

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM KERSHAW COUNTY
Court of General Sessions
Doyet A, Early, III, Circuit Court Judge

S.C. SUPREME COURT

Court of Appeals Case No. 2015-001436

The State of South Carolina, ... Respondent

v.

Nakia Johnson, ... *Petitioner.*

APPENDIX VOLUME II OF II

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INDEX

Volume I

Record on Appeal Volume I of II.....	1
--------------------------------------	---

Volume II

Record on Appeal Volume II of II	501
Final Brief of Appellant.....	532
Final Brief of Respondent.....	555
Final Reply Brief of Appellant.....	574
<i>State v. Johnson</i> , Unpublished Op. No. 2018-UP-109 (Filed March 14, 2018).....	585
Appellant’s Petition for Rehearing.....	593
Respondent’s Petition for Rehearing.....	600
Order Denying Petitions for Rehearing.....	609

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In The Court of Appeals

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SC Court of Appeals

22815

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

v.

NAKIA KARREIM JOHNSON,

..... Appellant.

RECORD ON APPEAL VOLUME II OF II

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INDEX
VOLUME I

Trial Transcript	1
Opening Statements	
By Ms. Cavanaugh.....	6
By Mr. Johnson.....	17
Jerry Barnwell (SW)	
Direct by Ms. Cavanaugh	22
Cross by Mr. Johnson	26
Re-Direct by Ms. Cavanaugh.....	26
Shawntea Ford (SW)	
Direct by Ms. Simpson	28
Cross by Mr. Johnson	72
Re-Direct by Ms. Simpson.....	101
Pamela Hall (SW)	
Direct by Ms. Simpson	103
Cross by Mr. Johnson	134
Direct by Ms. Simpson	151
Stacey Hall (SW)	
Direct by Ms. Simpson	154

Temple Hart (SW)

Direct by Ms. Cavanaugh	164
Cross by Mr. Johnson	179
Re-Direct by Cavanaugh.....	189

Jerry Dobbins (SW)

Direct by Ms. Cavanaugh	190
Cross by Mr. Johnson	201

Melisa Hall (SW)

Direct by Ms. Simpson	206
-----------------------------	-----

Nakiah Johnson (SW)

Direct by Ms. Cavanaugh	214
-------------------------------	-----

David Kellin (SW)

Direct by Ms. Cavanaugh	228
Cross by Mr. Johnson	251

Dave Capps (SW)

Direct by Ms. Cavanaugh	253
Cross by Mr. Johnson	256
Re-Direct by Ms. Cavanaugh.....	262

Ron Fountain (SW)

Direct by Ms. Cavanaugh	263
Cross by Mr. Johnson	266

Paul Meah (SW)

Direct by Ms. Simpson	268
Cross by Mr. Johnson	282
Re-Direct by Ms. Simpson.....	283

Steve Knafelc (SW)

Direct by Ms. Cavanaugh	284
Cross by Mr. Johnson	290

Laurie Caldwell (SW)

Direct by Ms. Cavanaugh	291
Direct by Ms. Cavanaugh (in camera)	297
Direct by Ms. Cavanaugh	301

Allison Foster (SW)

Direct by Ms. Cavanaugh (in camera)	308
Direct by Ms. Cavanaugh	313
Cross by Mr. Williams.....	334
Re-Direct by Ms. Cavanaugh.....	336

Susan Luberoff (SW)

Direct by Ms. Simpson	340
Cross by Mr. Johnson	353

Ricky Bailly (SW)

Direct by Ms. Simpson	355
Cross by Mr. Johnson	385
Re-Direct by Ms. Simpson.....	406

Re-Cross by Mr. Johnson.....	414
Directed Verdict Motion	415
Closing Arguments	
By Ms. Simpson.....	434
By Mr. Johnson.....	479
Jury Charge	498

Volume II

Jury Charge (cont.).....	501
Verdict.....	513
Sentencing.....	515
Sentencing Sheet.....	524
Indictments.....	526
Rule 210(g), SCACR Certification	

State's Exhibit No. 3 is a DVD that will be transported to the Court.

1 both meaning that's what you have to prove beyond a
2 reasonable doubt. A lot of times they'll say a
3 reasonable doubt is the kind of doubt that would
4 cause a reasonable person to hesitate to act. The
5 kind of doubt that would cause a reasonable person
6 to hesitate to act.

7 Proof beyond a reasonable doubt is also known
8 as proof that leaves you firmly convinced of the
9 defendant's guilt. There are very few things that
10 we deal with in the world today that we know with
11 absolute certainty. And in criminal cases, the law
12 does not require proof that overcomes every possible
13 doubt. If based on your consideration of the
14 evidence you are firmly convinced that the defendant
15 is guilty of the crimes charged, then you must find
16 him guilty. If, on the other hand, you think
17 there's a real possibility that the defendant is not
18 guilty, then you must give the defendant the benefit
19 of the doubt and find him not guilty.

20 Now, ladies and gentlemen, as we first started
21 out on Tuesday, and when I gave you some
22 instructions on Wednesday at the start of the trial
23 of the case, I told you that you and I have separate
24 and distinct duties to perform during the trial of
25 the case.

1 Obviously, my job is to rule on the
2 admissibility of evidence -- we had very few
3 objections during the trial of the case -- and my
4 other job is to instruct you on the law in the case.
5 And you've taken an oath to accept the law as I give
6 it to you; therefore, if you believe the law should
7 be something other than what I say or you have some
8 preconceived idea about what the law is, you have to
9 set that aside and accept the law as I give it to
10 you.

11 Also, because I'm the judge of the law and
12 you're the judges of the facts, I can have
13 absolutely no opinion about the facts. . That is your
14 decision to find the true facts. So if at any time
15 during the trial of the case you've looked over here
16 and I was smiling or frowning or raising my eyebrows
17 or doing whatever, and you thought I had an opinion
18 about the facts, please disregard that. The law
19 does not allow me to have any opinion about the
20 facts. I sit in cases day in and day out, week
21 after week, and sometimes I have to raise my
22 eyebrows. I have no opinion about the facts.

23 You are the finders of the facts. And by doing
24 that, obviously, you have the biggest job in the
25 case because you've got to determine what the true

1 facts are. You're the finders of the facts, so you
2 take those facts and apply them to the law as I give
3 it to you, and you'll be in a position to render a
4 true and just verdict at the conclusion of the case.

5 And in exercising your job as the judges of the
6 facts, obviously you have to determine the
7 credibility of the witness whose have testified in
8 the case. Credibility simply means believability.
9 Who do you believe? What evidence convinces you of
10 its truth? You have to analyze and evaluate the
11 evidence and determine what the true facts are.

12 Now, in exercising that job of determining what
13 the true facts are and determining the believability
14 of the witnesses who have testified in the case, you
15 have the right to believe one witness over several,
16 several over one; you can disregard everything a
17 witness says, you can believe a portion and
18 disregard the other. I ask that you use your common
19 sense that you use on a daily basis dealing with
20 family, friends, husbands, wives, children,
21 employees, employers. You know when someone is
22 telling the truth. And I ask that you use that
23 common sense in performing your job here today in
24 determining what witness was credible and what
25 witness was not.

1 You also have the right to consider whether any
2 witness has exhibited any interest, bias, prejudice,
3 or any other motive in the case, and you can also
4 consider the appearance and manner of a witness
5 while on the witness stand. So use all of your
6 skills that you've accumulated over the years in
7 determining who's tell the truth, and from that you
8 can make your decision of what the true facts are.

9 We've had a couple of witnesses who testified
10 as experts. And normally our rules of evidence do
11 not permit a witness to testify as to opinions
12 and/or conclusions. We have an exception under our
13 rules of evidence to that which we call the expert
14 witness exception. A witness who by education and
15 experience has become an expert in some art,
16 science, or profession may state an opinion as to
17 any relevant and material matter in which the
18 witness claims to be an expert. And they may also
19 state the reasons for their opinion.

20 You should consider any expert opinion received
21 in evidence in this case and, like any other
22 witness, give it the weight, if any, you think it
23 deserves. If you decide that an opinion of an
24 expert witness is not based on sufficient education
25 and experience or if you conclude that the reasons

1 given in support of the opinion are not sound or
2 that the opinion is outweighed by the other
3 evidence, you may disregard the opinion entirely.

4 An expert witness' testimony is to be given no
5 greater weight than that of any other witness simply
6 because the witness is an expert. Further, you're
7 not required to accept an expert's opinion even
8 though it's not contradicted.

9 I instruct and emphasize to you that the fact
10 that the defendant did not testify is not a fact to
11 be considered by you in any way during your
12 deliberation and in your consideration on the
13 question of the guilt or innocence of the defendant.
14 It must not be considered by you in any manner
15 whatsoever. A defendant has the constitutional
16 right to remain silent, and the assertion of that
17 right to remain silent must not be considered by you
18 during your deliberations. Madam Forelady, that's
19 one of your duties is to make sure that the fact he
20 didn't testify is not part of your consideration,
21 part of your deliberations, and is not to be
22 mentioned in your deliberations, and no inferences
23 are to be drawn from the fact that he did not
24 testify. He's not required to prove his innocence.
25 The burden of proof remains on the State to prove

1 his guilt to you beyond a reasonable doubt.

2 One of the witnesses who testified in the case
3 had a past criminal record. A person who has a past
4 criminal record is competent to testify during the
5 trial. The past record does not affect the ability
6 of that witness to testify. The past record may
7 only be considered by you, if at all, in determining
8 the witness' believability. Remember, you're the
9 judges of the facts and the believability of any and
10 all witnesses. So that was the only consider you
11 can give to the witness' past record.

12 All right. Madam foreman, ladies and
13 gentlemen, that is sort of the general propositions
14 of law. Let's turn to the three indictments in this
15 case. And, really, it's the -- the elements of
16 these three offenses is not that difficult. The
17 first offense is criminal sexual conduct with a
18 minor in the first degree.

19 The defendant is charged with first-degree
20 criminal sexual conduct with a minor. The State
21 must prove to you beyond a reasonable doubt that the
22 defendant engaged in a sexual battery with the
23 victim. Must prove to you beyond a reasonable doubt
24 that the defendant engaged in a sexual battery with
25 the victim. The statute under which this law is

1 defines sexual battery as sexual intercourse,
2 cunnilingus, fellatio, anal intercourse, or
3 intrusion, however slight, of any person's body or
4 with any object into the genital or anal openings of
5 another person's body. So you must prove that he
6 engaged in sexual battery which is basically sexual
7 intercourse, fellatio, cunnilingus, that sort of
8 thing.

9 The State must also prove beyond a reasonable
10 doubt that the victim was less than 11 years old at
11 the time of the battery. Consent, willingness,
12 indifference or ignorance on the part of the minor,
13 if any, as to what was taking place does not in any
14 way affect the charge of criminal sexual conduct
15 with a minor, because a married woman under the age
16 of 14 cannot legally consent to sexual intercourse.

17 The other indictment is -- or the second
18 indictment is criminal sexual conduct with a minor
19 in the second degree. The defendant is charged with
20 second-degree criminal sexual conduct with a minor.
21 The State must prove beyond a reasonable doubt that
22 the defendant, once again, engaged in a sexual
23 battery with the victim. And sexual battery is
24 defined as the same as in the first degree, as
25 sexual intercourse, cunnilingus, fellatio, anal

1 intercourse, or an intrusion, however slight, of any
2 part of person's body or any object into the genital
3 or anal openings of a person's body. And then the
4 State must prove beyond a reasonable doubt that the
5 victim was at least 11 but not more than 14 at the
6 time of the battery or the intercourse.

7 Now, ladies and gentlemen, also, there's a law
8 that our Legislature has enacted under Section
9 16-3-657 which says: The testimony of the victim
10 when someone is charged with criminal sexual conduct
11 with a minor in the first or second degree need not
12 be corroborated in these prosecutions.

13 The last indictment is what we call lewd act
14 upon a child. The defendant is charged with
15 committing a lewd act upon a minor. A minor is a
16 person under the age of 18. The State must prove
17 beyond a reasonable doubt that the defendant was
18 over the age of 14. Next, the State must prove that
19 the defendant willfully and lewdly committed or
20 attempted a lewd or lascivious act on or with the
21 body or its parts of a child under the age of 16
22 with the intent to arouse, appeal to, or gratify the
23 lusts, passions, or sexual desires of the defendant
24 or the child.

25 That statute defines the terms willfully, that

1 means voluntarily, intentionally, and with specific
2 intent to do something the law forbids. Lewd means
3 obscene, lustful, indecent, or lecherous.
4 Lascivious means tending to excite, lust, lewd,
5 indecent, obscene, or intending to deprave the
6 morals in respect to such relations.

7 Ladies and gentlemen, those are the three
8 indictments that you have to determine after you
9 determine what the true facts as to whether or not
10 the State has proven these cases to you beyond a
11 reasonable doubt.

12 As I told you, you have to decide each one of
13 them separate and apart from the other. You can
14 find him guilty on one and not guilty on the others
15 or not guilty on all three or guilty on all three,
16 any combination thereof, depending on whether or not
17 you determine the State has proven these elements to
18 you beyond a reasonable doubt.

19 Madam Forelady, you'll have in the jury room a
20 verdict form as to each indictment. It will simply
21 say: As to the offense of criminal sexual conduct
22 with a minor in the first degree, we the jury find
23 the defendant not guilty or guilty. The same thing
24 for second degree, criminal sexual conduct with a
25 minor, the same thing with lewd act upon a child.

1 You'll have three that you'll have to decide all
2 three separate and apart from the others. Your
3 verdict has to be unanimous. All 12 of you have to
4 agree as to the verdict on all three indictments.

5 Now, we're here participating in our criminal
6 justice system. As I told you earlier, you have the
7 most important job of anyone in the courtroom
8 because you have to determine what the true facts
9 are. And we're to determine that simply based on
10 the evidence that you've heard in this courtroom,
11 uninfluenced by anything on the outside. We have no
12 enemies to punish, no friends to reward. You're
13 under an oath to make a careful deliberation of the
14 evidence that you've heard and determine whether or
15 not the State has proven these indictments to you
16 beyond a reasonable doubt.

17 If at any time during your deliberations you
18 have a question that you need to ask me, the proper
19 procedure is to write it out on a pad. You'll have
20 a legal pad back there. Knock on the door and hand
21 it to the bailiff. Sometimes I can answer it,
22 sometimes I can't, depending on what your question
23 is. But if I can't answer it, I'll do the best I
24 can to tell you why at the conclusion of why I
25 can't.

1 I'll ask you to step back into your jury room
2 in just a second. I'll ask you not to start
3 deliberating until -- I have to ask the lawyers if
4 I've left anything out or if I need to delete
5 anything or change anything. And then we have to
6 gather up all of the evidence and bring it back to
7 you. I think we have a couple of DVDs. If you want
8 to look at those -- if you want to look at them,
9 just knock on the door and tell us that. We'll
10 bring the computer back there and there's a screen
11 back there and you can look at it.

12 All right. I'll ask you to return your jury
13 room. Don't start deliberating until I send word.
14 I'll send the verdict forms and exhibits back to
15 you.

16 Mr. Bailiff, please separate the alternates.

17 THE BAILIFF: All right, sir.

18 THE COURT: All right. Y'all go back to your
19 jury room.

20 (The jury exits the courtroom at 11:48 AM.)

21 THE COURT: Any requested additions, deletions,
22 objections, modifications to the charge by the
23 State?

24 MS. SIMPSON: No, Your Honor, nothing from the
25 State.

1 THE COURT: Mr. Johnson?

2 MR. JOHNSON: Nothing from the Defense, Your
3 Honor.

4 THE COURT: Will y'all please come forward,
5 review the evidence to make sure we have it all
6 accounted for, view the verdict form, so we can send
7 it back and the jury can start deliberating.

8 MS. SIMPSON: We're good.

9 THE COURT: Y'all want to come look at this
10 verdict form?

11 Let the record reflect, please, that both sides
12 have reviewed all of the evidence, all exhibits are
13 accounted for, both sides reviewed the verdict form.
14 There's no objection to the verdict form; is that
15 correct Ms. Simpson?

16 MS. SIMPSON: No, Your Honor.

17 THE COURT: You do have an objection?

18 MS. SIMPSON: They're fine. I'm sorry.

19 MR. JOHNSON: No objection from the Defense.

20 THE COURT: All right. We'll stand at ease.
21 It's 11:50 a.m.

22 (The jury begins deliberations at 11:50 AM.)

23 (Court's Exhibit Nos. 2, 3 and 4 marked for
24 identification.)

25 THE COURT: Is the State ready to receive the

1 verdict?

2 MS. SIMPSON: The State is ready.

3 THE COURT: Mr. Johnson, ready?

4 MR. JOHNSON: Yes, sir.

5 THE COURT: Everyone in the courtroom, please
6 listen carefully. Y'all have all been a wonderful
7 audience, y'all have behaved yourselves greatly.
8 However, if you're unable to -- I don't know what
9 the verdict is, obviously, not guilty or guilty. I
10 will not allow any outbursts, any show of emotion.
11 If you do, you'll be subject to contempt of court.
12 So, fair warning, if you're unable to control your
13 emotions, please leave now. Thank you.

14 (The jury enters the courtroom at 2:56 PM.)

15 THE COURT: Madam Forelady, have you reached a
16 verdict?

17 THE FOREWOMAN: Yes, Your Honor.

18 THE COURT: Hand it to me, please.

19 Madam Clerk, you may publish the verdict,
20 please.

21 THE CLERK: Thank you, Your Honor.

22 This is the State of South Carolina, County of
23 Kershaw. The State of South Carolina vs. Nakia
24 Karreim Johnson. On Indictment No. 2014-GS-28-419,
25 as to the offense of criminal sexual conduct with a

1 minor in the first degree, we the jury find the
2 defendant not guilty. Signed by Katinia B. Davis,
3 Foreperson.

4 On indictment 2014-GS-28-420, as to the offense
5 of criminal sexual conduct with a minor in the
6 second degree, we the jury find the defendant
7 guilty. We unanimously agree. Signed by Katinia B.
8 Davis, Foreperson.

9 As to Indictment No. 2014-GS-28-910, as to the
10 offense of lewd act on a minor child, we the jury
11 find the defendant guilty. We unanimously agree.
12 Signed Katinia B. Davis, Foreperson.

13 Madam Forelady, ladies and gentlemen of the
14 jury, are these your verdicts? If so, please
15 signify by raising your right hand.

16 THE COURT: Let the record reflect all have
17 raised their hands.

18 Anything for the jury before I dismiss them by
19 the State?

20 MS. SIMPSON: Nothing from the State, Your
21 Honor.

22 THE COURT: By the Defendant.

23 MR. JOHNSON: Not at this time, Your Honor.

24 THE COURT: Madam Forelady, ladies and
25 gentlemen, you've been a wonderful jury. I travel

1 all over the state and have juries everywhere.
2 Y'all have just been a great jury. You have paid
3 close attention, you've been attentive. And this is
4 not an easy civic duty, particularly in these types
5 of cases. And I thank you on behalf of the citizens
6 of Kershaw, the judiciary, and the people in the
7 state. You know, it's a tough job. But you
8 performed it well and you can look at yourselves in
9 the mirror and be proud of yourselves. I thank you.

10 That will conclude your services here this
11 week. What I have left to do now, I have to
12 sentence him, which will be done in the next few
13 minutes. You're welcome to stay for that or you're
14 welcome to leave.

15 Your wonderful clerk will send you a big check.
16 We got Chairman of County Council up here; maybe we
17 can agree to get him to up the checks. Seriously,
18 you'll be getting a check. If you need a work
19 excuse --

20 THE CLERK: Step across to my office and my
21 staff will have them ready for you.

22 THE COURT: Thank you. I've enjoyed being with
23 you. You're welcome to stay or welcome to go.

24 Okay. Prepare some sentence sheets for me,
25 please. Ms. Simpson, what's the sentence range on

1 CSC second with a minor?

2 MS. SIMPSON: Zero to 20 years, Your Honor.

3 THE COURT: Lewd act?

4 MS. SIMPSON: Zero to 15.

5 THE COURT: Madam Forelady and ladies and
6 gentlemen of the jury, there's a sentence sheet that
7 I have to fill out, and it's taking them about two
8 or three minutes to prepare it. And as soon as we
9 get that, we'll complete the sentencing.

10 All right. Mr. Johnson.

11 NAKIA JOHNSON

12 being first duly sworn, testified as follows:

13 THE DEFENDANT: Yes.

14 THE CLERK: Thank you.

15 THE COURT: Ms. Simpson, as I understand from
16 earlier --

17 MS. SIMPSON: Yes, Your Honor.

18 THE COURT: -- proceedings is that the
19 defendant does not have a prior record.

20 MS. SIMPSON: That is correct.

21 THE COURT: Anything the State wishes to put on
22 the record before I sentence him?

23 MS. SIMPSON: Your Honor, at the appropriate
24 time, there is a statement from Child

25 Child is not going to read it, but our victim

1 advocate would like to present it to the Court.

2 THE COURT: All right. If you'll hand it up.
3 Have you given it to Mr. Johnson?

4 MS. SIMPSON: No. It's a handwritten statement
5 that she just did. I'll be happy to show it to him
6 first.

7 THE COURT: All right. Anything else?

8 MS. SIMPSON: Other than that, Your Honor, no.
9 I think the trial -- you heard the facts and they
10 speak for themselves.

11 THE COURT: Mr. Johnson?

12 MR. JOHNSON: Your Honor, may it please the
13 Court. That's all I can say. You've heard the
14 whole trial, you've heard the facts, you've seen
15 everything. The only thing I can ask, Your Honor --
16 you know, our position and the decision has been
17 made. We'd just ask that --

18 THE COURT: That you were amazed?

19 MR. JOHNSON: No, sir. I said the decision has
20 been made. And all I ask is that you show as much
21 mercy as you possibly can.

22 THE COURT: Mr. Nakia Johnson, anything you
23 want to tell me?

24 THE DEFENDANT: Yes. I'm still -- I'm sticking
25 to the story --

1 THE COURT: I can't hear you.

2 THE DEFENDANT: I'm innocent of all these
3 charges. That's all I have to say at this time.

4 THE COURT: Well, Mr. Johnson, I've listened to
5 all of the evidence, and I concur with the jury's
6 decision. I think the case was proven beyond a
7 reasonable doubt. There's no reason in this whole
8 wide world this child would come in here and relay
9 the story that she relayed, other than the fact that
10 it happened.

11 Madam, you want to read this so we can have it
12 in the record?

13 VICTIM ADVOCATE: Yes, sir.

14 June 26th, 2015. I truly hope my prayers will
15 be answered. Even though the acts were brought to
16 attention, I still can see terrible and disgusting,
17 sickening things happening all over again. My whole
18 life was affected by Mr. Key. My first day back to
19 school after the event was published to the world
20 was the worst day of my life. Everyone was looking
21 at me, some stopped to ask questions. At that
22 moment, I wanted to be locked in a bottle floating
23 at sea. That's where mostly peace is found.

24 I was very highly ashamed. I had to talk to
25 people I barely knew. I was so nervous and

1 embarrassed to tell what happened to me. I vomited
2 everything time I thought about it. I thought if I
3 tried putting it out of my mind, I would do great.
4 But things just did not happen that way. I was
5 still afraid and could vision in my mind things that
6 you did to me and how sickening it made me feel.

7 I hated you. I wanted bad things to happen to
8 you. I wanted you to hurt and cry and to be taken
9 advantage of the way you took advantage of me. You
10 made my life a living hell. You violated me,
11 abusive and used me, physically and mentally. I
12 trusted you because I felt you were someone who
13 protected people from bad things and bad people.
14 But you did not, because you were the monster who
15 hides in light and did bad things.

16 I did what you asked me to do because I was
17 afraid of you. You said you would take away my mom,
18 the only person then in my life who I felt loved me
19 and I would then be alone. I didn't think of
20 myself, but how it would affect my two sisters and
21 brother.

22 But I'm stronger now and I know that I did not
23 do anything to cause the hurt and shame you brought
24 into my life. I can look in your face and tell you
25 that I'm not afraid of you anymore. There's nothing

1 you can do to me to feel to make me feel bad about
2 myself. On the other hand, now I look at you as a
3 sick person who harmed a little girl who never did
4 anything to you but accepted you as a stepfather and
5 trusted you with love and respect.

6 What you did to me did not make you a big man,
7 Mr. Key, it only made you a man with no respect for
8 yourself and nobody else. I'm stronger, much
9 stronger now, and I want to grow up to be a lawyer
10 or a child protector so I can protect innocent kids
11 from big, bad monsters like you.

12 I really thank my support team who helped me.
13 With that being said, I rest my case.

14 THE COURT: Let's make that part of the record,
15 please, ma'am.

16 (Court's Exhibit Nos. 2, 3 and 4 marked for
17 identification.)

18 THE COURT: Anything else, Mr. Virgin Johnson?

19 MR. JOHNSON: No. You've heard the facts.

20 THE COURT: Mr. Nakia Johnson, obviously one of
21 my biggest responsibilities in this job is to
22 protect innocent children. And somebody in your
23 position, being a stepfather to this child, it's
24 just despicable the way you took advantage of her.

25 The jury has given you a lot of mercy not

1 finding you guilty for first degree, which would
2 have subjected yourself to a minimum of 25 years to
3 life. On the criminal sexual conduct with a minor
4 in the second degree, I have the discretion to
5 sentence you anywhere from zero to 20 years, and on
6 the lewd act, I have the discretion to sentence you
7 to zero to 15 years.

8 As to Indictment 2014-GS-28-00420, the
9 indictment for criminal sexual conduct with a minor
10 in the second degree, the sentence of the Court is
11 that you be committed to the state department of
12 corrections for a period of 20 years.

13 As to Indictment -910 of lewd act, sentence of
14 the Court is that you be committed to the state
15 department of corrections for a period of 15 years.
16 They'll run concurrent. Good luck.

17 MS. SIMPSON: Thank you, Your Honor.

18 MR. JOHNSON: Thank you, Your Honor.

19 THE COURT: Everybody remain seated, please.

20 Madam Forelady, ladies and gentlemen of the
21 jury, let me explain a little bit about that.
22 Criminal sexual conduct in the second degree, I have
23 discretion between zero and 20 years. It's
24 classified as a most serious offense, which means a
25 number of things. We have a three-strike law in

1 South Carolina, so if he gets out and gets in
2 trouble again for these types of activities, he can
3 go to jail for the rest of his life.

4 The more important thing is that's what we call
5 a no-parole sentence, so he'll have to serve 85
6 percent of that before he can get out. He will not
7 be eligible for parole, so he'll do 17 years. I ran
8 them concurrent, at the same time, but he's -- he'll
9 be there for a while.

10 Thank you very much for your service, and I've
11 enjoyed working with you. I'll let y'all go now.
12 Thank you.

13 (The jury is excused at 3:15 PM.)

14 THE COURT: Mr. Johnson, I'll give you ten days
15 to make any posttrial motions.

16 MR. JOHNSON: Thank you, Your Honor.

17 THE COURT: Young lady, you're a great girl. I
18 hope everything is going to work out for you. Okay?

19 MISS FORD: Yes, sir.

20 THE COURT: Good luck.

21 (Court's Exhibit No. 5 marked for
22 identification.)

23 -- END OF TRANSCRIPT OF RECORD --

24

25

C E R T I F I C A T E

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

I, the undersigned, Bethanie K. Creppon, Circuit Court Reporter for the Second Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the trial of the captioned cause, relative to appeal in the Criminal Court for Kershaw County, South Carolina, on the 23rd - 26th days of June, 2015.

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

December 1, 2015

*s/Bethanie K. Creppon*Bethanie K. Creppon
Circuit Court Reporter

COUNTY OF Kershaw
STATE VS.
Nakia Karreim Johnson
AKA:
Race: BLACK Sex: M Age: 40
DOB: SS#:
Address:
City, State, Zip: Fairfax, SC 298276150
DL#: 011281165 SID#:

INDICTMENT/CASE#: 2014GS2800420
A/W#: 2014GS2800420
Date of Offense: 10/11/2011
S.C. Code § : 16-03-0655(B)(1)
CDR Code #: 0396

SENTENCE SHEET

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Sex / Criminal sexual conduct with minor, or Attempt - victim 11 to 14 yrs of age inclusive - Second deg

in violation of § 16-03-0655(B)(1) of the S.C. Code of Laws, bearing CDR Code # 0396
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)

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

ATTEST: 77500
SIMPSON, NICOLAS 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 20 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 the 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 16-25-65 (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: _____

*Fine: \$
§ 14-1-206 (Assessments 107.5 %) \$
§ 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00
§ 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 \$ 25.00
§ 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 (SCCJA Surcharge) \$5 \$ 5.00
3% to County (if paid in installments) \$ 3.90
TOTAL \$ 133.90

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
pmts. of \$ _____ beginning _____
\$ _____ paid to Public Defender Fund
Other: _____

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

Clerk of Court/ Deputy Clerk: Jana M. Donald Presiding Judge: J. B. Early Jr.
Court Reporter: Bethanie Cuppen Judge Code: 2136
Sentence Date: 6/26/15

A. 524

COUNTY OF Kershaw
STATE VS.
Nakia Karreim Johnson
AKA:
Race: BLACK Sex: M Age: 40
DOB: SS#:
Address:
City, State, Zip: Fairfax, SC 298276150
DL#: 011281165 SID#:

INDICTMENT/CASE#: 2014GS280910
A/W#: DP00112
Date of Offense: 10/11/2011
S.C. Code § : 16-15-0140
CDR Code #: 2468

SENTENCE SHEET

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Sex / Lewd Act, committing or attempting lewd act upon child under 16 (June 4, 1996)

in violation of § 16-15-0140 of the S.C. Code of Laws, bearing CDR Code # 2468
☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☒ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45
The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: 77500
SIMPSON, NICOLE 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: 14-65-28-420
☐ 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 the 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 16-25-65 (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: \$ _____
Payment Terms: _____
☐ Set by SCDPPPS _____

Recipient: _____

*Fine:
§ 14-1-206 (Assessments 107.5 %) \$
§ 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00
§ 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 \$ 25.00
§ 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 (SCCJA Surcharge) \$5 \$ 5.00
3% to County (if paid in installments) \$ 3.90
TOTAL \$ 133.90

_____ days/hours Public Service Employment
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
pmts. of \$ _____ beginning _____
\$ _____ paid to Public Defender Fund
Other: _____

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

Clerk of Court/ Deputy Clerk: Debra M. Connel
Court Reporter: Bethanne Creppon

Presiding Judge W. B. Early Jr.
Judge Code: 2136
Sentence Date: 6/26/15

A. 525

ROA 526

WITNESSES

(S) Inv. R. Bailey
- KCSD

ARREST WARRANT NUMBER

DP00083

**ACTION OF GRAND JURY
TRUE BILL**

reperson of Grand Jury
ite:

MAY 28 2014

VERDICT

reperson of Petit Jury
ite:

DOCKET NO. 2014-GS-28-0420

The State of South Carolina

County of

Kershaw

COURT OF GENERAL SESSIONS

JUNE TERM 2014

116

**THE STATE
vs.**

Nakia Karreim Johnson

**Indictment for
CRIMINAL SEXUAL CONDUCT WITH A
MINOR, 2ND DEGREE (AGE 11-14)**

**SC Code: 16-03-0655(B)(1)
CDR Code: 0396**

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 plea
guilty to the within indictment or to

Defendant

Witness:

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

FILED FOR RECORD
2014 MAY 28 PM 2:47
JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

A. 526

STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW)

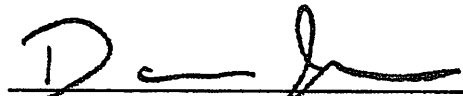
INDICTMENT

At a Court of General Sessions, convened on May 28, 2014, the
Grand Jurors of Kershaw County present upon their oath:

CRIMINAL SEXUAL CONDUCT WITH A MINOR
2ND DEGREE (AGE 11-14)

That Nakia Karreim Johnson did in Kershaw County, State of South
Carolina, on or between October 16, 2010 and , 2011, willfully,
unlawfully and feloniously engage in sexual battery with a minor who was
fourteen (14) years or less but who was at least eleven (11) years of age, to wit:
Child , in violation of Section 16-03-655(B) [formerly Section 16-3-
655(2)], S. C. Code of Laws, (1976, as amended).

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


DAN JOHNSON, SOLICITOR

ROA 528

WITNESSES

(S) Inv. R. Bailey - KCSD

ARREST WARRANT NUMBER

DP00112

ACTION OF GRAND JURY

TRUE BILL

Person of Grand Jury
e:

AUG 20 2014

VERDICT

Person of Petit Jury
e:

DOCKET NO. 2014-GS-28-0910

The State of South Carolina

County of

Kershaw

COURT OF GENERAL SESSIONS

AUGUST TERM 2014

79

**THE STATE
vs.**

Nakia Karreim Johnson

**Indictment for
LEWD ACT ON A MINOR CHILD**

SC Code: 16-15-0140

CDR Code: 2468

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.

FILED FOR RECORD
2014 AUG 20 PM 2:46
JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

A. 528

STATE OF SOUTH CAROLINA)

INDICTMENT

COUNTY OF KERSHAW

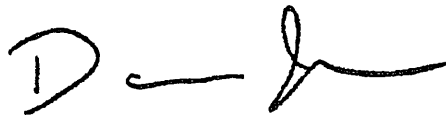
At a Court of General Sessions, convened on August 20, 2014, the

Grand Jurors of Kershaw County present upon their oath:

LEWD ACT ON A MINOR CHILD

That Nakia Karreim Johnson, being over fourteen years of age, did in Kershaw County on or between January 1, 2007 and . 2011, willfully and lewdly commit a lewd or lascivious act upon or with the body of a child, less than sixteen (16) years of age, to wit: with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of said defendant or of the victim. All in violation of Section 16-15-0140, S. C. Code of Laws, (1976, as amended).

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



DAN JOHNSON, SOLICITOR

RECEIVED

SEP 23 2016

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of General Sessions
Doyet A, Early, III, Circuit Court Judge

Court of Appeals Case No. 2015-001436

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

v.

Nakia Johnson,..... Appellant.

Rule 210(g), SCACR Certification

The Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully Submitted,

By 

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466

Attorney for Appellant

September 19, 2016
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of General Sessions
Doyet A, Early, III, Circuit Court Judge

RECEIVED

SEP 23 2016

SC Court of Appeals

Court of Appeals Case No. 2015-001436

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

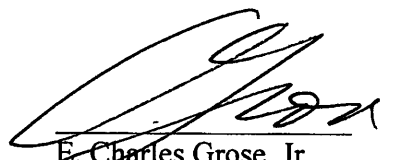
v.

Nakia Johnson,..... Appellant.

CERTIFICATE OF SERVICE

I certify that I have served the Record on Appeal by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed as follows:

William M. Blitch, Jr., Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211


E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466

September 19, 2016
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of General Sessions
Doyet A, Early, III, Circuit Court Judge

Court of Appeals Case No. 2015-001436

RECEIVED

OCT 17 2016

SC Court of Appeals

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

v.

Nakia Johnson,..... Appellant.

Final Brief of Appellant

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Attorney for the Appellant

TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	ii
Questions Presented	1
Statement of Case	2
Facts Presented at Trial	3
Arguments.....	10

Question I

Should the trial court judge have granted a mistrial when the State’s expert witness, Dr. Allison Foster, testified that the “most painful dynamics in child sexual abuse cases involving family members is that mothers [and other adults] . . . [questioning] how could I not have seen something was going on” when the State presented testimony of the child’s mother and other family members not being aware of the alleged child abuse and the case lacked physical evidence of sexual abuse and turned solely on the credibility of the child and Nakia Johnson?	10
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Question II

Should the trial judge have granted a mistrial when David Kellin, a child advocacy interviewer, testified he instructed the child to “tell the truth during the interview process,” when that testimony is prohibited by <i>State v. Kromah</i> and the case lacked physical evidence of sexual abuse and turned solely on the credibility of the child and Nakia Johnson?.....	14
---	----

Question III

Should this Court grant a new trial based on the cumulative error doctrine?	16
Conclusion	17

TABLE OF AUTHORITIES

Cases

State v. Anderson,

413 S.C. 212, 776 S.E.2d 76 (2015)..... 11, 12, 15, 16

State v. Blurton,

342 S.C. 500, 537 S.E.2d 291 (Ct. App. 2000)..... 16

State v. Brown,

411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015)..... 10

State v. Johnson,

334 S.C. 78, 512 S.E.2d 795 (1999)..... 16

State v. Kromah,

401 S.C. 340, 737 S.E.2d 490 (2013)..... 12, 14

State v. Schumpert,

312 S.C. 502, 435 S.E.2d 859 (1993)..... 12

State v. Weaverling,

337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999)..... 12

State v. White,

361 S.C. 407, 605 S.E.2d 540 (2004)..... 12

Statutes

S.C. Code Ann. § 17-23-175 14, 15

S.C. Code Ann. § 63-11-310..... 7

QUESTIONS PRESENTED

Question I

Should the trial court judge have granted a mistrial when the State's expert witness, Dr. Allison Foster, testified that the "most painful dynamics in child sexual abuse cases involving family members is that mothers [and other adults] . . . [questioning] how could I not have seen something was going on" when the State presented testimony of the child's mother and other family members not being aware of the alleged child abuse and the case lacked physical evidence of sexual abuse and turned solely on the credibility of the child and Nakia Johnson?

Question II

Should the trial judge have granted a mistrial when David Kellin, a child advocacy interviewer, testified he instructed the child to "tell the truth during the interview process," when that testimony is prohibited by *State v. Kromah* and the case lacked physical evidence of sexual abuse and turned solely on the credibility of the child and Nakia Johnson?

Question III

Should this Court grant a new trial based on the cumulative error doctrine?

STATEMENT OF CASE

On October 14, 2011, the alleged victim in this case and her mother alleged the appellant, Nakia Johnson, committed child sexual abuse. The State arrested and indicted Mr. Johnson for first-degree criminal sexual conduct with a minor, second-degree criminal sexual conduct with a minor, and committing a lewd act on a minor child. R. 526-29.

From June 22 – 26, 2015, the State tried Mr. Johnson before the Honorable Dayet A. Early, III and a jury in Kershaw County. Nicole Simpson and Kathryn Cavanaugh represented the State. Virgin Johnson, Jr. (no relation) and Corey Williams represented Mr. Johnson. The jurors found Mr. Johnson not guilty of first-degree criminal sexual conduct with a minor but returned guilty verdicts for second-degree criminal sexual conduct with minor and lewd act. R. 513-14. Judge Early sentenced Mr. Johnson to twenty years imprisonment for second-degree criminal sexual conduct with a minor and fifteen years imprisonment for lewd act. The sentences are concurrent. R. 521; R. 524-25. Judge Early subsequently denied Mr. Johnson's new trial motions.

This appeal follows.

FACTS PRESENTED AT TRIAL

Mr. Johnson, a Lee County Deputy Sheriff at the time, and Pamela Hall¹ met in September 2010. At the time, both were married to other people, and Ms. Hall had a daughter from her prior relationship. The two married, but divorced in 2007. They had a son and two daughters together. After the divorce, Mr. Johnson provided financial support to Ms. Hall and the children. Mr. Johnson and Ms. Hall continued to have a friendly and sometimes intimate relationship. Prior to and after the divorce, they argued about Mr. Johnson “cheating” with other women. Sometimes these arguments turned physical.² R. 103-17.

At 6:36 p.m. on Tuesday, October 11, 2011, Pamela Hall reported to the Kershaw County Sheriff’s Office that her eleven-year-old daughter from her previous relationship (hereinafter “the child”) had been sexually assaulted. At 7:23 p.m., Deputy Sheriff Jerry Barnwell arrived at Ms. Hall’s residence and interviewed her, learning that she had pointed a gun at Mr. Johnson. He did not interview the child but notified the “on-call investigator” and victim’s advocate to meet Ms. Hall and the child at the hospital. R. 23-27.

According to Ms. Hall, Mr. Johnson came to pick up their youngest child. Before the children came home, they had sex. While Ms. Hall was helping their son with his homework, Mr. Johnson and the child left to go to the store. Ms. Hall called Mr. Johnson

¹ Ms. Hall has a 2002 conviction for fraudulent check and a 2009 conviction for financial identity fraud. For the 2009 charge, she served 18 months following a probation revocation. In 2010, Ms. Hall received inpatient treatment for alcohol and drug abuse. R. 130-33.

² The child testified she was aware of Mr. Johnson’s “cheating” with other women. R. 33, lines 12-15; 35, lines 4-8.

and asked him to pick up skins and beer from the store. Ms. Hall testified she got a call from Mr. Johnson's phone and could hear him talking. At first, she couldn't make out the conversation but claims she heard him say, "[Y]ou know I want to nut in you, but I can't." Ms. Hall claimed Mr. Johnson asked, "[Y]ou know why?," and the child responded, "[B]ecause I will get pregnant." Ms. Hall also claims she heard Mr. Johnson asking the child "does she want to do it; does she want to be on top or does she want him to get on top." After the child allegedly said she wanted Mr. Johnson to be "on top," Ms. Hall hung up the phone. Ms. Hall called back. Mr. Johnson answered. Ms. Hall told Mr. Johnson, "[Y]ou got ten seconds to have my baby back in the yard." Ms. Hall doesn't remember everything else she said. She went into the yard and waited. Mr. Johnson drove back fast. Ms. Hall told the child to get out of the car. Ms. Hall jumped into the car, grabbed Mr. Johnson's gun, and argued with him. R. 117-20.

Still holding Mr. Johnson's gun, Ms. Hall went to her mother's house³ and talked to the child. When Ms. Hall asked her what happened, the child "kept saying nothing, nothing." Ms. Hall pressed, and the child eventually claimed Mr. Johnson "was touching her breasts." R. 120.

Ms. Hall took the child back outside and confronted Mr. Johnson, pointing his gun at him. Mr. Johnson denied he would "do something like that." R. 121-22. Ms. Hall told the child "to go in the house." She returned Mr. Johnson's gun and "told him to get out of my yard because I was calling the police." Ms. Hall called 911. After speaking with Deputy Barnwell, Ms. Hall took the child to the hospital. R. 125.

³ Ms. Hall lived in a single mobile home trailer, three bedrooms" this is next to her mother's house. R. 113.

At trial, the child testified about the allegations of sexual abuse.⁴ When they lived in Fairfax, South Carolina, the child claimed Ms. Johnson “discovered that I had hair on my privates.” She claimed Mr. Johnson would ask her to pull down her pants, and he would pull down his pants. She claimed Mr. Johnson would “rub” her arms and breasts, kiss her, and “put his private in my private.” She also claimed Mr. Johnson would ask her if she would tell, and the child said she would not. R. 36-38.

The child testified about abuse allegedly occurring when she lived on her grandmother’s property. She claimed she and Mr. Johnson would “go in the room” and Mr. Johnson “pull[ed] down his pants down” and told her “to suck it,” meaning his penis. While she did this, she claimed Mr. Johnson would “rub [her] hair or move [her] head back and forth.” She claimed “white stuff” would come out of his penis. Also at this location, the child claimed Mr. Johnson would “tell me to lay down and he’d kiss me. And he’d kiss my thighs and the he’ll put his penis in my private.” She further claimed Mr. Johnson would rub her bottom but would not put his penis inside. R. 38-40.

During the period of time when the child moved back to Fairfax, she claimed the abuse “just speeded up, just got worse than what it was. She claimed Mr. Johnson would “would mess with me” and the abuse lasted “hour after hours.” Other than claiming it happened in the “back room, laundry room, and his room,” the child did not testify to any details of the abuse. R. 44-46.

The child claimed abuse occurred at her Aunt Missy’s house in Cassatt, South Carolina while her aunt was at work and Ms. Hall was outside the house. She claimed

⁴ At the time she testified at trial, the child was a 15-year-old, high school sophomore. She lived with her father and stepmother following Ms. Hall’s probation revocation. R. 28-30.

Mr. Jonson would take her into the computer room, "pull down his clothes," and tell the child to pull down her clothes. The child claimed Mr. Johnson would have her sit on his lap. She claimed Mr. Johnson would talk for a while, start "kissing and rubbing" her, lick and kiss her breasts and stomach, and rub her butt. The child testified Mr. Jonson would sit in the computer chair, ask her to sit in his lap, and "put is penis in my vajayjay, and he'll just move up and down constantly." R. 46-51.

The child claimed the abuse occurred during a trip to Disney World in Orlando, Florida. On the first night there, she "slept on one side of the bed and they slept on the other side." She "got closer to where he was." She claimed "he would take the cover up and down so I could see his penis that night." On the last day of the trip, the child claimed Mr. Johnson sent Ms. Hall and the other children to get the car. While they were gone, she claimed Mr. Johnson kept touching and rubbing her and tried to "[p]ut his penis in me," but she told him to stop because it hurt. R. 51-53.

The child testified about a trip to Myrtle Beach, South Carolina. She claimed Mr. Johnson touched her underwater and made her grab him underwater. When they returned from Myrtle Beach to a hotel in Bishopville, South Carolina, the child claimed Mr. Johnson sent Ms. Hall "to the store to get some soap and something else" and told her "brothers and sisters to go in the bathroom." She claimed Mr. Johnson told her "to lay back on the bed and take [her] pants off" and "put his penis in my vajayjay." R. 53-55.

The child testified about incidents allegedly occurring on various dirt roads near her aunt Missy's house. She claimed Mr. Johnson would pull down her pants, take her pants off, have her "get on top of him," and have her "ride" him by "mov[ing] up and

down.” She claimed this happened “multiple times” on multiple dirt roads but she could only identify one dirt road for law enforcement. R. 55-58.

The child testified about the day Ms. Hall called the police. She and Mr. Johnson left to go to the store. Instead of going to the store, the child claimed Mr. Johnson took her to a graveyard, pulled down his pants, and told her to pull down her pants. She claimed, Mr. Johnson started touching me and he started feeling, but we never could have done nothing because of the fact that my mama was still on the line and he was just talking.” She further claimed, after Mr. Johnson got off the phone with Ms. Hall, the two went to the store and rushed home. R. 61-64.

Later that night, the child was examined at the hospital and interviewed by the police. R. 67; 361. Temple Hart, a registered nurse, performed the examination. After getting general medical history from Ms. Hall, the child described the sexual assault from earlier in the day as involving touching and rubbing “on top of my clothes.” Other than some redness, which could have multiple causes, the examination was normal. R. 165-80; 183; 188.

Ms. Hart collected evidence in a sexual assault kit for further analysis. *E.g.* R. 173, lines 21-24; 177, lines 10-18. The trial court Paul Meah of the South Carolina Law Enforcement Division as an expert in DNA analysis. Mr. Meah examined the sexual assault kit, which contained a request from Ms. Hart to look for semen. Mr. Meah did not find any evidence of semen. R. 268-83.

On October 12, 2011, David Kellin, a social worker, interviewed the child at the Family Resource Center—a child advocacy center mandated by statute⁵—at the request

⁵ S.C. Code Ann. § 63-11-310.

of Investigator Rick Bailey. Because of sickness, the interview was terminated early. The videotape of this interview was introduced at trial. R. 229-43; 251-52. On November 9, 2011, Laurie Caldwell of the Dickerson Center—also a child advocacy center—interviewed the child a second time. The videotape of this interview was not introduced into evidence because the child had turned twelve prior to the interview. R. 292-306.

Dr. Susan Luberoff, a medical doctor, testified as an expert “in the field of child sexual assault examinations.” She examined the child on October 14, 2011 at the Assessment & Resource Center (“ARC”)—also a child advocacy center. The examination was normal, and Dr. Luberoff couldn’t offer an opinion whether sexual abuse “happened or whether it didn’t” happen. R. 340-54.

A records custodian from AT&T testified that, on the afternoon of October 11, 2011, (1) Ms. Hall’s phone called Mr. Johnson’s phone for fifty seconds beginning at 5:41 p.m., (2) Mr. Johnson’s phone called Ms. Hall’s phone for two minutes, three seconds beginning at 5:54 p.m., and (3) Ms. Hall’s phone called Mr. Johnson’s phone for one minute, and twenty-three seconds to one minute, twenty-five seconds, beginning at 5:56 p.m. R. 191-205.

Investigator Dave Capps, of the Lee County Sheriff’s Office, who is also responsible for “in house IT,” retrieved the security video from Fountain Grocery Store showing that Mr. Johnson and the child were inside the store at 5:58 p.m. or 5:59 p.m. R. 253-61; 263-67. Investigator Rick Bailey of the Kershaw County Sheriff’s Office acknowledged it would be impossible for Mr. Johnson to have been at the graveyard and the store at the same time. R. 395-97.

Investigator Rick Bailey of the Kershaw County Sheriff's Office contacted Mr. Johnson and requested he provide an interview. Mr. Johnson cooperated with the investigation. The interview, occurring on October 14-15, 2011, was videotaped and played to the jurors. R. 362-70; 373-74. During the interview, Mr. Johnson denied abusing the child. At the conclusion of the interview, Investigator Bailey arrested Mr. Johnson by serving arrest warrants that had already been obtained based solely on the statements of Ms. Hall and the child. R. 385-87.

ARGUMENTS

Question I

Should the trial court judge have granted a mistrial when the State's expert witness, Dr. Allison Foster, testified that the "most painful dynamics in child sexual abuse cases involving family members is that mothers [and other adults] . . . [questioning] how could I not have seen something was going on" when the State presented testimony of the child's mother and other family members not being aware of the alleged child abuse and the case lacked physical evidence of sexual abuse and turned solely on the credibility of the child and Nakia Johnson?

The prosecution called Dr. Allison Foster, who is employed at the ARC and offered her as an expert in "child abuse assessment." The trial court judge convened a hearing outside the presence of the jurors. The trial court judge decided to qualify Dr. Foster as an expert witness based on this Court's holding in *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). The trial court judge clarified that Dr. Foster would "not be offering any opinion regarding the credibility or believability of the victim and/or other witnesses," "commenting on whether or not she was actually assaulted," or offering testimony beyond giving an opinion about the effects sexual assault has or responses to sexual assault on children." R. 308-13.

After the jurors returned to the courtroom, the trial court judge qualified Dr. Foster as an expert "in the field of child abuse assessment." R. 313-17. Consistent with *Brown*, Dr. Foster's initially testified about the dynamics of child sexual abuse and the process of a child disclosing the abuse. R. 317-31.

The prosecution asked, Dr. Foster, "[D]o family members always know what's happening to a child?" Dr. Foster responded:

No, they do not. And one of the more painful dynamics in child sexual abuse cases involving family members is that

mothers—and I’ll say mothers because most often it is the mother who is saying, how could I not have seen something was going on? So every week, and at my job at the ARC, that’s a question that –

Trial counsel requested a sidebar and moved for a mistrial. R. 331-33. At the conclusion of Dr. Foster’s testimony, trial counsel placed Mr. Johnson’s mistrial motion on the record. Counsel argued:

I think that goes directly in this case to bolstering the credibility of the – of what was said by the mom and the daughter. And that testimony elicited is prejudicial and would impact the jury that I think . . . the proper remedy is a mistrial.

R. 337, line 13 – 338, line 4.

Trial counsel pointed out the lack of “physical evidence” in the case, and the trial judge acknowledged, “Everything is credibility.” Trial counsel agreed and pointed out, “[T]he fact that she testified as an expert bolsters it. But when her testimony becomes more specific to this particular case, it bolsters it more.” Counsel pointed out, “[Y]ou can’t un-ring the bell,” and renewed the request for a mistrial “in the interest of justice and fairness.” The trial court judge once again denied the motion. R. 338, line 5 – 339, line 4.

The prosecutor emphasized the testimony of Dr. Foster during closing arguments. R. 350, line 25 – 351, line 4; 354, lines 4-5; 364, line 12 – 367, line 23.

In *State v. Anderson*, 413 S.C. 212, 218-19, 776 S.E.2d 76, 79 (2015), decided about six weeks after Mr. Johnson’s trial, our Supreme Court approved the procedure recognized by this Court in *Brown*, noting:

The better practice, however, is not to have the individual who examined the alleged victim testify, but rather to call an independent expert. 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.

By explaining the reactions of caregivers, Dr. Foster's testimony exceeded the procedure approved of in *Brown* and *Anderson*. *Anderson* cited to cases where our appellate court have approved expert testimony about the behavioral characteristics of victims of child sexual abuse. *E.g.*, *State v. White*, 361 S.C. 407, 605 S.E.2d 540 (2004); *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). None of these cases approved an expert testimony vouching for caregivers and other adult family members.

Dr. Foster's testimony prejudiced Mr. Johnson because of the lack of physical evidence corroborating the allegations and the fact that the case turned solely on the credibility of the witnesses. *Compare State v. Kromah*, 401 S.C. 340, 362, 737 S.E.2d 490, 501 (2013) ("Based on the entire record, including the physical evidence documented in this case, the challenged testimony could not reasonably have affected the result of the trial, so any error in its admission was harmless beyond a reasonable doubt.") *with Anderson*, 413 S.C. at 219, 776 S.E.2d at 79 (finding "overwhelming" prejudice when the "case turned solely on the credibility of the minor and of Appellant. The minor testified to abuse by Appellant over a course of three to four years, while Appellant denied any improper conduct. There was no physical evidence of sexual abuse.").

The prejudice to Mr. Johnson is similar to what happened in *Anderson*. The prosecution sought to prove the abuse occurred "time and time again," R. 441, line 12; 575 lines 20-21, but there was no physical evidence of abuse. Both medical exams were normal. The prosecution argued, "[B]ottom line, is if you believe [the child], that is

enough to find the defendant guilty.” R. 443, lines 7-10. And see, R. 446, lines 13-14 (“Well, the real question here is, why would [the child] lie.”). And, R. 471, lines 6-10 (“Bottom line is this: Why should you believe [the child]: Because if you accept that the victim’s testimony need not be corroborated, then the only question left is, why should you believe her?”).

The prosecution, in fact, used Dr. Foster’s inadmissible testimony to explain why none of the child’s relatives recognized any evidence of sexual abuse. Prior to what she allegedly overheard on the phone call on October 11, 2011, Pamela Hall had not observed any evidence of it. Pamela Hall’s sisters Stacey Hall and Melissa (“Aunt Missy”) Hall testified at trial. Stacey Hall testified that the child “acted normal” around Mr. Johnson, and she did to have any indication that sexual abuse was occurring. R. 159, lines 14-22. During the period of time that Pamela Hall and the child lived at her house, Melissa Hall also did not have any indication that sexual abuse was occurring. R. 211, lines 13-24.

The trial court judge erred by not granting a mistrial, and this Court should order a new trial.

Question II

Should the trial judge have granted a mistrial when David Kellin, a child advocacy interviewer, testified he instructed the child to “tell the truth during the interview process,” when that testimony is prohibited by *State v. Kromah* and the case lacked physical evidence of sexual abuse and turned solely on the credibility of the child and Nakia Johnson?

On October 12, 2011, David Kellin, a social worker, interviewed the child at the Family Resource Center at the request of Investigator Rick Bailey. At the time of the interview, the child was eleven years old. After explaining the interview process, Mr. Kellin testified, “We also ask in the beginning of the interview if will they tell the truth during the interview process.” Outside the presence of the jurors, trial counsel moved for a mistrial based on *Kromah* and moved to strike the testimony pursuant to *Kromah* and because the testimony was “more prejudicial than probative.” The trial court judge denied the motion for a mistrial, did not strike the testimony from the record, and did not issue a curative instruction. R. 229-37. Trial counsel renewed the motion. R. 245-46.

Trial Counsel correctly argued that *Kromah* prohibits the child interviewer from telling the jurors “that the child was told to be truthful” during the interview. 401 S.C. at 360, 737 S.E.2d at 500. After noting *Kromah*, our Supreme Court in *Anderson* set forth the proper procedures for admitting the videotaped child advocacy interviews:

First, the statute requires that the interviewer be called to testify *in camera*. See § 17-23-175(A)(4). At that *in camera* hearing, the interviewer must testify to establish the types of factors set forth in § 17-23-175(B), such as her training and background, whether she utilized the RATAC procedure or the ChildFirst protocol, as well as any other testimony that will assist the trial court in determining whether the child's statement possesses the “particularized guarantees of trustworthiness” and thus the admissibility of the video. § 17-23-175(B). 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.

413 S.C. at 220-21, 776 S.E.2d at 80.

Although Mr. Johnson's trial judge did not have the benefit of *Anderson*, trial counsel correctly pointed to the current and controlling law at the time – *Kromah*. Because the testimony was inadmissible under *Kromah*, the trial judge should have granted the mistrial motion. As seen in Section I above, Mr. Johnson was prejudiced because of the absence of physical evidence and the importance of the jurors determining the credibility of the witnesses. See *Anderson, supra*.

The trial court judge erred by not granting a mistrial, and this Court should order a new trial.

Question III

Should this Court grant a new trial based on the cumulative error doctrine?

The “cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial.” *State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297-98 (Ct. App. 2000), *reversed on other grounds by State v. Blurton*, 352 S.C. 203, 573 S.E.2d 802 (2002) (citing *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999)). Here, the error discussed in Sections I and II involved improper bolstering of the child, her mother, and the other family members that testified at trial. In both instances, Mr. Johnson moved for a mistrial. If this court disagrees Mr. Johnson is entitled to a new trial on each of these (or either one of these) issues, then this Court should apply the cumulative error analysis.

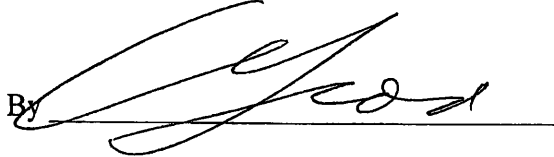
As seen in Sections I and II above, Mr. Johnson was prejudiced because of the absence of physical evidence and the importance of the jurors determining the credibility of the witnesses. *See Anderson, Supra*.

This Court should order a new trial.

CONCLUSION

For the foregoing reasons, this Court should order a new trial.

Respectfully Submitted,

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October 9, 2016
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of General Sessions
Doyet A, Early, III, Circuit Court Judge

Court of Appeals Case No. 2015-001436

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SC Court of Appeals

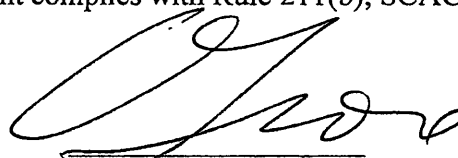
The State of South Carolina,..... Respondent

v.

Nakia Johnson,..... Appellant.

Rule 211, SCACR Certification

I certify that this Final Brief of Appellant complies with Rule 211(b), SCACR.



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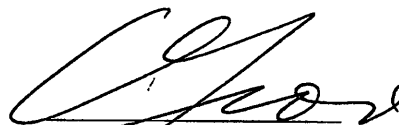
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Nakia Johnson, ... Appellant.

CERTIFICATE OF SERVICE

I certify that I have served the Final Brief of Appellant and Final Reoly Breif of Appellant by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed as follows:

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SC Court of Appeals

Re: *State v. Nakia Johnson*
Court of Appeals Case No. 2015-001436

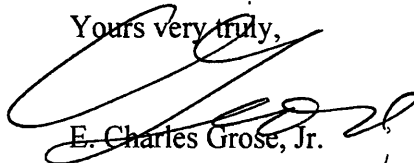
Dear Ms. Kitchens:

Enclosed please find the fifteen copies of the Final Brief of Appellant and Final Reply Brief of Appellant, one copy of each is not bound, along with a certificate of service.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

With kindest regards, I am

Yours very truly,



E. Charles Grose, Jr.

cc: William M. Blitch, Jr., Esquire

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County
Honorable Doyet A. Early, III, Circuit Court Judge
Appellate Case Tracking No. 2015-001436

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SEP 23 2016
SC Court of Appeals

The State,

Respondent,

vs.

Nakia Johnson,

Appellant.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	2
ARGUMENT.....	3
I. The trial court did not err in denying Appellant's motion for a mistrial because the expert's testimony did not constitute impermissible bolstering.	3
II. The trial court did not err in denying Appellant's motion for a mistrial because the comment by the forensic interviewer did not warrant the extreme consequence of a mistrial.....	7
III. This Court should not grant a new trial based on cumulative error.....	11
CONCLUSION.....	13

TABLE OF AUTHORITIES

Cases

<u>State v. Anderson</u> , 413 S.C. 212, 776 S.E.2d 76 (2015).....	5, 6, 8
<u>State v. Beam</u> , 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999)	6
<u>State v. Beekman</u> , 405 S.C. 225, 236, 746 S.E.2d 483, 489 (Ct. App. 2013).....	11
<u>State v. Edwards</u> , 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007).....	3, 7
<u>State v. Gaster</u> , 349 S.C. 545, 564 S.E.2d 87 (2002).....	4
<u>State v. Harris</u> , 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000)	3, 7
<u>State v. Inman</u> , 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011).....	8
<u>State v. Jennings</u> , 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011)	4
<u>State v. Kirby</u> , 269 S.C. 25, 236 S.E.2d 33 (1977).....	3, 7
<u>State v. Kromah</u> , 401 S.C. 340, 737 S.E.2d 490, 499 (2013)	4, 8
<u>State v. McDonald</u> , 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)	4
<u>State v. McLeod</u> , 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004)	4
<u>State v. Pagan</u> , 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006)	9
<u>State v. Patterson</u> , 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct. App. 1999).....	3, 7
<u>State v. Price</u> , 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006)	4
<u>State v. Sparkman</u> , 358 S.C. 491, 495, 596 S.E.2d 375, 377 (2004)	3, 7
<u>State v. Stanley</u> , 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005).....	3, 7
<u>State v. Stroman</u> , 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984).....	6
<u>State v. Taylor</u> , 404 S.C. 506, 514, 745 S.E.2d 124, 128 (Ct. App. 2013).....	4
<u>State v. Torrence</u> , 305 S.C. 45, 66, 406 S.E.2d 315, 327 (1991).....	11
<u>State v. Ward</u> , 374 S.C. 606, 612, 649 S.E.2d 145, 148 (Ct. App. 2007).....	3, 7

State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989)..... 3, 7

Wheat v. State, 527 A.2d 269, 273 (Del. 1987)..... 5

Other Authorities

Rule 603, SCORE..... 9

STATEMENT OF ISSUES ON APPEAL

- I. The trial court did not err in denying Appellant's motion for a mistrial because the expert's testimony did not constitute impermissible bolstering.
- II. The trial court did not err in denying Appellant's motion for a mistrial because the comment by the forensic interviewer did not warrant the extreme consequence of a mistrial.
- III. This Court should not grant a new trial based on cumulative error.

STATEMENT OF THE CASE

The Kershaw County Grand Jury returned true-billed indictments against Appellant for criminal sexual conduct (CSC) with a minor in the first degree, CSC with a minor in the second degree, and committing a lewd act on a child. (Indictments; R. 526-529). Appellant proceeded to trial from June 22-26, 2015, in front of the Honorable Doyet A. Early, III. The jury found Appellant not guilty of CSC with a minor in the first degree, guilty of CSC with a minor in the second degree, and guilty of committing a lewd act on a child. (T.634-635; R. 513-514). Judge Early sentenced Appellant to twenty years for CSC with a minor second degree and fifteen years for committing a lewd act; the sentences are concurrent. (T.642; R. 521).

ARGUMENT

I. The trial court did not err in denying Appellant's motion for a mistrial because the expert's testimony did not constitute impermissible bolstering.

Appellant contends the trial court erred in admitting testimony by the State's expert witness regarding the reaction of family members of victims of child sexual abuse. The testimony by the expert did not constitute impermissible bolstering. The trial court properly denied the motion for a mistrial.

A trial judge's ruling on a motion for a mistrial will not be disturbed absent an abuse of discretion amounting to an error of law. State v. Sparkman, 358 S.C. 491, 495, 596 S.E.2d 375, 377 (2004); State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). This Court favors the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. See State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct. App. 1999).

A mistrial should be declared only when absolutely necessary. In order to receive a mistrial, the defendant must show error and resulting prejudice. Harris, 340 S.C. at 63, 530 S.E.2d at 628; State v. Ward, 374 S.C. 606, 612, 649 S.E.2d 145, 148 (Ct. App. 2007). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." Patterson, 337 S.C. at 227, 522 S.E.2d at 851 (citing State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989); State v. Kirby, 269 S.C. 25, 236 S.E.2d 33 (1977) (power of court to declare mistrial ought to be used with greatest caution under urgent circumstances, and for very plain and obvious causes)). Granting of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way. State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007) (citing State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005)).

In addition, the admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error, which results in prejudice to the defendant. State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004).

Qualification of a witness as an expert and the subsequent admission of that witness's testimony are matters within the sound discretion of the trial court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

"[E]ven though 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, 499 (2013). "For an expert to comment on the veracity of a [victim's] accusations of sexual abuse is improper." State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011). This Court recently stated:

"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, 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, or corroborates other evidence; 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 a witness that the testimony becomes improper.

Exposing jurors to the unique interpersonal dynamics involved in prosecutions for intrafamily child sexual abuse can provide jurors with possible alternative explanations for complainant actions and statements that are, to average laypeople, “superficially bizarre,” “seemingly unusual,” “seemingly inconsistent,” or normally attributable to “inaccuracy or prevarication.” Thus informed, the jury will be better able to perform its fact finding duty.

Wheat v. State, 527 A.2d 269, 273 (Del. 1987). This is the same kind of testimony provided by the State’s expert to explain the “seemingly unusual” fact that others did not recognize the fact the child was being abused until accidentally overhearing a phone conversation. The testimony did not indicate the mom or child was telling the truth, instead it merely explained a phenomenon that occurs that may be outside the understanding of the average juror.

Additionally, this case is clearly distinguishable from State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015). In Anderson, the expert witness also served as the forensic interviewer and met with the child. The expert was well aware of the child’s testimony and statements regarding how the abuse occurred and the ramifications of the abuse through the interview with the child. When the expert testified regarding typically admissible behaviors of a child sexual abuse victim, the testimony of tailored to meet the statements and interview of the child victim. As a result, the Court found her testimony vouched for the minor when she testified only to those characteristics which she observed in the minor. Id. at 219, 776 S.E.2d at 79.

The State followed the “better practice” outlined in Anderson during this case and called a separate “independent” expert to testify regarding behavioral characteristics and family dynamics. See id. at 218, 776 S.E.2d at 79. The expert did not track the testimony of the child because of having been privy to the experiences and statements of the child. Instead, the expert

testified to a portion of the family dynamic which was also seen in the instant case. Her testimony complied completely with the requirements and admonishments of Anderson.

Finally, the testimony was in direct response to questions of the victim's mother which opened the door to the testimony. "Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially." State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984); see also, State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999) (same).

In the following colloquy, Appellant's counsel clearly tried to infer that the story was not true because no one had noticed anything prior to the phone conversation overheard:

- Q. I just want to establish, Nakia [Appellant] was a good stepfather to [victim]?
- A. Yes, he was.
- Q. Okay. And he was a good provider and good person to you?
- A. Yes, he was.
- Q. Okay. And up until the time you got this phone call, you had no indications of anything like this?
- A. No, I hadn't.

(T.256; R. 135). The colloquy continued to try and paint Appellant as supportive of the victim and her family. (T.257; R. 136). As a result, Appellant opened the door to the State's expert's testimony regarding whether the mother would have any indications something was occurring between Appellant and the victim.

Accordingly, because the testimony was properly admitted, was not impermissible bolstering, and was in direct response to questions asked by Appellant's counsel, the trial court did not err in denying Appellant's motion for a mistrial.

II. The trial court did not err in denying Appellant's motion for a mistrial because the comment by the forensic interviewer did not warrant the extreme consequence of a mistrial.

Appellant maintains the trial court erred in failing to grant his motion for a mistrial after the forensic interviewer commented on the fact the child was told to tell the truth during the interview. Even if error, the single comment in the midst of a longer statement regarding the interview was harmless, or at most minimally prejudiced Appellant, and certainly did not warrant the extreme remedy of a mistrial.

A trial judge's ruling on a motion for a mistrial will not be disturbed absent an abuse of discretion amounting to an error of law. State v. Sparkman, 358 S.C. 491, 495, 596 S.E.2d 375, 377 (2004); State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). This Court favors the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. See State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct. App. 1999).

A mistrial should be declared only when absolutely necessary. In order to receive a mistrial, the defendant must show error and resulting prejudice. Harris, 340 S.C. at 63, 530 S.E.2d at 628; State v. Ward, 374 S.C. 606, 612, 649 S.E.2d 145, 148 (Ct. App. 2007). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." Patterson, 337 S.C. at 227, 522 S.E.2d at 851 (citing State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989); State v. Kirby, 269 S.C. 25, 236 S.E.2d 33 (1977) (power of court to declare mistrial ought to be used with greatest caution under urgent circumstances, and for very plain and obvious causes)). Granting of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way. State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007) (citing State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005)). "The granting of a motion for a mistrial

is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way.” State v. Inman, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011).

The incident in question did not inject such prejudice into the proceeding as to warrant the extreme measure of a mistrial. The prosecutor asked: “How did you begin the interview?” The forensic interviewer responded:

I interviewed by introducing myself, and very briefly in the beginning, we talk about just general topics. We check and see if they're aware that this is being recorded. We provide a couple of semi-instructions just about how to respond if they don't know something so that they're not trying to provide information to us just to try to provide us information or to guess.

So we encourage them to -- if they don't know something, to say they don't know; if they don't understand, to say I don't understand and not to guess. We also ask in the beginning if will they tell the truth during the interview process.

(T.353; R. 232). It was at that point that Appellant's counsel indicated he had a motion and made his motion for a mistrial. The concept of the child being asked to tell the truth was never mentioned again during the trial.

While the comment was arguably improper under State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) and State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015), the trial court correctly concluded the prejudice to Appellant by the comment was minimal and did not warrant a mistrial. The trial court analyzed the comment in light of the Supreme Court's holding in Kromah. (T.355-356; R. 234-235). The court concluded: “And I think the context in which he has testified about the truthful statement would not taint it so as to make it inadmissible.” (T.357; R. 236). The court further indicated:

Well, the question was asked: Tell us generally how you conduct the interview. And he started off by telling us a number of things, including encouraging her to tell the truth, is basically what he

said. I don't find that to be more prejudicial than probative, so I'm going to allow him to continue on with his testimony.

(T.358; R. 237). As the trial court specifically concluded, the prejudice of the comment did not rise to the level necessitating a mistrial.

Further, this is not a case that relies entirely on the credibility of the child victim as the only evidence of the ongoing sexual abuse. The victim's mother indicated she and Appellant talked by phone several times after he left the house with the victim. (T.239-240; R. 118-119). At one point, the victim's mother received a telephone call from Appellant. When she answered she said hello and could hear Appellant talking but he couldn't hear the victim's mother. (T.240; R. 119). She testified she heard Appellant tell the child victim "you know I want to nut in you, but I can't." She then heard him say "you know why?" The child victim's response was "I'll get pregnant." Appellant then asked the child victim if she missed him and asked her how she wanted to do it; does she want to get on top or does she want him to get on top. The child victim indicated she wanted Appellant on top. (T.240; R.119). The testimony clearly provides additional evidence beyond just the testimony of the child victim and corroborates the child victim's story regarding one incident of the abuse. (T.182-186; R. 61-65).

Additionally, the single innocuous comment was unlikely to sway the jury or impact the jury's verdict in this case. State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained."). In the particular instance, the child victim was duly sworn in front of the jury. This oath requires the telling of the truth. See Rule 603, SCRE ("Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness'

mind with the duty to do so.”). The child’s testimony at trial was not significantly different from the information provided in the forensic interview. (State’s Exhibit 3). As a result, the jury could not have been swayed by the innocuous statement that she was asked to tell the truth. The trial court did not abuse its discretion in denying the motion for a mistrial because any prejudice resulting from the comment by the forensic interviewer did not rise to the grievous level necessitating the extreme measure of a mistrial.

III. This Court should not grant a new trial based on cumulative error.

Appellant contends this Court should grant a new trial based on the cumulative error doctrine based on the alleged prejudice resulting from the first two issues he raised. He never moved for a new trial on the basis of the cumulative error doctrine so the issue is not preserved for review on appeal. Further, there was not cumulative error in this case and any prejudice resulting from the testimony of the two witnesses was not such that this Court should use the cumulative error doctrine as a means of circumventing the preservation or waiver rules.

First, Appellant never raised the cumulative error doctrine to the trial court. He never raised it during trial or even in a post-trial motion after trial, and as a result, the issue is not preserved for review on appeal. See State v. Beekman, 405 S.C. 225, 236, 746 S.E.2d 483, 489 (Ct. App. 2013) (finding cumulative error doctrine must be raised to and ruled upon by the trial court in order to be addressed on appeal). Appellant seems to be asking this court to completely ignore longstanding preservation and waiver rules, and instead address this issue as plain error. South Carolina has rejected the plain error doctrine and this Court should not entertain it under the guise of the cumulative error doctrine. See e.g., State v. Torrence, 305 S.C. 45, 66, 406 S.E.2d 315, 327 (1991) (eliminating *in favorem vitae* review in death penalty cases and holding: “A contemporaneous objection requirement enables trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition. This, in turn, allows potential errors to be prevented or cured.”).

Next as discussed above, there is no error in the admission of the testimony of the State’s expert witness. No prejudice resulted from the properly admitted testimony. Therefore, it could not have contributed to a level of cumulative error necessitating a new trial. Additionally, the prejudice resulting from the single comment regarding the child being asked to tell the truth

during the interview with the forensic interviewer did not create any substantial prejudice to Appellant. As a result, even if some possible prejudice existed from the expert witness' testimony, the combined effect with the comment by the forensic interviewer does not warrant this Court ignoring the preservation requirements and finding the case should be reversed and remanded for a new trial.

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 23, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County
Honorable Doyet A. Early, III, Circuit Court Judge
Appellate Case Tracking No. 2015-001436

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SC Court of Appeals

The State,

Respondent,

vs.

Nakia Johnson,

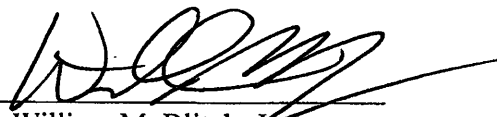
Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled, "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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September 23, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of General Sessions
Doyet A, Early, III, Circuit Court Judge

Court of Appeals Case No. 2015-001436

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

v.

Nakia Johnson,..... Appellant.

Final Reply Brief of Appellant

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SC Court of Appeals

TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities	ii
Arguments.....	1

Question I

Should the trial court judge have granted a mistrial when the State's expert witness, Dr. Allison Foster, testified that the "most painful dynamics in child sexual abuse cases involving family members is that mothers [and other adults] . . . [questioning] how could I not have seen something was going on" when the State presented testimony of the child's mother and other family members not being aware of the alleged child abuse and the case lacked physical evidence of sexual abuse and turned solely on the credibility of the child and Nakia Johnson?	1
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Question II

Should the trial judge have granted a mistrial when David Kellin, a child advocacy interviewer, testified he instructed the child to "tell the truth during the interview process," when that testimony is prohibited by <i>State v. Kromah</i> and the case lacked physical evidence of sexual abuse and turned solely on the credibility of the child and Nakia Johnson?.....	3
---	---

Question III

Should this Court grant a new trial based on the cumulative error doctrine?.....	4
--	---

Conclusion	5
------------------	---

TABLE OF AUTHORITIES

ARGUMENTS

Question I

Should the trial court judge have granted a mistrial when the State's expert witness, Dr. Allison Foster, testified that the "most painful dynamics in child sexual abuse cases involving family members is that mothers [and other adults] . . . [questioning] how could I not have seen something was going on" when the State presented testimony of the child's mother and other family members not being aware of the alleged child abuse and the case lacked physical evidence of sexual abuse and turned solely on the credibility of the child and Nakia Johnson?

The State argues that Dr. Foster's testimony was not impermissible bolstering because the State "followed the 'better practice' outlined in *Anderson*¹ in this case and called a separate 'independent' expert to testify regarding behavioral characteristics and family dynamics." Respondent's Brief, p 5. *Anderson* approved of the procedure followed in *State v. Brown*:

[W]e hold the circuit court properly admitted Galloway-Williams' expert testimony regarding general behavioral characteristics of child sex abuse victims and delayed disclosures because the subject matter fell outside the realm of lay testimony. Moreover, we hold Galloway-Williams' expert testimony did not improperly bolster the minor victims' testimony because (1) she never met with the minor victims, (2) her knowledge of this case was limited to her discussions with the solicitor, (3) she did not comment on the credibility of the minor victims in the instant case, and (4) she did not express an opinion or belief regarding the credibility of child sex abuse victims' allegations more generally. We further find her testimony did not improperly corroborate—and, therefore, was not cumulative to—the minor victims' testimony. Finally, we hold the high probative value of Galloway-Williams' testimony outweighed any prejudicial effect on Appellant's case.

411 S.C. 332, 348, 768 S.E.2d 246, 254-55 (Ct. App. 2015).

¹ *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015).

Nothing in *Brown* authorized Dr. Foster's testimony about mothers not recognizing the abuse or her counseling if these mothers at the ARC. This testimony directly bolstered the testimony of the child's mother, the credibility of which was a central issue in this case. It also implied that all children, and this child in particular, are honest when making allegations of sexual abuse.

The trial court judge erred by not granting a mistrial, and this Court should order a new trial.

Question II

Should the trial judge have granted a mistrial when David Kellin, a child advocacy interviewer, testified he instructed the child to “tell the truth during the interview process,” when that testimony is prohibited by *State v. Kromah* and the case lacked physical evidence of sexual abuse and turned solely on the credibility of the child and Nakia Johnson?

The State acknowledges error but argues, “The trial court did not err in denying Appellant’s motion for a mistrial because the comment by the forensic interview did not warrant the extreme consequences of a mistrial.” Rather, the State contends the prejudice was minimal because this case did not turn solely on credibility. Respondent Brief, p. 7-10.

Although the child’s mother did provide corroborating testimony about the supposed content of the phone call, the joint motive and credibility of the child and her mother were central issues in the case. Mr. Johnson was prejudiced because of the absence of physical evidence and the importance of the jurors determining the credibility of the witnesses. *See Anderson, supra*.

The trial court judge erred by not granting a mistrial, and this Court should order a new trial.

Question III

Should this Court grant a new trial based on the cumulative error doctrine?

As discussed in Mr. Johnson's opening brief, this Court should order a new trial based on the cumulative error doctrine based on the matters he preserved for appellate review during his trial. Respondent's brief, at p. 11-12, however, conflates the "cumulative error doctrine" with the "plain error rule" by misapplying this Court's analysis in *State v. Beekman*, 405 S.C. 225, 746 S.E.2d 483 (Ct. App. 203). *Beekman* asked this Court to apply the "cumulative error doctrine" based on his unspecified objections sustained during trial and other alleged errors that he did not object to during trial. Under those circumstances, this Court properly concluded *Beekman* was attempting to invoke the "plain error rule" that is not recognized in our State. *Id.* 405 S.C. at 236-38, 746 S.E.2d at 489-90. As seen, Mr. Johnson raised both issues and trial that he asserted in his opening brief, and the State does not contend those issues are not preserved for appellate review. Specific objections to both issues are all that is required to invoke the cumulative error doctrine on appeal.

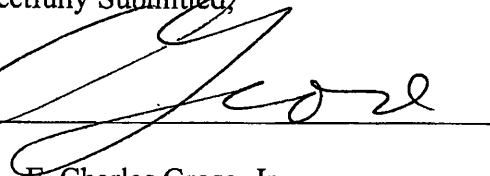
Here, both issues involve improper bolstering. If this Court concludes that neither issue, standing alone, is sufficient to grant a new trial, then this Court should order a new trial based on the cumulative error doctrine.

CONCLUSION

For the reasons set forth in the opening brief and this brief, this Court should order a new trial.

Respectfully Submitted,

By

A handwritten signature in black ink, appearing to read "E. Charles Grose, Jr.", written over a horizontal line.

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October 9, 2016
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of General Sessions
Doyet A, Early, III, Circuit Court Judge

Court of Appeals Case No. 2015-001436

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SC Court of Appeals

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

v.

Nakia Johnson,..... Appellant.

Rule 211, SCACR Certification

I certify that this Final Reply Brief of Appellant complies with Rule 211(b),
SCACR.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
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SC Court of Appeals

The State of South Carolina, ... Respondent

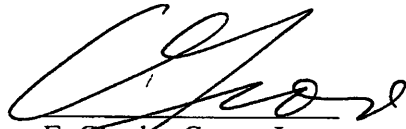
v.

Nakia Johnson, ... Appellant.

CERTIFICATE OF SERVICE

I certify that I have served the Final Brief of Appellant and Final Reply Brief of Appellant by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed as follows:

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October 10, 2016

The Honorable, Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
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Columbia, SC 29211

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SC Court of Appeals

Re: *State v. Nakia Johnson*
Court of Appeals Case No. 2015-001436

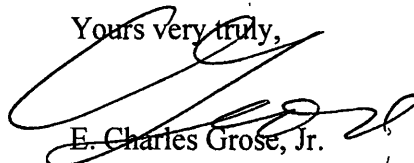
Dear Ms. Kitchens:

Enclosed please find the fifteen copies of the Final Brief of Appellant and Final Reply Brief of Appellant, one copy of each is not bound, along with a certificate of service.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

With kindest regards, I am

Yours very truly,



E. Charles Grose, Jr.

cc: William M. Blitch, Jr., Esquire

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

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

The State, Respondent,

v.

Nakia Karreim Johnson, Appellant.

Appellate Case No. 2015-001436

Appeal From Kershaw County
Doyet A. Early, III, Circuit Court Judge

Unpublished Opinion No. 2018-UP-109
Heard December 5, 2017 – Filed March 14, 2018

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

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Attorney General Alan McCrory Wilson, Assistant
Attorney General William M. Blitch, Jr., and Solicitor
Daniel Edward Johnson, all of Columbia, for
Respondent.

PER CURIAM: Nakia Johnson appeals his convictions of second-degree

criminal sexual conduct (CSC) with a minor and lewd act on a minor (lewd act). On appeal, Johnson argues the trial court erred in refusing to grant a mistrial because (1) the State's expert witness in child abuse assessment testified family members generally question how they failed to recognize that abuse was occurring and (2) the child advocacy interviewer testified he instructed Victim to tell the truth during the forensic interview. We affirm in part, reverse in part, and remand for a new trial.

STANDARD OF REVIEW

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). "The decision to grant or deny a mistrial is within the sound discretion of the trial judge." *State v. Stanley*, 365 S.C. 24, 33, 615 S.E.2d 455, 460 (Ct. App. 2005). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Douglas*, 369 S.C. at 429–30, 632 S.E.2d at 848. "To show prejudice, the appellant must prove 'that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof.'" *State v. Brown*, 411 S.C. 332, 339, 768 S.E.2d 246, 249 (Ct. App. 2015) (quoting *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)). "The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." *Stanley*, 365 S.C. at 34, 615 S.E.2d at 460.

EXPERT'S TESTIMONY

Johnson argues the trial court erred in refusing to grant a mistrial after the State's expert witness in child abuse assessment testified family members in abuse cases generally question how they failed to recognize that abuse was occurring. Johnson asserts this testimony improperly bolstered the Mother's and Aunts' testimony because they testified they were not aware of the recurring abuse of Victim. Johnson asserts an expert testifying about the behavioral characteristics of family members of abuse victims exceeds the scope of *Brown*¹ and *Anderson*.² We

¹ *Brown*, 411 S.C. at 341–42, 768 S.E.2d at 251 (holding an expert's "specialized knowledge of the behavioral characteristics of child sex abuse victims was relevant and crucial in assisting the jury's understanding of why children might

disagree.

"[E]ven though 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, 358, 737 S.E.2d 490, 499 (2013). "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.'" *Brown*, 411 S.C. at 343, 768 S.E.2d at 252 (quoting *Kromah*, 401 S.C. at 358–59, 737 S.E.2d at 500). A child abuse assessment expert can "testify to the behavioral characteristics of sex abuse victims." *Anderson*, 413 S.C. at 218, 776 S.E.2d at 79.

The better practice, however, is not to have the individual who examined the alleged victim testify, but rather to call an independent expert. 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.

Id. at 218–19, 776 S.E.2d at 79.

The trial court qualified Dr. Allison Foster, chief psychologist at the Assessment & Resource Center (ARC), as an expert in child abuse assessments. When asked if family members always know what was happening to a child, Dr. Foster answered,

No, they do not. And one of the most painful dynamics in child sexual abuse cases involving family members is that mothers -- and I'll say mothers because most often it is the mother who is saying, how could I not have seen

delay disclosing sexual abuse, as well as why their recollections may become clearer each time they discuss the instances of abuse").

² *State v. Anderson*, 413 S.C. 212, 220–21, 776 S.E.2d 76, 80 (2015) ("The sole purpose of [a forensic interviewer's] 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.").

something was going on? So every week -- and at my job at the ARC, that's a question that --

Johnson objected, and the trial court held a bench conference. The trial court instructed the jury to "[d]isregard that last statement and answer." After the jury was excused from the room, the trial court allowed Johnson to place his objection on the record. Johnson moved for a mistrial, arguing Dr. Foster's testimony bolstered the credibility of Mother's testimony and was prejudicial because there was no physical evidence. The trial court denied the motion for a mistrial, finding Dr. Foster's testimony was not a comment on Mother's credibility and the court's instructions to the jury to ignore the comment were sufficient.

We hold the trial court did not err in denying Johnson's motion for a mistrial because Dr. Foster's testimony did not bolster Mother's testimony.³ The State properly followed the procedure in *Anderson* by calling an expert who had no prior involvement with the case. Dr. Foster never interviewed Victim or Mother, and she did not have any prior knowledge of the case. Dr. Foster never commented—directly or indirectly—about the credibility of Victim's allegations. Although Dr. Foster's testimony that family members did not always know when a minor was being sexually abused mirrored Mother's testimony that she did not know Johnson was abusing Victim, this testimony did not rise to the level of bolstering Mother's testimony. *See Brown*, 411 S.C. at 345, 768 S.E.2d at 253 ("The fact that [an expert's] testimony corroborated some of the minor victims' reasons for delaying disclosure of the abuse does not mean her testimony improperly bolstered their accounts."). Moreover, the trial court struck Dr. Foster's statement about family members not always being aware of abuse. Thus, had there been error, such was cured by striking the testimony, and it did not rise to the level of being so prejudicial as to require a mistrial. *See Stanley*, 365 S.C. at 34, 615 S.E.2d at 460 ("The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way."). Therefore, we find the trial court did not abuse its discretion in

³ We find Johnson's bolstering argument as to the Aunts' testimony unpreserved. *See State v. Adams*, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) (stating a defendant may not argue one ground below and another on appeal). On appeal, Johnson argues Dr. Foster's testimony bolstered "other family members[]" testimony. However, at trial, Johnson argued Dr. Foster's testimony bolstered "the credibility . . . of what was said by the mom and the daughter."

refusing to grant a mistrial. *See id.* at 33, 615 S.E.2d at 460 ("The decision to grant or deny a mistrial is within the sound discretion of the trial judge.").

FORENSIC INTERVIEWER'S TESTIMONY

Johnson argues the trial court erred in denying his motion for a mistrial when the forensic interviewer testified his procedure for an interview includes asking interviewees if they will tell the truth. Johnson contends this goes directly against the supreme court's holding in *Anderson*. Johnson asserts the testimony was prejudicial because the case turned on the credibility of Victim because there was no physical evidence in the case. The State admits the comment by the forensic interviewer was "arguably improper" according to *Kromah* and *Anderson*, but it "was minimal and did not warrant a mistrial."

In *Kromah*, our supreme court held forensic interviewers should avoid testifying that they instructed the child to be truthful. 401 S.C. at 360, 737 S.E.2d at 500. In *Anderson*, the supreme court clarified "[t]here is to be no testimony [by a forensic interviewer] . . . of the instruction to the interview subject of the importance of telling the truth" 413 S.C. at 221, 776 S.E.2d at 80. "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." *Id.*

At trial, David Kellin, the forensic interviewer, described how he began the interview with Victim:

- I begin by introducing myself, and very briefly in the beginning, we talk about just general topics. We check and see if they're aware that this is being recorded. . . . [W]e encourage them to -- if they don't know something, to say they don't know; if they don't understand, to say I don't understand and not to guess. We also ask in the beginning if they will . . . tell the truth during the interview process.

We agree with Johnson that the forensic interviewer's testimony was improper under *Kromah* and *Anderson*. In *Anderson*, our supreme court explicitly stated forensic interviewers are not to testify about instructing victims to tell the truth during forensic interviews because that testimony "necessarily" vouches for the victim's credibility. *See id.* In the instant case, Kellin testified he begins forensic

interviews by asking victims if they would tell the truth during the interview process. The trial court refused to strike this testimony or grant a mistrial. It is difficult to tell from the record presented whether the jury heard Kellin ask this question or Victim answer the question when the forensic interview was played at trial. The State argues Kellin's one comment did not rise to the level of being so prejudicial as to require a mistrial. Although it is true the prejudice in *Anderson* was "overwhelming" and Kellin's testimony only mentioned truth-telling once, we feel constrained by the language in *Kromah* and *Anderson* to find any mention of the word "truth" during a forensic interview or during a forensic interviewer's testimony to be improper. *See Anderson*, 413 S.C. at 220, 776 S.E.2d at 80 ("The prejudice on this record is overwhelming.").

Although we find the trial court erred in allowing Kellin to testify that he asked Victim if she would tell the truth in the forensic interview, we believe this error only requires reversal of Johnson's conviction for second-degree CSC with a minor because only that conviction depended solely on the credibility of Victim. *See State v. Chavis*, 412 S.C. 101, 110, 771 S.E.2d 336, 341 (2015) ("The determination whether a bolstering error is harmless depends on whether the case turns on the credibility of the victim."). We affirm Johnson's lewd act conviction because Mother's testimony about overhearing Johnson and Victim's conversation corroborated Victim's testimony regarding the graveyard incident. Victim testified Johnson told her to get into the car to go to the store, and he left before Mother and the other children could come. Victim indicated Mother called to ask Johnson why he left her and the other children. Victim recalled Johnson took her to a graveyard instead of the store and told her to pull down her pants. Victim indicated Johnson pulled down his pants and started touching her, but the incident stopped because Mother was "still on the line." Victim testified they "hurried up and went to the store," and he took her home.⁴

Similarly, Mother testified Johnson took Victim to the store but left her and the other children at home. She indicated she called Johnson to ask why he left without them and to tell him to get items from the store. Mother recalled she later got an incoming call from Johnson, but he did not say anything when she answered the phone. Mother then heard the following conversation between Johnson and Victim:

⁴ The State entered a surveillance video into evidence showing Johnson and Victim at the store that day.

I heard him say, you know I want to nut in you, but I can't. . . . Then I heard him say, you know why? And she didn't say anything. He said, do you know why? And she said, because I'll get pregnant. And he asked her did she miss him. She didn't say anything. And he asked her how does she want to do it; does she want to get on top or does she want him to get on top. And I think she said, you on top.

We find Mother's testimony about the telephone call corroborated Victim's testimony about the graveyard incident, and the graveyard incident was enough evidence for the jury to convict Johnson of lewd act. *See State v. Norton*, 286 S.C. 95, 97, 332 S.E.2d 531, 532–33 (1985) (explaining, under the crime of lewd act, it is unlawful "for any person" over fourteen to "wil[l]fully and lewdly commit or attempt [to commit] any lewd or lascivious act upon or with the body . . . of a child under" fourteen "with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child" (quoting S.C. Code Ann. § 16-15-140 (1976)⁵)). Mother's testimony, however, does not corroborate Victim's testimony about any of the other incidents. The graveyard incident itself is not enough to support Johnson's conviction for second-degree CSC with a minor because there was no evidence of penetration. *See* S.C. Code Ann. § 16-3-655(B) (2015) (defining second-degree CSC with a minor as "engag[ing] in a sexual battery with a victim" who is between eleven and fourteen years old); S.C. Code Ann. § 16-3-651 (2015) (defining "sexual battery" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body"). Therefore, we affirm Johnson's conviction for lewd act with a minor and reverse and remand for a new trial on second-degree CSC with a minor.

CUMULATIVE ERROR

Johnson argues he is entitled to a new trial pursuant to the cumulative error doctrine based on (1) the improper bolstering of the family members' testimony by the State's expert witness and (2) the improper bolstering of the Victim's testimony by the forensic interviewer. We disagree.

⁵ Lewd act is now third-degree CSC with a minor. *See* S.C. Code Ann. § 16-3-655(C) (2015).

"The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial." *State v. Beekman*, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013). "An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground." *Id.*

We find no merit to this argument because we hold the trial court did not err in regards to Dr. Foster's testimony.

CONCLUSION

For the foregoing reasons, we affirm Johnson's conviction for lewd act with a minor. We reverse his conviction for second-degree CSC with a minor and remand for a new trial.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WILLIAMS, THOMAS, and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of General Sessions
Doyet A, Early, III, Circuit Court Judge

Court of Appeals Case No. 2015-001436

RECEIVED
MAR 29 2018
SC Court of Appeals

The State of South Carolina, ... Respondent,

v.

Nakia Karreim Johnson, ... Appellant.

Petition for Rehearing

Pursuant to Rule 221, SCACR, Nikia Johnson petitions this Court for rehearing because this Court overlooked or misapprehended the following points:

A. Expert Testimony.

This court's opinion states, "We hold the trial court did not err in denying Johnson's motion for a mistrial because Dr. Foster's testimony did not bolster Mother's testimony." Slip Opinion at 4. As set forth in Mr. Johnson's Final Brief of Appellant at 10-13, this testimony violates the procedure set forth in *State v. Anderson*, *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015) and *State v. Brown*, 411 S.C. 332, 768 S.E.2d 246 (Ct.App.2015), which limited the testimony prosecution experts can provide regarding the general characteristic of victims of child abuse. Neither *Anderson* nor *Brown* nor any other appellate court precedent allows the State to introduce evidence explaining the characteristic or dynamics of caregivers of children that experience child

abuse. 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); and *State v. White*, 361 S.C. 407, 605 S.E.2d 540 (2004).

The only conclusion the jurors could reach was that Dr. Foster's testimony meant the child's mother was telling the truth. See *State v. Kromah*, 401 S.C. 340, 360, 737 S.E.2d 490, 500-01 (2013); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011). This testimony, additionally is the very type of "absolute" opinion testimony previously held to be improper bolstering and vouching. *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989) (psychiatrist's testimony that alleged victim's "symptoms are genuine" improperly vouched for alleged victim's credibility."); *State v. Dempsey*, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000) (testimony from a child abuse counselor that child tells the truth 95% to 99% percent of time abuse is alleged improperly vouches for child's credibility).

B. "Forensic" Interviewer's Testimony.

This Court correctly found that David Kellin's testimony improperly bolstered or vouched for the credibility of the child. This Court, however, erred by not reversing the conviction and ordering a new trial for Mr. Johnson's conviction for committing or attempting to commit a lewd act on a minor child. Specifically, this Court erred in concluding that the mother's testimony was sufficient to corroborate the child's testimony regarding the alleged assault at the graveyard. In reaching this conclusion, this Court overlooked Mr. Johnson presenting evidence of the mother's motive to pressure or coach the child to make false allegations. Following the Court's analysis to the logical conclusion, the appellate courts could never reverse a conviction of third-degree criminal

sexual conduct with a minor when the adult “coaching” the child provides testimony corroborating the child whose credibility is an issue in the case.

This Court must be able to conclude the error was “harmless beyond a reasonable doubt.” *State v. Mouzon*, 326 S.C. 199, 205, 485 S.E.2d 918, 921 (1997). Although arising in the context of a post-conviction relief case, our Supreme Court’s recent opinion in *Smalls v. State*, No. 2016-001079, 2018 WL 736339, at *8 (S.C. Feb. 7, 2018) is instructive for when the State’s evidence is so strong that error does not result in prejudice. *Smalls* held, “[F]or the evidence to be overwhelming such that it categorically precludes a finding of prejudice..., the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland*¹ standard of a reasonable probability ... the factfinder would have had a reasonable doubt cannot possibly be met.” *Id.* (internal quotations omitted). In this case, the State did not present any evidence so conclusive that excludes the possibility that the jurors could have a reasonable doubt if the error was removed from the case.

This Court correctly observed, “Mother’s testimony, however, does not corroborate Victim’s testimony about any other events” other than the graveyard allegations. Slip Opinion at 7. The lewd act indictment alleged the crime occurred “on or between January 1, 2007 and [redacted], 2011.” Accordingly, there is no way to know whether the jurors convicted Mr. Johnson of lewd act based on the graveyard allegations. Indeed, the record contains evidence that Mr. Johnson and the child were at the store at the time of the phone call that supposedly occurred when they were at the graveyard.

¹ *Strickland v. Washington*, 466 U.S. 668 (1984).

Because credibility of the witnesses was the central issue for the jurors to determine, the error was not harmless. *Compare State v. Kromah*, 401 S.C. 340, 362, 737 S.E.2d 490, 501 (2013) (“Based on the entire record, including the physical evidence documented in this case, the challenged testimony could not reasonably have affected the result of the trial, so any error in its admission was harmless beyond a reasonable doubt.”) *with Anderson*, 413 S.C. at 219, 776 S.E.2d at 79 (finding “overwhelming” prejudice when the “case turned solely on the credibility of the minor and of Appellant. The minor testified to abuse by Appellant over a course of three to four years, while Appellant denied any improper conduct. There was no physical evidence of sexual abuse.”).

Alternatively, if this Court does not order a new trial on the lewd act charge, then this Court should vacate the sentence and remand for a new sentencing hearing. The lewd act sentence was subsumed by the concurrent second-degree criminal sexual conduct with a minor sentence. The sentence might have been different if the trial judge was sentencing Mr. Johnson only on the lewd act charge.

C. Cumulative Error.

This Court declined to apply the cumulative error doctrine because “the trial judge did not err in regard to Dr. Foster’s testimony.” Slip Opinion at 8. Once this Court finds error regarding Dr. Foster’s testimony, *see* Section A, *supra*, the need to apply the cumulative error doctrine becomes apparent. See Final Brief of Appellant at 16.

D. Conclusion.

This Court should grant rehearing, reverse Mr. Johnson’s conviction for committing or attempting a lewd act on a minor child, and remand this case to the Court

of General Sessions for Kershaw County for a new trial. Alternately, this Court should vacate the lewd act sentence and remand for a new sentencing hearing.

IT IS SO MOVED.

Respectfully Submitted,

By 

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466

Attorney for Appellant

March 28, 2018
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of General Sessions
Doyet A, Early, III, Circuit Court Judge

RECEIVED

MAR 29 2018

Court of Appeals Case No. 2015-001436

SC Court of Appeals

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

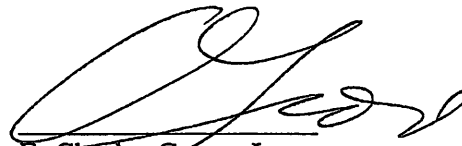
v.

Nakia Johnson,..... Appellant.

PROOF OF SERVICE

I certify that I have served the Petition for Extension of Time to file the Initial Reply Brief, by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed as follows:

William M. Blich, Jr., Esquire
Office of the Attorney General
P.O. Box 11549
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March 28, 2018
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March 28, 2018

The Honorable, Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED
MAR 29 2018
SC Court of Appeals

Re: *State v. Nakia Johnson*
Court of Appeals Case No. 2015-001436

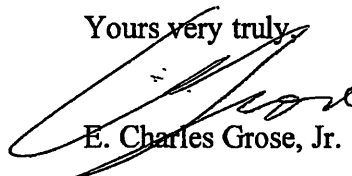
Dear Ms. Kitchings:

Enclosed please find the original and six copies of Mr. Johnson's Petition for Rehearing, along with a certificate of service.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

With kindest regards, I am

Yours very truly,



E. Charles Grose, Jr.

cc: Mr. Nakia Johnson
William M. Blich, Jr., Esquire

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
APR 10 2018
SC Court of Appeals

Appeal from Kershaw County
Honorable Doyet A. Early, III, Circuit Court Judge
Appellate Case Tracking No. 2015-001436

The State,

Respondent,

vs.

Nakia Johnson,

Appellant.

PETITION FOR REHEARING

On March 14, 2018, this Court affirmed in part and reversed and remanded in part Appellant's convictions and sentences for lewd act upon a minor and criminal sexual conduct with a minor in the second degree. This Court conflated cases and analysis related to the grant of a mistrial with cases and analysis related to exclusion of evidence. Additionally, this Court overlooked or misapprehended the relevant case law regarding when a mistrial is appropriate, and overlooked or misapprehended the relevant facts in this case which clearly establish insufficient prejudice to warrant the extreme remedy of a mistrial. Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing, find the single reference to the child telling the truth was insufficient to warrant a mistrial, and affirm Appellant's convictions and sentences.

Initially, it should be noted Appellant raised the following issue in his Brief of Appellant related to the testimony of the forensic interviewer:

Should the trial judge have granted a mistrial when David Kellin, a child advocacy interviewer, testified he instructed the child to "tell the truth during the interview process," when that testimony is prohibited by *State v. Kromah* and the case lacked physical evidence of sexual abuse and turned solely on the credibility of the child and Nakia Johnson?

(Br. App. i, 1, 14). As a result, the sole issue to be considered by this Court is whether the trial judge erred in refusing to grant the extreme remedy of a mistrial based on the existence of manifest necessity. See Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); Burris v. Propst Lumber & Logging, Inc., 396 S.C. 85, 94, 719 S.E.2d 695, 700 (Ct. App. 2011) (finding "specific issue is not preserved for appellate review because Employer did not specifically raise this point in its Statement of Issues on Appeal."). Additionally, Appellant specifically concluded his argument on this issue by indicating: "The trial court judge erred by not granting a mistrial, and this Court should order a new trial." (Br. App. 15). As a result, Appellant clearly limited consideration of any error to whether or not the trial court properly denied his request for a mistrial. This Court's analysis should be similarly limited.

"The appellants have the responsibility to identify errors on appeal, not the [c]ourt. . . . As Chief Judge Alex Sanders so aptly stated, 'appellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.' " Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 533, 564 S.E.2d 322, 323 (2001) (last alteration by court) (quoting State v. Austin, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991)). In this case, Appellant has not challenged any ruling of the trial court regarding the exclusion of testimony or the striking of testimony. He does not ask this court to find error in failing to exclude the testimony. He has solely raised an issue related to whether it was error to deny the serious consequence of a mistrial. Any other arguments, whether based on Rule 403, SCRE or other grounds are not

properly raised before this Court and should not have formed the basis for this Court's Opinion. See State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (holding that an unchallenged ruling, right or wrong, is the law of the case); State v. Jones, 344 S.C. 48, 58–59, 543 S.E.2d 541, 546 (2001) (declining to address an issue on appeal because the supporting argument was “so conclusory that it has been abandoned”); Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999) (issue is deemed abandoned on appeal if it is argued in a short, conclusory statement without supporting authority). As a result, this Court should reconsider its Opinion, omit any discussion of the exclusion of testimony, and rule solely on the basis of whether the trial court erred in denying the motion for a mistrial.

When the issue is properly reviewed solely through the lens of a mistrial motion, the appropriate standard is whether the trial court committed an abuse of discretion in failing to grant the serious and extreme measure of a mistrial. See State v. Herring, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009) (“[W]hether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion.”). Whether a mistrial is manifestly necessary is a fact specific inquiry. “It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge.” State v. Rowlands, 343 S.C. 454, 457-58, 539 S.E.2d 717, 719 (Ct. App. 2000) (citations omitted). This Court ‘favors the exercise of a **wise discretion of the circuit judge** in determining the merits of such motion in each individual case. State v. Craig, 267 S.C. 262, 269, 227 S.E.2d 306, 309 (1976) (emphasis added) (quoting State v. Singleton, 167 S.C. 543, 166 S.E. 725 (1932)). “Trial judges in South Carolina, as elsewhere, are allowed a wide discretion in the trial of cases. This is as it should be because a trial judge experiences ‘a feel of the case’ which oftentimes may not be detected from a cold printed record.” State v. Perry, 278 S.C. 490, 494,

299 S.E.2d 324, 326 (1983). This Court's opinion overlooks the substantial deference afforded the trial court in this state's long-standing case law.

The Courts of this state have also recognized that the grant of a mistrial is restricted to only the most serious situations in which there is no other means available to protect the rights of the defendant. "A mistrial should not be ordered in every case where incompetent evidence is received." State v. Patterson, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct. App. 1999). "The grant of a motion for a mistrial is an **extreme measure** which should be taken only where an incident is **so grievous** that the prejudicial effect can be removed in no other way." Id. (citations omitted) (emphasis added). It is for this reason, the Courts have held that trial court's should be reluctant to grant a mistrial. "The power of a court to declare a mistrial ought to be used with the **greatest caution under urgent circumstances**, and for very **plain and obvious causes**." State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977) (emphasis added). In reviewing the need for a mistrial and exercising its "wise discretion" a trial court should consider "the character of the testimony, the circumstances under which offered, the nature of the case, other testimony in the case, and perhaps other matters, should be considered." Craig, 267 S.C. at 269, 227 S.E.2d at 309-10.

This Court's Opinion overlooks these clear tenants of case law in its review of the denial of the motion for a mistrial in this case. This Court's opinion indicates the trial court allowed incompetent testimony from the forensic interviewer, and sets forth a near *per se* rule that this should result in a mistrial. Instead, this Court should have determined whether the single, isolated statement which was merely a portion of a long explanation of procedure by the forensic interviewer qualified as a "grievous" incident resulting in "urgent circumstances" necessitating the ending of the trial. The trial court, which should be given extensive deference, clearly and

thoroughly explained the lack of prejudice and the minimal impact had by the testimony. The court specifically found the interviewer did not comment on the believability or credibility of the child. The court concluded: "I think the context in which he has testified about the truthful statement would not taint it so as to make it inadmissible." (R.236). After explaining the statement was made as part of a discussion regarding "a number of things" by the interviewer, the court found it was not sufficiently prejudicial. (R.237). These holdings were overlooked by this Court in ruling that "any mention of the word 'truth' during a forensic interview¹ or during a forensic interviewer's testimony" is sufficient to warrant a mistrial. State v. Johnson, Op. No. 2018-UP-109 (S.C. Ct. App. filed Mar. 14, 2018).

Further, this Court's discussion of the corroborative evidence provided by the child victim's mother provided additional evidence of the fact the single, isolated innocuous comment from the forensic interviewer did not warrant the extreme measure of a mistrial. As this Court noted, the testimony of the mother corroborated many of the facts of the child victim and provided evidence supporting the timing and occurrence of the lewd act committed by Appellant. However, this Court overlooked or misapprehended the significance of the phone conversation the child victim's mother overheard as it relates to corroborating the criminal sexual conduct with a minor charge. The mother overheard Appellant:

At first I couldn't make out what he was saying, but then I heard him say, you know I want to nut in you, but I can't. And I didn't hear anything . Then I heard him say, you know why? And she didn't say anything. He said, do you know why? And she said, because I'll get pregnant. And he asked her did she miss him. She didn't say anything. And he asked her how does she want to do it; does she want to get on top or does she want him to get on top. And I think she said, you on top.

¹ Additionally, it should be noted that neither Kromah nor Anderson have found it error to reference "truth" or show the interviewer asking the child to tell the truth during the playing of the actual forensic interview and the State asks this Court to correct its Opinion to reflect that the only impermissible mention is during the live testimony before the jury and not as part of the video recording.

(R.119). The nature of this phone conversation, which clearly included a discussion of Appellant committing CSC with a minor, provides significant corroboration of the fact Appellant and the child victim had a sexual relationship. The contents of the discussion lend credibility to the child's testimony regarding the CSC with a minor, just as the circumstances of the phone call and the child victim and Appellant leaving lend credibility to the lewd act charge. This Court should find the testimony of the forensic interviewer had minimal impact on the trial and the jury's decision in light of the detailed testimony by the child victim and the corroborative effect of the mother's testimony regarding the overheard conversation.

Additionally, this Court overlooks the highly significant fact that Appellant never requested a curative instruction from the trial court. A mistrial is only appropriate in a circumstance in which no other means may correct the error. In this case, had a curative instruction been requested, it could have cured any possible error in the testimony. Appellant never requested a curative instruction. Accordingly, this Court should find a mistrial was not manifestly necessary in light of the alternative remedies available to Appellant but never requested of the trial court.

As a result, this Court should reconsider its Opinion, find the only issue appropriate for consideration is whether the trial court erred in denying the motion for a mistrial and not any other issue related to the exclusion of evidence because that issue has not be properly raised to this Court, find the testimony did not warrant the extreme remedy of a mistrial, and affirm Appellant's convictions and sentences for both lewd act and CSC with a minor.²

² The State reiterates and includes by reference all arguments made in its Final Brief of Respondent.

CONCLUSION

For all of the foregoing reasons, the State requests the panel grant the petition for rehearing, find the trial court properly denied Appellant's motion for a mistrial, and affirm Appellant's convictions and sentences for both lewd act and CSC with a minor.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

BY: 

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ATTORNEYS FOR RESPONDENT

April 10, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County
Honorable Doyet A. Early, III, Circuit Court Judge
Appellate Case Tracking No. 2015-001436

RECEIVED
APR 10 2018
SC Court of Appeals

The State,

Respondent,

vs.

Nakia Johnson,

Appellant.

PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Petition for Rehearing by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, South Carolina 29646

I further certify that all parties required by Rule to be served have been served.
This 10th day of April, 2018.


ANNE A. MUELLER
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727



ALAN WILSON
ATTORNEY GENERAL

April 10, 2018

VIA HAND DELIVERY

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED
APR 10 2018
SC Court of Appeals

Re: State v. Nakia Johnson,
Appellate Case No. 2015-001436

Dear Ms. Kitchings:

Please find enclosed for filing the original and six (6) copies of the Petition for Rehearing, with proof of service, in the above-referenced case.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General
S.C. Bar No. 15608

Enclosures

cc: E. Charles Grose, Jr., Esquire (2 copies enclosed)
Victim's Services (enclosure)

The South Carolina Court of Appeals

The State, Respondent,

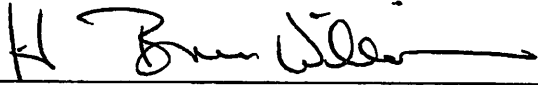
v.

Nakia Karreim Johnson, Appellant.

Appellate Case No. 2015-001436

ORDER

After careful consideration of the petitions 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 petitions for rehearing are denied.



J.

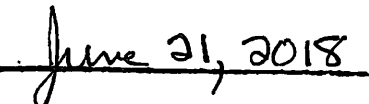

J.


J.

Columbia, South Carolina

cc: Alan McCrory Wilson, Esquire
E. Charles Grose, Jr., Esquire
William M. Blitch, Jr., Esquire
Daniel Edward Johnson, Esquire

FILED



June 21, 2018