as the basis for the objection is not clear from the record when counsel made an objection shortly before the testimony which is on a completely different basis from the one being argued on appeal.

Preservation

First, the issue as raised on appeal is not preserved for review and this court should find it is not preserved for review. The State explored the symptoms of trauma seen in child victims, and possible PTSD. At this point, Appellant objected in an off the record conference. (T.475-476; R. 130-131). Later, counsel placed her objection on the record, indicating her objection went to the **qualification of the State's expert** to discuss

PTSD because she was a social worker and not a medical doctor. (T.522; R.140). Nothing in her objection addressed vouching, bolstering, or Kromah. In making his next objection, counsel mere stated: "Your Honor, I'm going to object." This objection is just as likely to be on the basis of the lack of qualification as it is any other ground, especially since an objection based on Kromah or bolstering and vouching had not previously been raised as to this testimony. As a result, the issues related to vouching and Kromah are not preserved for review on appeal because a party may not argue one ground at trial and another on appeal. State v. Brockmeyer, 406 S.C. 324, 355, 751 S.E.2d 645, 661 (2013); see also, State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue not preserved when one ground is raised to the trial court and another ground is raised on appeal); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (same).

Merits

Appellant next contends this Court erred in relying on the cases of State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) and State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999). He contends these cases were overruled by State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). He then maintains the testimony presented by the State's expert violates the South Carolina Supreme Court's recent opinion in State v. Anderson, ___ S.C. ___, 776 S.E.2d 76 (2015). The testimony by the expert in this case is not similar to the testimony found in Anderson and does not impermissibly bolster or vouch for the victim.

First, nothing in Kromah overruled either the Supreme Court's prior case law or this Court's case law regarding the admissibility and importance of expert testimony in

regard to behavioral characteristics of victims of sexual abuse. Kromah did nothing more than reaffirm the longstanding rule that an expert may not impermissibly bolster or vouch for the testimony of a victim and reiterated the holding of State v. Douglas that a forensic interviewer should not be qualified as an expert in the field of forensic interviewing. The case did not address the behavioral testimony admitted in Schumpert or Weaverling.

Additionally, and most telling, while Appellant cites to the recent opinion in Anderson for what may or may not be bolstering and vouching, overlooked is the Supreme Court's clear reaffirmation of the Schumpert line of cases. In Anderson, the Court specifically stated:

Certainly we recognize that there is such an expertise: this is the type of expert who can, for example, testify to the behavioral characteristics of sex abuse victims. See, e.g., State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993); State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct.App.1999); see also State v. White, 361 S.C. 407, 605 S.E.2d 540 (2004) (such witness may be more crucial where alleged victim is a child).

Anderson, supra. Certainly if the Supreme Court intended Kromah to overrule Schumpert and Weaverling, it would not have cited those cases for approval of the admission of expert testimony regarding the behavioral characteristics of sex abuse victims. Accordingly, Appellant's first argument has been decided already by Anderson and so this Court should deny the petition for rehearing and certainly has no need to grant *en banc* review of this issue.

As to Appellant's second contention, the testimony in Anderson is vastly different from the testimony in the instant case. The testimony in the instant case does not impermissibly bolster or vouch for the victim.

In Anderson, the expert testified regarding delayed disclosure and why a child would not disclose. She was the same person who conducted the forensic interview with the child and so was intimately aware of the child's allegations. Her testimony of delayed disclosure did not list all the reasons possible for delayed disclosure, but instead tailored her testimony to the characteristics alleged by the victim.

Here the testimony was only of personally observed behavioral characteristics, not repeating allegations made by the victim. The expert in this case testified extensively to observed behaviors—testimony specifically allowed under Kromah. Kromah, 401 S.C. at 360, 737 S.E.2d at 500 (allowing witness to testify to “any personal observations regarding the child's behavior or demeanor”). At no time did the State's expert indicate the child was telling the truth regarding her victimization at the hand of Appellant. In Anderson, the expert relied solely on the allegations made by the victim to determine the basis for the delayed disclosure. Here, the expert relied on personally observed behavioral characteristics to educate the jury about the behaviors and the possible correlation with the characteristics of PTSD.

“The expert's testimony educates and enlightens the jury. The jury can then make a more informed decision when it assesses the victim's credibility.” State v. Robins, 297 P.3d 1213, 1217 (Mont. 2013). The same can be said for the testimony by the State's expert. It did not invade the province of the jury in determining whether the victim was telling the truth, instead it educated the jury regarding the behavioral characteristics seen and their significance. The expert did not have to rely on the accuracy of the victim's allegation to render her opinion; instead, she was able to see the behaviors and testify regarding those behaviors as is specifically allowed under Kromah and Anderson.

The State also relies on its Final Brief of Respondent for this issue and any other issue addressed in the Petition for Rehearing not specifically addressed. No issues raised in the Petition for Rehearing warrant *en banc* review as the issues have already been addressed by the South Carolina Supreme Court or this Court. Based on the above, this Court properly affirmed Appellant's conviction and sentence and should deny the Petition for Rehearing.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General



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ATTORNEYS FOR RESPONDENT

September 21, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

SEP 21 2015

SC Court of Appeals

Appeal from Union County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case Tracking No. 2013-000435

The State,

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vs.

Stephen Douglas Berry,

Appellant.

PROOF OF SERVICE

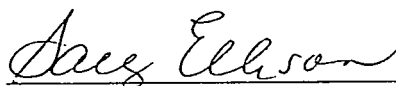
I, Sally Ellison, certify that I have served the Return to Petition for Rehearing on Appellant by depositing a copy of same in the United States mail, postage prepaid, addressed to:

League B. Creech, Esquire
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Hampton, South Carolina 29924

Robert M. Dudek, Esquire
Chief Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

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

This 21st day of September, 2015.



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The South Carolina Court of Appeals

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November 20, 2015

Mr. Robert Michael Dudek, Esquire
PO Box 11589
Columbia SC 29211

Ms. League B. Creech, Esquire
PO Box 457
101 Mulberry Street East
Hampton SC 29924-0457

Re: The State v. Stephen Berry
Appellate Case No. 2013-000435

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Alan McCrory Wilson, Esquire
William M. Blicht, Jr., Esquire
Kevin Scott Brackett, Esquire
The Honorable John C. Hayes, III

The South Carolina Court of Appeals

The State, Respondent,

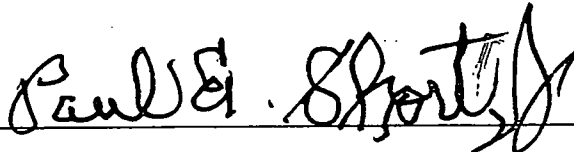
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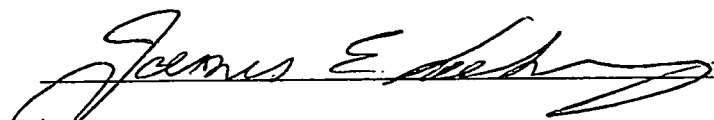
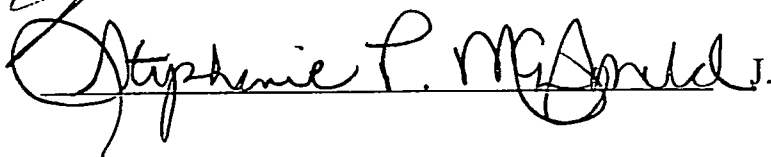
Stephen Douglas Berry, Appellant.

Appellate Case No. 2013-000435

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.

 J.

 J.
 J.

Columbia, South Carolina

cc:

Robert Michael Dudek, Esquire
Alan McCrory Wilson, Esquire
League B. Creech, Esquire
William M. Blitch, Jr., Esquire

FILED

November 20, 2013

Kevin Scott Brackett, Esquire
The Honorable John C. Hayes, III