STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STACY CAROL RIDEN,

APPELLANT

APPELLATE CASE NO 2016-000234

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On April 14, 2015, the Pickens County Grand Jury indicted Appellant Stacy Carol Riden and her ex-boyfriend, Aaron Hendrix, for two counts of criminal sexual conduct with a minor first degree and one count of criminal sexual conduct with a minor third degree for offenses allegedly committed against Riden's three minor children. Riden was also indicted for one count of unlawful conduct towards a child. R. * (Indictments).

On January 25 – 28, 2016, Riden and her ex-boyfriend/co-defendant, Aaron Hendrix, proceeded to trial before the Honorable Parry H. Gravely and a jury.[1] Tr. 1. Riden was represented by Caroline Horlbeck ("Ms. Horlbeck"), Hendrix was represented by Richard Warder ("Mr. Warder"), and the state was represented by assistant solicitor Christopher Jones. Tr. 1. The jury found both defendants guilty on all counts. Tr. 606, l. 18 – 608, l. 14. Riden was sentenced to twenty-five years on each of the CSC offenses and to a consecutive sentence of ten years on the neglect offense, for a total of thirty-five years. Tr. 615, ll. 2-21.

This appeal follows.

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[1] The judge issued a bench warrant for Riden after she failed to appear for trial. The police located her and brought her to court for the third and fourth days of trial. Tr. 10, ll. 20-23; Tr. 68, l. 7 – 71, l. 18; Tr. 267, l. 19 – 270, l. 15; Tr. 288, ll. 14-18. When Riden testified, she explained that she left because it "kills" her to hear the Children's allegations when she knows that she would never do those things. Tr. 453, ll. 10-16.

STATEMENT OF FACTS

Riden is the mother of three children, Minor 1 (male) and Minor 2 (female), who are twins, and Minor 3 (female), collectively "the Children." She worked at McDonalds for nine years and reached the level of department manager. Tr. 440, ll. 7-21. Riden was introduced to Hendrix by her sister, Jennifer, and knew him for approximately five years before their friendship became romantic. He began spending the night, progressively staying over more and eventually moving in with Riden and the Children in their three bedroom, two bathroom single-wide trailer at the beginning of 2012. Tr. 435, l. 21 – 437, l. 22; Tr. 448, ll. 15-21; Tr. 459, l. 7 – 460, l. 11; Tr. 467, ll. 11-22. Riden and Hendrix broke up at end of 2012 and he moved out before Christmas. Tr. 459, ll. 17-19; Tr. 469, ll. 6-8; Tr. 507, ll. 9-12.

In March 2013, the Children began living with their maternal grandfather and step-grandmother, Mark and Lisa Riden, because Riden was struggling to pay bills and take care of the Children on her own following her break up with Hendrix. Tr. 444, l. 2 – 447, l. 7; Tr. 456, l. 3 – 457, l. 18. It was meant to be a temporary solution and there was no court order in place. Tr. 308, ll. 16-24; Tr. 463, ll. 13-22. The grandparents allowed Riden to come visit the Children at their home in the beginning but slowly limited her access. Tr. 447, l. 13 – 448, l. 1. Riden admitted that after the Children went to live with their grandparents, she began hanging out with a bad crowd, using drugs, and not showing up for work. Tr. 463, l. 23 – 464, l. 25; Tr. 471, ll. 14-19. On December 29, 2013, police responded to the grandparents' home about a report of sexual abuse allegedly disclosed to the Children's step-grandmother. Tr. 259, l. 22 – 260, l. 24.

The solicitor alleged that Riden and her former live-in boyfriend, Hendrix, sexually abused the Children from December 25, 2011 thought December 25, 2012 by touching their genitalia, digitally penetrating them, and making the Children give and receive cunnilingus and

fellatio with Riden and Hendrix. The twins, Minor 1 and Minor 2, would have been five years old at the beginning of the relevant time period and Minor 3 would have been twenty-months old. The state further alleged that Riden neglected the Children. Both Riden and Hendrix testified at their joint trial and denied the allegations against them. Tr. 431, l. 13 – 473, l. 9; Tr. 493, l. 18 – 504, l. 8.

Motion to Sever

At the beginning of trial, Ms. Horlbeck made a motion to sever both the charges against Riden and the trials of Riden and Hendrix. Tr. 52, l. 21 – 55, l. 21; Tr. 57, l. 8 – 58, l. 12. Regarding severance of the defendants, Ms. Horlbeck admitted that there were some similarities in the defenses that she and Mr. Warder intended to put forth on behalf of their clients. Tr. 57, ll. 9-13. However, she argued that Mr. Warder was likely to open the door to objectionable hearsay that she would not have otherwise presented. Tr. 57, ll. 13-17; Tr. 57, l. 23 – 58, l. 4. She further argued: "[O]ur styles in what kind of testimony we wanted admitted into this case and the manner of presenting our respective defenses are just vastly different." Tr. 57, ll. 18-22. Ms. Horlbeck had also noted that children's original account of the abuse alleged that it was committed by Hendrix. Tr. 55, ll. 1-16. Mr. Warder stated that he had no objection to severance so long as Riden was tried first. Tr. 58, ll. 5-7. The trial judge denied the motion. Tr. 58, ll. 8-12; Tr. 137, ll. 5-16.

As the trial progressed, the differing theories of the co-defendants became more obvious. Riden's theory was plainly that the Children made these disclosures because they wanted to insure that they would remain in the home of their grandparents, who could provide a better standard of living. Whether coached by the grandparents or just the Children's distortions of reality, Riden asserted that the abuse never happened. Tr. 525, ll. 17-22; Tr. 528, l. 6 – 540, l.

16. Hendrix, on the other hand, argued two alternative theories – either the abuse never happened or it occurred sometime after Hendrix stopped residing with Riden and the Children. Tr. 541, l. 8 – 544, l. 15; Tr. 548, ll. 16-22. As to the second theory, Mr. Warder argued:

> And that's why I say that if it happened after we left because we don't know what happened then. We can only testify for the period of time we were there. My client moved out in December, I think it was March that the father found the needle and the electricity was off. Everybody says it went down, and I think Stacy said that she felt alone. People who feel alone end up falling into drugs.
>
> My client can't tell you what happened. Because my client can only account for the year that he was there, not the next year. That was after the period of time that they say it happened. My client was arrested in 2014. He was first reported in I think December. He had been gone since December of '12, 2012.

Tr. 543, l. 23 – 544, l. 15.

In addition to the differences in their overall strategies, Mr. Warder called the Children's biological father, Mark Lusk, to testify. There was some favorable testimony yielded from Lusk, including that Riden was a "damn good mother" and his testimony that he did not see any evidence of sexual abuse, much less witness it as alleged by the Children. However, Lusk admitted the he was an alcoholic and unable to provide for his Children. Lusk also described evidence of possible neglect by Riden after Hendrix moved out, including that he found a syringe needle in Riden's car, the power and water were cut off to Riden's trailer, there was not much food in Riden's home, and the condition of the home had generally degenerated. It was because of that Lusk asked the grandparents to take the Children into their home. Tr. 478, l. 12 – 480, l. 22; Tr. 481, l. 15 – Tr. 482, l. 5. Just as Ms. Horlbeck predicted, Mr. Warder also elicited hearsay testimony from Lusk that Lisa Riden, the Children's step-grandmother "[s]aid she'd heard some things about the house being in a bad condition." Tr, 480, ll. 10-13. In his summation, the solicitor characterized Lusk as "an interesting guy" with nothing to lose unless he admitted that he knew about the abuse. Tr. 557, l. 3 – 558, l. 5.

Forensic Interviews

The Children were subjected to multiple interviews, including recorded forensic interviews at the Julie Valentine Center by Shauna Galloway-Williams. Tr. 49, l. 17 – 50, l. 25; see State's Ex. 1 (2/19/14 Video Interview of Minor 2); State's Ex. 2 (4/11/14 Video Interview of Minor 2); State's Ex. 3 (3/11/14 Video Interview of Minor 1); State's Ex. 4 (4/7/14 Video Interview of Minor 1).[2] The defense objected to the admission of the videos on a variety of grounds, including that they provided improper bolstering and corroboration. Tr. 25, l. 2 – 48, l. 14.

After reviewing the videos *in camera*, the trial judge excluded the interview of Minor 3 because it lacked internal coherence, but admitted the interviews on Minor 1, conducted on March 7, 2014 and April 11, 2014, and the interviews of Minor 2, conducted on February 19, 2014 and April 11, 2014. Tr. 140, l. 4 – 144, l. 18. The trial judge also ruled upon the defendants' redactions requests, some of which were agreed to by the solicitor. Tr. 144, l. 18 –

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[2] State's Exhibits 1 through 4 are on file with this Court. Due to technological difficulties, the solicitor was unable to provide redacted copies of the videos as exhibits. Instead, he stopped and started the video to comply with the court's rulings on Riden's requests for redactions. Tr. 144, l. 18 – 164, l. 21; Tr. 368, l. 2 – 369, l. 1; Tr. 596, l. 25 – 597, l. 7; R. * (Court's Ex. 1, Defendant Riden's Redactions Request).

On State's Ex. 1, the trial judge ordered the redaction of 0:00 to 10:36 except for introductory language; the solicitor agreed to redact the references to what Minor 1 wanted Minor 2 to say, beginning at 22:53; and the trial judge ordered the redaction of what DSS or the police said from 36:30 to 45:34. Tr. 145, l. 17 – 149, l. 5; Tr. 149, l. 18 – 150, l. 17.

On State's Ex. 2, the solicitor agreed to redact 0:00 to 2:34, 25:30 to 28:28, 34:57 to 39:10, 43:43 to 43:50, 49:24 to 50:05. Tr. 151, ll. 13-17; Tr. 153, ll. 5-6.

On State's Ex. 3, the trial judge ordered the redaction of the reference to the dog dying from 0:00 to 6:10; the trial judge ordered the redaction of 23:28 to 23:51; and the trial judge ordered the redaction of 36:10 to 37:23. Tr. 153, l. 25 – 156, l. 7; Tr. 157, l. 24 – 158, l. 6.

On State's Ex. 4, the solicitor agreed to redact 32:15 to 39:02; the trial judge ordered the redaction of 49:25 to the end of Minor 1's description of his drawings; and the trial judge ordered the redaction of anything that grandma said from 54:45 to the end of the video. Tr. 158, l. 16 – 161, l. 18; Tr. 162, ll. 7-22.

164, l. 15; R. * (Court's Ex. 1, Defendant Riden's Redactions Request). Of relevance to this appeal, the trial judge denied Ms. Horlbeck's requests to redact the following from Minor 2's second interview:

INTERVIEWER: Now when we're back here we only talk about things that are real and that really happened. Is there anything we've talked about that's not real or didn't really happen?

MINOR 2: Uh, it really happened.

INTERVIEWER: What really happened?

MINOR 2: Uh, everything that I told y'all.

INTERVIEWER: Everything that you told us?

MINOR 2: It was real.

Tr. 151, l. 18 – 152, l. 22; State's Ex. 2 (4/11/14 Video Interview of Minor 2) (45:10 – 45:30), and

INTERVIEWER: Is there anything that you've talked about that someone else told you to tell me or – ?

MINOR 2: No.

INTERVIEWER: No; okay.

Tr. 153, ll. 9-22; State's Ex. 2 (4/11/14 Video Interview of Minor 2) (50:28 – 50:38). The trial judge also denied Ms. Horlbeck's request to redact the following from Minor 1's first and second interviews:

INTERVIEWER: Is there anything that we've talked about that's not real?

MINOR 1: Uh. (indicates negative)

INTERVIEWER: Are you worried about you or anyone else getting in trouble for anything that we talk about?

MINOR 1: Shrugs shoulders.

INTERVIEWER: Don't know? Okay.

Tr. 158, ll. 7-8; State's Ex. 3 (3/11/14 Video Interview of Minor 1) (50:58 – 51:29).

INTERVIEWER: And, has anybody told you what to say when you come her to talk to me?

MINOR 1: Uh-uh. [negative response]

INTERVIEWER: And, is there anything that we've talked about today that's not real?

MINOR 1: Uh-uh. [negative response]

INTERVIEWER: Is there anything else that you wanted to talk to me about today?

MINOR 1: I don't think so.

INTERVIEWER: You don't think so. Have you and Natalie talked about what happened at home?

MINOR 1: Um, we told our grandma what happened to us.

Tr. 161, l. 19 – 162, l. 6; State's Ex. 4 (4/7/14 Video Interview of Minor 1) (52:40 – 53:22).

Ms. Horlbeck argued that the portions referenced *supra* were improper because the interviewer is prohibited from testifying about any questions or statements made to the Children regarding truth telling abilities or reminders to the Children to tell the truth. Thus, she argued that the solicitor cannot get the same information in through the interview itself either. Tr. 151, l. 18 – 152, l. 10; Tr. 153, ll. 7-20. The trial judge determined that the interviewer's questions were not prohibited under State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015), and denied the request for redactions. Tr. 152, ll. 11-22; Tr. 153, ll. 21-22; Tr. 158, ll. 7-8; Tr. 161, l. 19 – 162, l. 6. The videos were admitted into evidence over Ms. Horlbeck's prior objection. Tr. 355, ll. 10-23.

"Child Sexual Abuse Dynamics" Expert

In an attempt to explain away the weaknesses in its case, the State called Christine Carlberg as an expert in "child sexual abuse dynamics." Tr. 370, l. 8 – 417, l. 22. Carlberg earned a Bachelor's of Science degree in "rehabilitation services education," with a minor in psychology and a Master of Arts degree in "marriage and family therapy." Tr. 371, l. 18 – 372, l. 1. She was not psychiatrist or psychologist, but rather a licensed professional counselor in the state of Mississippi. Tr. 375, ll. 6-18. While she initially indicated that she had only two hundred hours of supervision to obtain her Mississippi license, she later asserted that it was two thousand hours. Tr. 375, l. 19 – 376, l. 19; Tr. 377, ll. 9-13; Tr. 382, ll. 12-22.

Carlberg had been through two "national programs" on forensic interviewing and said she had interviewed a total of 2,826 children over approximately fifteen and a half years. Tr. 372, l. 2 – 373, l. 3. She also helped train new staff at the former child advocacy center where she worked in Mississippi and at the Julie Valentine Center. Tr. 373, ll. 4-15. Carlberg had been previously qualified as an expert approximately twenty-five times in criminal and family courts. Tr. 373, l. 16 – 374, l. 1. Carlberg admitted that she has never written or published any articles in the field of "child abuse dynamics," peer-reviewed or otherwise. Tr. 377, ll. 3-8. She likewise admitted that she was not involved in any research or the collection of any data on the subject, but had rather merely read literature recommended at conferences that she attended. Tr. 378, l. 25 – 379, l. 24.

Carlberg was an employee of the Greenville Department of Mental Health and contracted with the Julie Valentine Center to conduct interviews where there have been allegations of abuse against children or delayed adults. Tr. 370, l. 17 – 371, l. 2. She described the process of case

referral at the Julie Valentine Center, including the forwarding of the information collected on to the detective who is investigating the case. Tr. 371, ll. 3-17.

The defense objected to Carlberg's qualifications as an expert witness and the propriety of her testimony in this field of expertise. Tr. 380, ll. 7-21. The trial judge ruled that the area of expertise was approved in State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015), *cert. denied* Aug. 6, 2015. He further ruled that Carlberg's licensing was not necessarily a requirement for her to serve as an expert and that he would qualify her as an expert in the field of "child abuse dynamics." Tr. 380, l. 22 – 381, l. 10.

Carlberg did not conduct or watch the interviews of the Children in this case and testified that she had no contact with them. Tr. 383, l. 20 – 384, l. 2. Nonetheless, her testimony included the topics of "delayed disclosure," "the process of disclosure," "grooming," factors that make children more vulnerable to abuse including the increased risk for abuse in a single-parent household, and "coaching." Tr. 384, l. 3 – 404, l. 19. Surely the solicitor prepared Carlberg for her testimony, just any competent attorney would do.

Carlberg testified that "delayed disclosure" is "very common," occurring in seventy percent of cases. Tr. 384, l. 3 – 386, l. 10. She listed common reasons for delayed disclosure, including that the child knows and is loyal to the abuser, the child does not want the abuser to get into trouble, the child feels ashamed or embarrassed, the child is afraid that they will not be believed or protected, or the child is unaware that what happened was wrong. Tr. 386, l. 11 – 389, l. 8. Carlberg testified that disclosure is usually not a one-time event. Rather, the "process of disclosure" generally incudes denial, tentative disclosure, active disclosure, sometimes recantation, and then usually active disclosure again. Tr. 389, l. 9 – 391, l. 24. She explained

that during tentative disclosure, the child may provide piecemeal information and minimize the abuse to see how it will be received and if they will be protected. Tr. 389, l. 22 – 390, l. 16.

"Grooming" was described by Carlberg as "a process that an offender or alleged perpetrator uses to kind of get that trust of a child." Tr. 393, ll. 6-8. She said that it "can look like a lot of things," including gift-giving, providing special privileges, and exposure to "sexual things." Tr. 393, ll. 8-20. Carlberg opined that having sex in front of children or showing them pornography is used to normalize children to that behavior. Tr. 393, l. 21 – 394, l. 16. Carlberg listed the following factors "that would make children more vulnerable to child abuse" in the home: physical neglect, domestic violence, drug use, educational neglect, abuse to animals, or living with a single-parent. Tr. 394, l. 17 – 392, l. 12. When asked if "there [is] any other aspect of being a single parent that would make the children more vulnerable to abuse," Carlberg responded: "They're just more vulnerable to abuse if they're not living with the biological parents or if the parents like have partner after partner come in. That might put them more at risk." Tr. 395, ll. 18-25. The trial judge did not allow Carlberg to testify regarding statistics on the likelihood of a child to be abused if they have a single-parent with a live-in partner. Tr. 396, l. 16 – 397, l. 8.

Lastly, Carlberg testified regarding "coaching." She said that you can often just ask children whether anyone told them what to say or ask what a specific third party says about the alleged abuser. Tr. 397, l. 11 – 398, l. 1. Carlberg testified that in her experience, children admit when they have been coached and that **"it's very hard to keep up a lie in such great detail."** Tr. 398, l. 2 – 399, l. 2. Though couched as signs of coaching, her testimony soon turned to factors such as consistency over time with regard to the core details of who did it, what happened, and where it happened. Additionally, you look at whether the children give you details

on how things tasted, felt, smelled, and clothing. Carlberg said that you should also compare the statements given to law enforcement and DSS and look to see if the medical findings are consistent. Tr. 399, ll. 3-18. Carlberg said: **"It would be very hard for someone coaching a child to give them all that kind of information that a child can repeat during that investigation process."** Tr. 399, ll. 19-22.

Carlberg also discussed the impact of the child's age on their ability to articulate details in a forensic interview, again couched as a discussion of "coaching." She testified that a three year old cannot give much detail beyond who did it and what happened, but as a child gets older they can tell you more about how and when things happened. Tr. 401, l. 8 – 402, l. 5. Over Ms. Horlbeck's objection, the solicitor asked: "Is there anything specifically as to how forensic interviews are conducted that would help the forensic interviewer detect coaching?" Tr. 403, l. 15 – 404, l. 6. Carlberg responded that you can just ask kids directly "what did they tell you about coming here today?" or "what did mom say about coming here today" or "did anyone tell you to say those things." Tr. 404, ll. 7-13. You can also use "source monitoring," which means asking the children how they know something to determine if they saw it or were told about it. Tr. 404, ll. 14-19.

ARGUMENT

I. The trial court erred in denying Appellant's request to redact portions of the forensic interviews of Minor 1 and Minor 2 where they were instructed to only talk about "things that are real," asked whether what was discussed "really happened," and asked if they were told what to say.

Riden's attorney, Ms. Horlbeck, argued for the redaction of portions of the forensic interviews of Minor 1 and Minor 2 that discussed truth telling. She argued that the solicitor was attempting to circumvent the prohibition against a forensic interviewer's in-court testimony on such matters by presenting the same information through the interview itself. Tr. 151, l. 18 – 152, l. 22; Tr. 153, ll. 7-22; Tr. 158, ll. 7-8; Tr. 161, l. 19 – 162, l. 6. The trial judge erred in ruling that the portions of the videos during which the interviewer discussed that the Children should only talk about what was real, asked if what they said really happened, and asked whether they had been told what to tell her during the interview, were not prohibited under State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015). Tr. 152, ll. 11-22; Tr. 153, ll. 21-22; Tr. 158, ll. 7-8; Tr. 161, l. 19 – 162, l. 6. Contrary to the trial judge's ruling, use of the word "real" rather than the "truth" does not affect the applicability of Anderson. See Tr. 152, ll. 11-22.

In State v. Kromah, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013), our Supreme Court warned that the qualification of "expert" should be "jealously guarded" because of the reality that many jurors place significant weight on the testimony of someone so qualified. Even experts who are properly qualified are not permitted to offer an opinion regarding the credibility of others. Id. at 358, 737 S.E.2d at 499. The Kromah Court wrote: "It is undeniable that the primary purpose for calling a 'forensic interviewer' as a witness is to lend credibility to the victim's allegations. When this witness is qualified as an expert the impermissible harm is compounded." Id. Because the pervasiveness of the solicitors attempts to use forensic

interviews to bolster their cases, the Court provided examples of "the kinds of statements that a forensic interviewer should avoid at trial," which included:

> **[T]hat 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, 737 S.E.2d at 500. The Kromah Court also listed the following, which it deemed to be the proper subject matter for a forensic interveiwer's testimony: the time, date, and circumstances of the interview; any personal observations regarding the child's behavior or demeanor; or a statement as to events that occurred within the personal knowledge of the interviewer. Id.

Subsequently, our Supreme Court wrote in Anderson, with respect to the purpose of a forensic interviewer's testimony at trial:

> Assuming the court determines that the interview is admissible under the statute, the forensic interviewer will be called to testify before the jury. The sole purpose of her jury testimony is to lay the foundation for the introduction of the videotape, and the questioning must be limited to that subject. **There is to be no testimony to such things as techniques, of the instruction to the interview subject of the importance of telling the truth,** or that the purpose of the interview is to allow law enforcement to determine whether a criminal investigation is warranted. **This type of testimony, which establishes the "particularized guarantees of trustworthiness," necessarily conveys to the jury that the interviewer and law enforcement believe the victim** and that their beliefs led to the defendant's arrest, these charges, and this trial, **thus impermissibly bolstering the minor's credibility. We hold none of the evidence necessary for the trial court's determination of "whether a statement possesses particularized guarantees of trustworthiness" and thus admissible under § 17–23–175(A)(4) and (B) is to be presented to the jury, as such evidence necessarily vouches for the credibility of the alleged victim.**

Id. at 220-21, 776 S.E.2d at 80 (emphasis added). In the present case, the objected to statements and questions by the interviewer were proper for the trial court to consider in determining the

admissibility of the videos under S.C. CODE ANN. § 17–23–175. However, they were not proper for the jury to hear and consider because they bolstered the Children's credibility just as if the interviewer repeated the questions from the witness box.

Riden was prejudiced because the State's case rested entirely on the credibility of the witnesses. See, e.g., State v. Jennings, 394 S.C. 473, 479, 716 S.E.2d 91, 94 (2011) (finding the improper admission of the forensic interviewer's written reports was not harmless where the trial "hinged on the children's credibility"); State v. McKerley, 397 S.C. 461, 467, 725 S.E.2d 139, 143 (finding error was not harmless where the court could not say that the forensic interviewer's bolstering testimony, considered in the context of the other testimony and evidence of McKerley's guilt, did not contribute to the jury's decision).

Here, the Children's allegations evolved over time, with Minor 2 first accusing Hendrix of touching her over her cloths. She then alleged that she took a shower with Riden and Hendrix but denied that she had ever touched or seen Aaron's "privates," referring to his genitals. She also described seeing movies where people took their clothes off and an instance when Riden allegedly engaged in sexual activity with two of her sisters and "some guys." State's Ex. 1 (2/19/14 Video Interview of Minor 2). In Minor 2's second interview, she immediately disclosed that the Children were forced to touch and perform oral sex on Hendrix and Riden. Later on in the same interview, she indicated that Hendrix and Riden also performed oral sex on the Children. She later indicated that Riden had digitally penetrated the Children prior to Hendrix ever moving in, though she eventually indicated that Hendrix also performed digital penetration. Minor 2 said she told her father, Mark Lusk, and his girlfriend, Tasha, about the abuse but neither of them did anything about it. Then she said that Lusk and Aunt Jennifer both observed the sexual abuse by Riden and Hendrix, laughed, and eventually joined in abusing the Children

also. Minor 2 claimed that she forgot about Lusk and Jennifer touching her but then remembered it. She also provided an additional description of the "movies" she discussed in the first interview, saying that there was a lot of sex and people getting killed, sounding more like violent movies than pornography. State's Ex. 2 (4/11/14 Video Interview of Minor 2).

Minor 1's disclosure had a similar evolution. His first interview did not occur until almost three weeks after Minor 2's first interview. He began by alleging that Riden had threatened the Children with knives and said she was going to kill them, eventually stating that he was actually cut on the arm by a knife. He claimed that Hendrix and Lusk both saw that occur. He described Hendrix touching Minor 1's privates and attempting to get Minor 1 to touch Hendrix's "privates." He again alleged that Lusk was present and watched as Aaron touched the Children's "privates." He later described how Hendrix and Aaron would both poke and rub his front and back "privates." Further on in the first interview, Minor 1 described an occasion when Riden allegedly hit him in the face with a motorcycle helmet and said that Riden, Hendrix, and Lusk had all kicked him in the privates. He said that only Hendrix and Riden had ever touched his privates. When the interviewer brought in the anatomical dolls, Minor 1 disclosed that Hendrix was "digging in our privates" and poked Minor 1's front and back "privates" with his finger. He then said that had touched Hendrix's front privates more than once and it felt weird. State's Ex. 3 (3/11/14 Video Interview of Minor 1).

In his second interview, Minor 2 said that Riden and Hendrix would touch the Children's "privates" and suck, lick, and put their fingers in the Children's front and back "privates." He said that they had to put their mouths on Riden and Hendrix's "privates" too. He told the interviewer that no one else was there other than Riden, Hendrix, and the Children. However, when asked if his father was there, he said that Lusk would watch while Riden and Hendrix

sexually abused the Children and did not do anything. Later on, when asked if anyone else ever watched it happen, he said that Jessie and Billy, his aunt and aunt's boyfriend, also saw Riden and Hendrix touching the Children's "privates." State's Ex. 4 (4/7/14 Video Interview of Minor 1). Thus, neither Minor 1 nor Minor 2 mentioned oral sex until the second interview. Unlike Minor 2, Minor 1 never alleged that his father or aunt ever engaged in sexual abuse of the Children. Even so, the inconsistencies in the alleged perpetrators and the repetition of strikingly similar phrases by both children raises serious doubts about their credibility.

Further, the physical exams performed on Minor 1 and Minor 2 were both normal. Tr. 333, ll. 9-11; Tr. 333, ll. 21-23. The physical exam on Minor 3 revealed dental caries, commonly referred to as cavities, and labial adhesions. Tr. 334, l. 7 – 336, l. 25. Dr. Mary Croswell, who performed the physical examinations of the Children, explained that labial adhesions are not infrequent in Minor 3's age group and that the finding is "nonspecific." Tr. 337, ll. 1-12. It can result from poor toileting hygiene, an infection in that area, or from accidental or non-accidental trauma. Tr. 337, l. 12 – 338, l. 1. Dr. Croswell could not determine from her examination what specifically caused the labial adhesions noted on Minor 3. Tr. 348, ll. 8-13.

Notably, Dr. Croswell's examinations of the Children did not occur until March 26, 2014, at which time the Children had been living with their grandfather and step-grandmother for approximately one year. Tr. 182, ll. 19-22; Tr. 332, ll. 1-11; Tr. 444, ll. 2-8. Additionally, when the interviewer brought the anatomical dolls in during their first interview, Minor 2 disclosed that her step-grandmother showed the Children sexual scenarios using Barbie dolls. Minor 2 said that "the guy was laying down and the girl had the knees bent" and "they laid on there and then they kissed." Minor 2 said that their step-grandmother "asked us if it happened" and that they said "yes, they did that." State's Exhibit 1 (2/19/14 Video Interview of Minor 2). Thus, it

was certainly reasonable to conclude the step-grandmother planted or fueled the Children's allegations.

In this case, the trial judge committed reversible error in denying the requests to redact the questions and statements related to truth telling. Riden is accordingly entitled to a new trial.

II. The trial court erred in admitting the testimony of an "expert" who has never interviewed the Children regarding "child sexual abuse dynamics" where she was not qualified to present expert testimony and the subject matter of her testimony was improper.

The solicitor called Christine Carlberg as an expert in "child sexual abuse dynamics." Tr. 370, l. 8 – 417, l. 22. The defense objected based on both her qualifications and the propriety of the subject matter of her testimony. Tr. 380, ll. 7-21. There is simply no field of study regarding "child sexual abuse dynamics" and the *real job* of Carlberg is to conduct forensic interviews at the Julie Valentine Center, the same advocacy center where the Children were interviewed by Shauna Galloway-Williams. Tr. 332, ll. 5-11; Tr. 370, l. 17 – 371, l. 17. The solicitor's use of Carlberg as a "blind" expert was merely an attempt to skirt the restrictions of testimony by a forensic interviewer by creating a fictitious area of expertise.

In Watson v. Ford Motor Co, 389 S.C. 434, 699 S.E.2d 169 (2010), our Supreme Court specified the three-prong test that must be considered by the trial judge before allowing the jury to hear expert testimony:

> First, **the trial court must find that the subject matter is beyond the ordinary knowledge of the jury**, thus requiring an expert to explain the matter to the jury. Next, while the expert need not be a specialist in the particular branch of the field, **the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter.** Finally, **the trial court must evaluate the substance of the testimony and determine whether it is reliable.**

Id. at 446, 699 S.E.2d at 175 (emphasis added). In the present case, the testimony offered by Carlberg failed under all three prongs of that test.

A. Subject Matter Not Beyond Knowledge of the Jury

The subject matter of Carlberg's testimony was not beyond the knowledge of the ordinary juror. Here, the testimony offered by Carlberg related to the topics of "delayed

disclosure," "the process of disclosure," "grooming," factors that make children more vulnerable to abuse including the increased risk for abuse in a single-parent household, and "coaching." Tr. 384, l. 3 – 404, l. 19. A jury can certainly understand why children might delay their disclosure or not give every detail of their abuse when it is first reported. A child's considerations of their affection for and reliance upon the alleged perpetrator are hardly novel. Here, Minor 1 and Minor 2 were both asked what prompted them to report the abuse and why they delayed in giving certain details during their forensic interviews and trial testimony. State's Exs. 1-4 (Video Interviews of Minor 1 and Minor 2); Tr. 201, l. 20 – 202, l. 14; Tr. 225, ll. 7-22.

The jury could likewise understand that exposure to adult sex or pornography may be used to normalize sexual behavior in a household. Perhaps the most obvious of the testimony was that an unrelated adult in the residence increases the risk for sexual abuse. Lastly, the testimony regarding "coaching" was a wholly improper, as the solicitor utilized it as a means of telling the jury that the forensic interviewer would have been able to uncover if the Children were lying and describing for the jury factors to consider in determining whether to believe the Children. The portions of the forensic interview during which questions about "coaching" were asked to the Children were admitted over objection, as discussed *supra* in Issue I. The jury did not need expert testimony to explain this subject matter as it did not involve scientific, technical, or other specialized knowledge. See Rule 702, SCRE.

The **only** purpose of Carlberg's testimony was to improperly bolster the Children's testimony. See State v. Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013) ("It is undeniable that the primary purpose for calling a 'forensic interviewer' as a witness is to lend credibility to the victim's allegations."). This Court held in State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012), that it is improper for a witness to bolster the

testimony of other witnesses. See Smith v. State, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010) (finding a "forensic interviewer's . . . opinion testimony improperly bolstered the Victim's credibility"). Our Supreme Court has likewise held that it is improper "for an expert to comment on the veracity of a child's accusations of sexual abuse." State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011); see State v. Dawkins, 297 S.C. 386, 393-394, 377 S.E.2d 298, 302 (1989) (finding therapist indicating he believed victim's allegations were genuine was improper); see also State v. Dempsey, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct. App. 2000) (finding therapist's testimony children were being truthful in ninety-five percent of instances in which sexual abuse was alleged was improper vouching for child).

Here, Carlberg's testimony was undoubtedly interpreted by the jury to express that they should believe the Children because their behavior is typical, expected, and complies with the behavior of the majority of other victims of sexual abuse. Her testimony strongly implied that because the Children acted in the same manner as other victims of sexual abuse they must be telling the truth. Furthermore, she made it sound as though the forensic interviewer asked the proper questions to uncover "coaching" and that Children would not have been able to keep up their story if it were not true. Therefore, qualifying Carlberg as an expert and allowing her to testify was error for "[t]he assessment of witness credibility is within the exclusive province of the jury." McKerley, 397 S.C. at 464, 725 S.E.2d at 141 (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)).

Appellant recognizes that this Court found that expert testimony on "child abuse dynamics" and delayed disclosures was not improper in State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015), *cert. denied* Aug. 6, 2015, as cited by the trial judge in this case. Tr. 380, ll. 22-25. However, Appellant avers that the Brown Court interpreted Kromah too narrowly. The

intent of Kromah and the line of cases that preceded it was to limit opinions vouching for the credibility of witnesses. The state has simply renamed forensic interviewers as experts in spurious fields like "dynamics of child sexual abuse." This testimony does not aid the trier of fact and instead invades the province of the jury.

The error in admitting Carlberg's testimony was prejudicial to Riden. In addition to improper vouching and bolstering, her testimony was cumulative to victim's testimony. See Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994) ("Improper corroboration testimony that is ***merely cumulative to the victim's testimony***, however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.") (emphasis in original). Additionally, as discussed *supra*, there was no physical evidence to support the accusations of sexual abuse. Thus, the witnesses' credibility was critical to the determination of this case. Because Carlberg's testimony was used solely to bolster their credibility, Riden was prejudiced and should be accordingly be granted a new trial. See Jennings, 394 S.C. at 480, 716 S.E.2d at 94-95 ("Because the children's credibility was the most critical determination of this case, we find the admissibility of the [forensic interviewer's] written reports was not harmless.").

B. Expert's Lack of Qualification and Reliability

In Kromah, our Supreme Court recognized that "although 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." 401 S.C. at 357, 737 S.E.2d at 499. Thus, the Court wrote: "The label of expert should be jealously guarded by the court and never loosely bandied about." Id.

"All expert testimony must satisfy the Rule 702, SCRE, criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009); see Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010) (holding "the trial court must evaluate the substance of the testimony and determine whether it is reliable."). Recently, in State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015), our Supreme Court held that State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) should apply in qualifying child abuse assessment experts because their testimony is non-scientific. "Under White, two threshold determinations must be made. First, the qualifications of the expert must be sufficient, and second, there must be a determination that the expert's testimony will be reliable." Chavis, 412 S.C. at 106-107, 771 S.E.2d at 339 (citing White, 382 S.C. at 273, 676 S.E.2d at 688).

The Chavis Court held that the trial court improperly qualified the child abuse assessment "expert" because there was no evidence that her conclusions or impressions taken from the forensic interviews she conducted were accurate and her only peer review was another interviewer reviewing her work to ensure she was using the RATAC protocol. Id. at 108, 771 S.E.2d at 339. The Court further noted that although there is "no formulaic approach for determining the foundational requirements of qualification and reliability in non-scientific evidence," "*evidence of mere procedural consistency does not ensure reliability* without some evidence demonstrating that the individual expert is able to draw reliable results from the procedures of which he or she consistently applies." Id. (emphasis added).

In State v. Anderson, 413 S.C. 212, 221 n. 6, 776 S.E.2d 76, 80 n. 6 (2015), our Supreme Court noted: "Since the [forensic] interviewer is not an expert . . . she cannot testify to 'issues of delayed reporting.' This improper expression of expert opinion by a lay witness is prohibited by

Rules 602 and 701, SCRE." While Anderson may authorize the calling of an "independent expert" who did not examine the child to testify as to behavioral characteristics of child abuse victims, even such an expert must meet the threshold requirements, including qualification "by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE.

"[A] forensic interviewer is a person specially trained to talk to children when there is a suspicion of abuse or neglect." Kromah, 401 S.C. at 357, 737 S.E.2d at 499. Carlberg had no higher qualification than the forensic interviewer, Shauna Galloway-Williams. She is merely a subordinate contractor at the Julie Valentine Center, as we learned during the *in camera* pre-trial hearing that Galloway-Williams is the executive director of the center. Tr. 31, l. 12 – 32, l. 15; Tr. Tr. 370, l. 17 – 374, l. 1; Tr. 375, ll. 6-18; Tr. 377, ll. 3-8; Tr. 378, l. 25 – 379, l. 24. Certainly not every person who conducts forensic interviews is an expert on the behavioral characteristics of sex abuse victims. If that were the case, then we can expect the state to do exactly what it did here, have the children interviewed by one person from the center and call the someone who works down the hall to testify to bolster and vouch for the children's testimony.

Further, like the "expert" in Chavis, there was no evidence that Carlberg's conclusions and claims were accurate or reliable. She testified that she had never written or published any articles in the field of "child abuse dynamics," peer-reviewed or otherwise and was not involved in any research or data collection on the subject. The few studies the she referenced during her testimony were merely mentioned at conferences she attended. Tr. 377, ll. 3-8; Tr. 378, l. 25 – 379, l. 24. Carlberg was unaware of a 1996 study that found "at present research findings regarding disclosure of sexual abuse are scanty and inconsistent." Tr. 407, l. 14 – 408, l. 15. She

was further unable to answer questions about the delayed disclosure study that she referenced during her direct testimony. Tr. 409, l. 15 – 410, l. 25.

Because Carlberg was not qualified to present expert testimony and there was no evidence of the reliability of her conclusions and opinions, the trial court failed to properly execute its gatekeeping function. Riden is accordingly entitled to a new trial.

III. The trial court erred in denying Appellant's motion to sever her trial from that of her co-defendant where counsel accurately foresaw and told the judge in advance that the co-defendants defenses conflicted and that cod-defendant would elicit harmful testimony not otherwise admitted by the solicitor.

The joint trial of these co-defendant's violated Riden's constitutional rights by shifting the burden of proof. While Mr. Horlback argued that the abuse never happened and was the product of a custody battle, Mr. Warder argued alternatively that the allegations were either false or that the abuse occurred after Hendrix moved out. Tr. 525, ll. 17-22; Tr. 528, l. 6 – 540, l. 16; Tr. 541, l. 8 – 544, l. 15; Tr. 548, ll. 16-22. Though the antagonistic defenses of the co-defendants do not alone warrant severance, they are relevant to the trial court's consideration of such a motion.

Here, it was Riden's co-defendant rather than the solicitor who called Mark Lusk, the witness who provided the most compelling evidence of alleged neglect. Mr. Warder elicited testimony that Lusk found a syringe needle in Riden's car, the power and water were cut off to Riden's trailer, there was not much food in Riden's home, and the condition of the home had generally degenerated. Tr. 478, l. 12 – 480, l. 22. Those conditions were what prompted Lusk to ask Riden's father and step-mother to take the Children into their home. Tr. 481, l. 15 – Tr. 482, l. 5. Thus, this case did not just involve antagonistic defenses, but rather a co-defendant who presented evidence to support a separate charge of neglect that was made only against Riden.

"A motion for severance is addressed to the sound discretion of the trial court." State v. Simmons, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct. App. 2002). "The trial court's ruling will not be disturbed on appeal absent an abuse of that discretion." State v. Rice, 368 S.C. 610, 613, 629 S.E.2d 393, 394 (Ct. App. 2006). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id. At 613, 629 S.E.2d at 395. "A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a

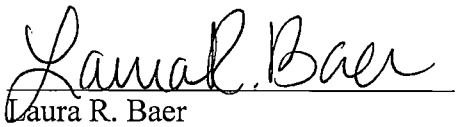
codefendant's guilt." State v. Walker, 366 S.C. 643, 657, 623 S.E.2d 122, 129 (Ct. App. 2005). "A defendant who alleges he was improperly tried jointly must show prejudice before an appellate court will reverse his conviction." State v. Halcomb, 382 S.C. 432, 440, 676 S.E.2d 149, 153 (Ct. App. 2009).

"The general rule allowing joint trials applies with equal force when a defendant's severance motion is based upon the likelihood he and a codefendant will present mutually antagonistic defenses, i.e., accuse one another of committing the crime." State v. Dennis, 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999). "The trial judge, however, must act cautiously in allowing a joint trial." Id. "The judge must carefully consider problems that may arise from a joint trial, such as redacted statements, and must assure protection of each defendant's constitutional right to confront witnesses against him." Id. at 281-82, 523 S.E.2d at 176.

In the present case, there was no violation of Riden's right to confrontation because Hendrix testified at trial and was subject to cross-examination by Ms. Horlbeck. Tr. 493, l. 18 - 504, l. 8. Rather, the trial right that was compromised was that the solicitor bear the burden of proving Riden's guilt beyond a reasonable doubt. State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013) ("The State has the burden of proving the defendant guilty beyond a reasonable doubt."); U.S. CONST. amends. V, XIV; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). Riden is accordingly entitled to a new trial on all charges, but at the very least as to the charge of neglect.

CONCLUSION

Based on the foregoing, Appellant Stacy Carol Riden respectfully requests that this Court reverse her convictions and remand her case for a new trial.



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of October, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STACY CAROL RIDEN,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and upon Stacy Carol Riden, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, this 17th day of October, 2016.

Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of October, 2016.

(L.S)
Notary Public for South Carolina
My Commission Expires: April 27, 2026.