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STATE OF SOUTH CAROLINA

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IN THE SUPREME COURT

ORIGINAL

S.C. SUPREME COURT Appeal From Greenville County
Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

Petitioner,

vs.

ONTARIO STEFON PATRICK MAKINS

Respondent.

Appellate Case No. *2020-000024*

APPENDIX

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ONTARIO STEFON PATRICK MAKINS,

APPELLANT

APPELLATE CASE NO 2016-002495

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)	
)	COURT OF GENERAL SESSIONS
COUNTY OF GREENVILLE)	
State of South Carolina,)	
)	
Plaintiff,)	
v.)	Case No. 16-GS-23-04363 et al
)	
Ontario Makins,)	
)	
Defendant.)	

TRANSCRIPT OF JURY TRIAL

The within JURY TRIAL in the above-captioned matter was held December 5-8, 2016, before The Honorable Robin Stilwell in Courtroom 6 of the Greenville County Courthouse, 305 East North Street, Greenville, South Carolina; attended by counsel as follows:

APPEARANCES:

Kate Patterson, Assistant Solicitor
Chris Hodge, Assistant Solicitor
...Appearing for State of South Carolina

Tom Quinn, Esq.
... Appearing for Defendant

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Before The Honorable Robin Stilwell

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Case No. 16-GS-23-04363 *et. al.*

Jury Trial of December 5-8, 2016

Jury Qualification & Selection

1

(STATUTORY JURY QUALIFICATION)

2

(DEFENDANT PRESENT)

3

(JURY PANEL IN @ 11:33 A.M.)

4

THE COURT: Take your seats,

5

ladies and gentlemen. It's good to see y'all

6

up here. I told them to only send me the

7

most exceptional jurors. So congratulations.

8

Ladies and gentlemen, we're going to

9

select a jury for the specific case that's

10

being called to bar.

11

The process and procedure is very

12

similar to what we went through downstairs.

13

That is, I'll ask you questions and you'll

14

respond to the question that are posed. I

15

remind you that continue under the oath that

16

you took downstairs. The distinction is in

17

jury selection is that I'm asking you

18

questions that are specific to your

19

qualifications or the appropriateness of your

20

serving as a juror in this particular case.

21

So the process will be the same in

22

that when I ask a question, if you'll stand

23

up and state, please, your name and juror

24

number. That's particularly important in

25

this process because now we have a court

State of South Carolina v. Ontario Makins

6

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Jury Trial of December 5-8, 2016

Jury Qualification & Selection

1 reporter who is taking down everything that
2 is said in the courtroom. So for purposes of
3 the record, it's important for you to state
4 name and juror number. Because even though I
5 can see you and I may know your name and
6 juror number because you just answered a
7 question, the record can't see you. So
8 please discipline yourself to do that if you
9 will, please.

10 Ladies and gentlemen, I am going to
11 read for you the indictments in the case that
12 is being brought to bar this morning. Now,
13 ladies and gentlemen, before we get started
14 and before I read to you these indictments, I
15 need to tell you something that's very
16 important, that is a cornerstone of our
17 justice system. That is that in any criminal
18 proceeding in the United States of America,
19 in the State of South Carolina or in the
20 County of Greenville, a Defendant is presumed
21 innocent until the State proves each and
22 every element of the offense, of all
23 offenses, beyond a reasonable doubt. So as
24 we sit here right now, the Defendant in this
25 case, Mr. Makins, is presumed innocent and he

State of South Carolina v. Ontario Makins

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Jury Trial of December 5-8, 2016

Jury Qualification & Selection

1 retains that presumption of innocence until
2 such time as twelve deliberating jurors
3 determine that the State has met its burden
4 of proving each and every element of each
5 offense beyond a reasonable doubt.

6 Now, I tell you that because it's
7 important and it's critical to your
8 determination ultimately, but I also tell you
9 that because I'm going to read the
10 indictments to you, the substantive portions
11 of the indictments. And what I want to make
12 sure of is that you do not think that because
13 I am reading these indictments, that I'm
14 representing to you that these are the facts
15 in this case. I am not. All I am doing is I
16 am reading to you the allegations on the
17 indictment. The indictment is the charging
18 paper. It's the paper whereby the State
19 initiates the prosecution. So these are the
20 allegations from the State. I don't want you
21 to take at face value that these are facts
22 that I am representing to you. I'm not.

23 The reason that I read to you the
24 allegations, just the summary allegations, is
25 because it's important for you to know those

State of South Carolina v. Ontario Makins

8

Case No. 16-GS-23-04363 *et. al.*

Jury Trial of December 5-8, 2016

Jury Qualification & Selection

1 so that then you can intelligently answer the
2 questions that are posed to you.

3 So, ladies and gentlemen, this case
4 is the State of South Carolina versus Ontario
5 Stefon Patrick Makins. There are three
6 indictments and I'll read those to you:

7 The first one is indictment 2016-GS-
8 23-04363, and that is criminal sexual conduct
9 with a minor, first degree. Ladies and
10 gentlemen, the State would allege that Mr.
11 Makins did, in Greenville County, between the
12 1st day of January 2012 and the 20th day of
13 March 2015 commit a sexual battery on "BENCH
14 WARRANT", who is less than eleven years of
15 age.

16 Ladies and gentlemen, the second
17 indictment that I have is case number 2016-
18 GS-23-7512A, and that is lewd act upon a
19 child. The State would allege that Mr.
20 Makins did, in Greenville County, between 1st
21 of January 2012 and 17 June 2012, being over
22 the age of fourteen, did willfully and lewdly
23 commit or attempt a lewd and lascivious act
24 upon or with the body parts or its parts of
25 BW, a child under the age of sixteen, with

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Pretrial Testimony of Christine Carlberg

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CHRISTINE CARLBERG, having been
duly sworn to tell the truth, and nothing but
the truth, testified as follows:

DIRECT EXAMINATION

BY SOLICITOR PATTERSON:

Q. Ms. Carlberg, can you state your
name for the record?

A. Christine Carlberg.

Q. Thank you. And where are you
employed?

A. I'm employed the Greenville Depart-
ment of Mental Health and I'm contracted to
work at the Julie Valentine Center.

Q. And how long have you been with both
of those agencies?

A. Since February 2007.

Q. And what are your duties with the
Julie Valentine Center?

A. I'm a forensic interviewer.

Q. Can you briefly tell the Court what
a forensic interview is?

A. A forensic interview is a non-
leading, non-suggestive manner gathering
information for investigation.

Q. And can you tell the Court about

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Pretrial Testimony of Christine Carlberg

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1 your experience in forensic interviewing?

2 A. I have been a forensic interviewer
3 since May of 2000 in Mississippi and in South
4 Carolina. I've conducted two thousand nine
5 hundred and forty-six (2,946) interviews over
6 that timespan.

7 Q. Can you tell us a little bit about
8 your educational background?

9 A. I have a Bachelor's of Science in
10 rehabilitation education and a minor in
11 psychology from the Pennsylvania State
12 University. I have a Master's of Arts in
13 marriage and family therapy from Reform
14 Theological Center in Jackson, Mississippi.

15 Q. And you mentioned you've been a
16 forensic interviewer since 2000. What
17 special training have you had specific to
18 forensic interviewing?

19 A. Specifically, I've been trained at
20 CornerHouse, which is a nationally recognized
21 facility for forensic interviewing, which is
22 in Indianapolis. That is a forty-hour
23 training -- a forty-hour, week-long training.

24 And I've also attended two other forty-
25 hour, week-long trainings; Finding Words in

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1 Mississippi and ChildFirst in South Carolina.

2 And just various other conferences
3 throughout the years.

4 Q. Okay. And do you consult with other
5 professionals in the field about children,
6 about forensic interviewing, about the field
7 in general?

8 A. Yes, ma'am.

9 Q. And how does that consultation work?

10 A. Not only do I consult with other
11 forensic interviewers at the Julie Valentine
12 Center, but I'm also part of a statewide peer
13 review, plus a national peer review.

14 Q. And you mentioned in the last
15 sixteen years you've conducted almost three
16 thousand forensic interviews?

17 A. Yes, ma'am.

18 Q. And in the course of your work with
19 the Julie Valentine Center, did you conduct
20 an interview with the victim in this case

21 **Minor** ?

22 A. Yes, ma'am.

23 Q. And what person or agency referred
24 the child to you for the forensic interview?

25 A. The Greenville County Sheriff's

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Pretrial Testimony of Christine Carlberg

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1 Office.

2 Q. And why was she referred?

3 A. For allegations of sexual abuse.

4 Q. Okay. And when you receive a
5 referral -- and you can talk specifically
6 about this case -- what information do you
7 typically receive?

8 A. When we receive a referral, we
9 usually receive just a brief history of the
10 allegations. And then if law enforcement's
11 involved, we will usually receive the
12 incident report.

13 Q. And did you receive the incident
14 report in this case?

15 A. Yes, ma'am.

16 Q. And how old was **Minor** when you
17 interviewed her?

18 A. Eight.

19 Q. What model did you use in conducting
20 **Minor** interview?

21 A. We used that ChildFirst of South
22 Carolina protocol.

23 Q. And can you tell the Court a little
24 bit about what that protocol is?

25 A. It's a semi-structured protocol,

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1 which means you can move from stage to stage
2 through. And it's comprised of rapport,
3 transition, rapport, expiration and closure.

4 Q. And so how does that work? Do you
5 take a child through each of those stages or
6 ---

7 A. Yeah. And we can move in between
8 them as needed or skip them as need, just
9 based on how -- what the child needs and how
10 it's going.

11 Q. Okay. And have you received
12 specific training in ChildFrist South
13 Carolina?

14 A. Yes, ma'am.

15 Q. Going back to the training program
16 in general, what types of questions do you
17 use in that protocol?

18 A. We would like -- we want to use non-
19 leading, non-suggestive questions.

20 Q. And why is that?

21 A. We want the child or whoever you're
22 asking the questions to, to be able to
23 provide their information their way and using
24 their terms and their story, basically.

25 Q. And is there a reason that you would

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Pretrial Testimony of Christine Carlberg

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1 ever deviate from a non-leading question?

2 A. No, I would never ask them like a
3 suggestive question. There's like a range in
4 questions where you might ask a more focused
5 question. But not -- no, I would not ask --
6 I would not deviate from the non-leading
7 question.

8 Q. And where did the interview of
9 **Minor** take place?

10 A. At the Julie Valentine Center.

11 Q. And who was present in the room
12 during the interview?

13 A. Just **Minor** and myself.

14 Q. And was the video or -- excuse me.
15 Was the interview preserved using audio and
16 video equipment?

17 A. Yes, ma'am.

18 SOLICITOR PATTERSON: Could I
19 approach the witness, if I may, Your Honor?

20 THE COURT: Sure. Yes, ma'am.

21 DIRECT EXAMINATION CONTINUED

22 BY SOLICITOR PATTERSON:

23 Q. Ms. Carlberg, I'm showing -- I'm
24 showing what has been -- will be marked as
25 State's Exhibit 2. Do you recognize that?

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Jury Trial of December 5-8, 2016

Pretrial Testimony of Christine Carlberg

1 A. Yes, ma'am.

2 Q. And what is it?

3 A. That is a copy of Minor

4 interview from April 21st, 2015.

5 Q. And how do you know that it's that
6 interview?

7 A. I initialed it and signed it the day
8 I made a copy.

9 Q. Okay. And has that interview been
10 changed or altered in any way from the date
11 of that interview?

12 A. No, ma'am.

13 (SO MARKED AS STATE'S EXHIBIT 2)

14 DIRECT EXAMINATION CONTINUED

15 BY MS. PATTERSON:

16 Q. And Ms. Carlberg, during the inter-
17 view with Minor did she disclose sexual
18 abuse to you?

19 A. Yes, ma'am.

20 Q. And did she tell you when and where
21 that abuse occurred?

22 A. She said it happened between the
23 ages of five years old and eight years old
24 and that it happened at her sister's, Toi's
25 house.

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Pretrial Testimony of Christine Carlberg

1 Q. And was Minor statement coherent
2 to you?

3 A. Yes, ma'am.

4 Q. Did you have any concerns as to her
5 ability to understand you or respond to your
6 questions?

7 A. No, ma'am.

8 Q. And did Minor give a detailed
9 account of what happened?

10 A. Yes, ma'am.

11 Q. And how would you describe her
12 demeanor during the interview?

13 A. She was, I would say reserved. She
14 didn't want to answer some of the questions
15 at first. But she did eventually.

16 Q. And, in your opinion, did she act in
17 an appropriate manner?

18 A. Yes, ma'am.

19 SOLICITOR PATTERSON: Your Honor,
20 just a moment if I may?

21 THE COURT: Okay.

22 SOLICITOR PATTERSON: Judge,
23 nothing further from the State. We would, at
24 this time we would -- that the forensic
25 interview is compliant with Section 17-23-175

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1 and ask that the Court admit it into
2 evidence.

3 THE COURT: Okay.

4 (SO ENTERED AS STATE'S EXHIBIT 1)

5 THE COURT: Mr. Quinn, any
6 questions, sir?

7 MR. QUINN: Just a couple if I
8 might.

9 CROSS-EXAMINATION

10 BY MR. QUINN:

11 Q. Do you still have your originals?

12 A. It's at my office.

13 Q. And is there any reason it was not
14 brought to Court?

15 A. We don't let the original leave our
16 office. We just run copies.

17 Q. And who produces those copies?

18 A. I did in -- I produced this one.

19 Q. And reviewed it?

20 A. Yes.

21 Q. And is it identical to the original?

22 A. Yes, sir.

23 Q. You matched them for length of time
24 or how did you make certain it was identical?

25 A. I watched it looking at my report

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Pretrial Testimony of Christine Carlberg

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1 and ---

2 Q. You watched what?

3 A. That video.

4 Q. The one that's here in court, the
5 copy?

6 A. Yes, sir. I mean, yes, ma'am. I'm
7 sorry. Yes, sir.

8 Q. I've been called worse.

9 A. I'm sorry.

10 Q. So did you ever match the original
11 match the original to the copy to be certain
12 that it's an identical copy?

13 A. I'm not sure to do that on a
14 machine. I would just -- our machine does
15 that, I think. Like we have a copy machine
16 so the original goes in, and then the blank
17 comes in, goes in. And then it copies it.

18 Q. And did you do that?

19 A. Yes, sir.

20 Q. And did you test to be certain it
21 was the same length of time on each disk?

22 A. I watched it fully so I knew that it
23 was -- at the beginning and then when I ended
24 it.

25 Q. Okay. And you call this the

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Pretrial Testimony of Christine Carlberg

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1 ChildFirst South Carolina protocol. Wasn't
2 it previously called RATAAC, R-A-T-A-C?

3 A. It was, previously. Yes.

4 Q. And it's the same protocol with a
5 different name; isn't that correct?

6 A. No, there's some changes to it.

7 Q. Substantive?

8 A. Not as far as questions but there's
9 -- we go over some rules in the beginning
10 that we did not do in RATAAC. And there's a
11 promise to tell -- have a child tell what
12 really happened that we did not do with
13 RATAAC.

14 MR. QUINN: Those are all the --
15 I'm sorry. One other.

16 CROSS-EXAMINATION CONTINUED

17 BY MR. QUINN:

18 Q. Ms. Carlberg, are you licensed in
19 South Carolina?

20 A. No, I'm not.

21 MR. QUINN: I don't have any other
22 questions.

23 THE COURT: Okay. Any additional
24 direct examination? I'm not suggesting that
25 you should.

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Pretrial Testimony of Christine Carlberg

1 SOLICITOR PATTERSON: I understand,
2 Your Honor. Does the Court have any concerns
3 about the true and correct copy? I'm happy
4 to follow up with that if you do?

5 THE COURT: No, what I would do is
6 have a discussion with Mr. Quinn and if when
7 she comes back to testify, if she has the
8 original -- the original resident on a C-
9 drive of a computer as opposed to on a disk.
10 But if the original --

11 Is the original on a disk or is it
12 on that C-drive?

13 WITNESS: It's on the disk, sir.

14 THE COURT: It's on a disk?

15 WITNESS: Yes.

16 THE COURT: Okay. Talk with Mr.
17 Quinn. If he wants her to bring that
18 original disk to determine whether it
19 conforms, then please do that, okay?

20 SOLICITOR PATTERSON: We will, Your
21 Honor.

22 THE COURT: Okay.

23 SOLICITOR PATTERSON: Thank you.
24 Nothing further from the stand.

25 THE COURT: Okay. All right.

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Pretrial Testimony of Christine Carlberg

1 Well, I will review the statement to
2 determine, of course, whether there are
3 particularized guarantees of trustworthiness
4 as indicated by the five enumerated tests.

5 Thank you. I'd appreciate it.
6 Please step down.

7 (WITNESS STEPS DOWN)

8 MR. QUINN: And, Your Honor, if I
9 might?

10 THE COURT: Yes, sir.

11 MR. QUINN: Your Honor, we had
12 the interview that has now been discussed
13 transcribed.

14 THE COURT: Yes, sir.

15 MR. QUINN: And have provided a
16 copy of the transcription. I have the
17 original here if the Court would like the
18 original. It was sealed when I received it
19 and it's still sealed.

20 THE COURT: Yeah, I'll take it.
21 I think that for probably purposes of deter-
22 mining whether it's coercive or not, I need
23 to look at the actual video.

24 MR. QUINN: I agree.

25 THE COURT: But I thank you for

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1 this because that may be helpful to me.

2 I'm presuming you do intend to
3 introduce the disk and show the video to the
4 jury; is that correct?

5 SOLICITOR PATTERSON: We do, Your
6 Honor, Yes.

7 THE COURT: Okay. All right.
8 Thank you for this. I appreciate it.
9 All right. Anything further regarding that
10 matter?

11 SOLICITOR PATTERSON: Nothing
12 further but if you have any questions, I'll
13 be happy to go through the specifics of the
14 statute and we'll talk about the true copy.

15 Judge, at this time, the State would
16 call Kristin Rich to do the expert qualifica-
17 tion for the therapist.

18 THE COURT: Okay.

19 SOLICITOR PATTERSON: And, Judge,
20 we're going to excuse Ms. Carlberg for today.

21 THE COURT: All right. Good
22 enough. Have a great evening.

23 (WITNESS TAKES STAND)

24 THE COURT: Yes, ma'am.

25 SOLICITOR PATTERSON: Thank you,

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1 Your Honor.

2 KRISTEN RICH, having been duly
3 sworn to tell the truth, and nothing but the
4 truth, testified as follows:

5 DIRECT EXAMINATION

6 BY MS. PATTERSON:

7 Q. Ms. Rich, can you tell us where you
8 are currently employed?

9 A. Sure. I work for Piedmont Mental
10 Health out of the Greer Clinic for the
11 Department of Mental Health of the State of
12 South Carolina.

13 Q. Okay. And what do you do for the
14 Department of Mental Health?

15 A. I'm a mental health therapist for
16 children and adolescents.

17 Q. Okay. And where -- are you
18 currently resident in a particular place?

19 A. Yes. I'm the school-based therapist
20 and I work out of Greer High School, but
21 prior to that I was in the out-patient clinic
22 as a clinician at the Greer location.

23 Q. And can you tell the Court a little
24 bit about your educational background?

25 A. Sure. I went to the University of

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1 South Carolina and got my degree in clinical
2 science and a cognate in social work and
3 graduated in 2003.

4 Then following that, I did some
5 humanitarian work overseas and then came back
6 and did my Master's Degree in clinical
7 counseling at Columbia International
8 University and graduated in 2010.

9 Q. And after 2010, what is your
10 employment history been?

11 A. After 2010 I worked for about a year
12 with the South Carolina Autism Project and
13 did in-home therapy with autistic children.

14 And then after that, I started work for
15 the Department of Mental Health in Catawba,
16 at Catawba Mental Health out of Rock Hill,
17 South Carolina as a school-based therapist,
18 what I do now.

19 Then I transferred then to Greer Mental
20 Health in 2013.

21 Q. And how long have you been at Greer
22 High School?

23 A. I've been at Greer High School since
24 -- a little -- about a year and a month.

25 Q. But just to clarify, so you've been

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1 with Greer Mental Health for a total of three
2 years, because you're still an employee of
3 Greer Mental Health?

4 A. Yes.

5 Q. Ad can you tell a little bit about
6 your jobs and your duties in your current
7 position?

8 A. Sure. As a mental health clinician,
9 I start off -- I can do assessments. So
10 that's assessment of the mental health needs
11 of a child that comes to see me, as far as
12 what kind of symptoms they're presenting and
13 their history and then provide a diagnosis
14 for them and a treatment plan. And then from
15 there, I go on to provide individual and
16 family therapy as well as treatment plan
17 development. My primary mode of therapy as
18 far as my theory is cognitive behavioral
19 therapy.

20 Q. And do you focus on any particular
21 type of issues with children?

22 A. Really, it's based on what they
23 present and what they have. Many, many of
24 the children that I work with had a history
25 of trauma and I do -- I am qualified to

1 provide trauma treatment for them.

2 Q. Okay. And can you talk a little bit
3 about what trauma is?

4 A. Sure. Trauma is, you know,
5 according to the diagnostic manual -- so it
6 is an event that happens where someone thinks
7 that they're going to be hurt very badly or
8 killed or someone that they love is going to
9 be hurt very badly or killed. And they can
10 hear about that event as well and have just
11 an intense reaction, a feeling of terror,
12 horror or helpless. And so that constitutes
13 what a trauma is.

14 Q. And can you give some examples of
15 what may cause trauma?

16 A. Sure. Many time what I experience
17 in my practice and what I see, is children
18 who have gone through abuse, physical abuse,
19 sexual abuse, witnessing domestic violence,
20 car accidents, being at robberies, different
21 things of that. House fires, different
22 things of that nature, bad things that you
23 would feel in these kinds of situations.

24 Q. And is there a particular method you
25 use in dealing with children who have

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1 experienced trauma?

2 A. Yes. I'm trained in trauma focused
3 cognitive behavioral therapy, which is an
4 evidence-based treatment to treat childhood
5 trauma. And from that, that model has a
6 acronym that you use that has each step.
7 It's PRACTICE. And each letter has a
8 particular type of treatment that you give.

9 Q. And can you walk us through what
10 those steps are?

11 A. Sure. So the P for PRACTICE stands
12 for psychoeducation and parenting.

13 And so what you do at the beginning is
14 give just a general view of what trauma is
15 for the child and then for the parent(s) and
16 what typical responses happen so that you can
17 normalize that to reduce some of the
18 symptoms. And what are typical symptoms as
19 well.

20 Behavioring -- behavior of a parent is
21 very helpful because oftentimes children with
22 trauma are going to respond with behavioral
23 issues. And so there's a lot of time some
24 parenting that needs to take place as well.

25 The next part is the R for relaxation.

1 So those are breathing techniques, different
2 techniques in order to help the child relax
3 when they're triggered by trauma.

4 Oftentimes, you know, that is going to be
5 very helpful when a child is triggered or
6 remembers things or has in an episode,
7 remember that causes distress.

8 And then from there, we're going to do
9 affect regulation or modulation. That's
10 emotions. Basically helping the child
11 understand what the different types of
12 emotions are, what their intensity is and
13 then helping them to be able to express their
14 emotions about what happened with the trauma
15 and identify those, as well as regulate them.
16 Use those coping skills in order to reduce
17 the distress when are triggered.

18 Then from there we're going to do
19 cognitive coping. And that's helping them
20 understand the relationship between the
21 thoughts, the feelings and the actions of
22 what happened and how we can change your --
23 what you think or you can change what you do
24 and it helps you change how you feel.

25 Then from there the most important that's

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1 next is the trauma narrative. And that is
2 talking with the child, just asking questions
3 for the child to go through what happened in
4 the trauma, piece by piece, just try to talk
5 about it and talk about it again in order to
6 have the child have exposure to it, so that
7 they no longer view that memory as if it
8 happening all over again. So the more they
9 talk about it the more that they are able to
10 reduce the trauma stress from what happened.

11 And then from there we do cognitive
12 restructuring. Sometimes from the "I" is in
13 vivo exposure. If there's a particular smell
14 or particular sound or a particular place
15 that the child wants to avoid or the trauma
16 is triggered by, we can use in-life exposure
17 to help them. Sometimes that's needed,
18 sometimes it's not. It depends on the child.

19 And then cognitive restructuring is the
20 next part. And that's where throughout the
21 trauma narrative we're asking the child, you
22 know, 'What did you think?' 'How did you
23 feel?' 'What did you do?' And their
24 thoughts are very important because a lot of
25 times they can be distorted or can be

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1 distressing. 'It was my fault.' You know,
2 different things that they can say. And so
3 there, what we do is use questioning to help
4 the child to understand or to change their
5 thoughts so that they're not as distressing.

6 And then from there we also do a
7 conjoined session with the caregiver that is
8 supportive and believing of the child, safe
9 for the child and the child is able to share
10 the trauma narrative with the caregiver.

11 And then the last part is enhancing
12 safety and so talking about what, you know,
13 how to prevent the child from going through
14 trauma again. Because children who've gone
15 through trauma once are more likely to go
16 through another one.

17 Q. And are you currently licensed as a
18 counselor?

19 A. I am.

20 Q. And is there a particular title for
21 that?

22 A. I'm a licensed professional
23 counselor.

24 Q. And what is the process to become a
25 licensed professional counselor?

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1 A. Sure. To become a licensed
2 professional counselor you first have to do
3 the educational requirement with a Master's
4 in counseling.

5 And then from there you have to take an
6 examination. It's the NCA, National
7 Counselor's Exam. And you have to have a
8 passing score on that.

9 At that time, then you can submit to the
10 licensure board that you've met those pre-
11 qualifications. Then what they do, after,
12 they've reviewed that and you have identified
13 a supervisor, a licensed professional
14 counselor supervisor, what they do is they
15 license you as a licensed professional
16 counselor intern. And then at that time you
17 have two years to complete a particular
18 number -- I believe it's two hundred fifty.
19 I'm not a hundred percent sure -- hours of
20 supervision, one-on-one supervision with that
21 supervisor as you are completing direct
22 client contact hours.

23 Then following that, your supervisor
24 signs off that you've done the appropriate
25 number of hours, and then that's submitted to

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1 the board and then the board authorizes you
2 to transition from a licensed professional
3 counselor intern to licensed professional
4 counselor.

5 Q. And as a licensed professional
6 counselor, what are you able to do?

7 A. So I'm able to -- I'm able to
8 diagnose and I'm able to treat mental
9 illness.

10 And I'm also, you know, able to get on
11 insurance panels, to bill insurance privately
12 if I'd like; however, I don't do that. I
13 just work for the State and I'm able to bill
14 insurance underneath the State, the State
15 now.

16 Q. Okay.

17 A. Uh-huh.

18 Q. You talked a little bit about your
19 educational background and the internship.
20 Can you talk a little bit about what other
21 trainings you have gone through, continue to
22 go through, for your work?

23 A. Sure. Part of -- a lot of my
24 training, even with my education, I was a
25 graduate assistant during my education. So I

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1 -- for two years I was a graduate assistant
2 in my program. So that was very helpful as
3 well.

4 The other things that I have done, the
5 trauma focused cognitive behavioral therapy,
6 that particular training was with Project
7 BEST, which was a year-long training that
8 encompassed some learning collaboratives,
9 two-day learning collaboratives. I believe
10 there are two or three of those.

11 And then from there, there was also
12 consultation calls where we would have a case
13 that we were completing the practice model --
14 that I had talked to you about before -- with
15 a client and they were presenting that on
16 supervision calls with an expert in trauma
17 focused cognitive behavior therapy. And I
18 participated in twelve of those calls. And
19 then was given a certificate that I had
20 completed that training and was competent,
21 and certified in delivering trauma focused
22 cognitive behavioral therapy.

23 Prior to that, I've also done a trauma
24 recovery model, which was the TREM training,
25 that's the abbreviation for that. And that's

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1 specifically regarding sexual abuse and
2 treating that using an empowerment model.
3 That was a two-day training.

4 The other training that I received in
5 2015 was Darkness into Light Training. And
6 that was -- let me look at the name of that
7 one. The Stewards of Child Training, and
8 that was strategies to prevent and to respond
9 to sexual abuse.

10 Q. And can you talk to the Court a bit
11 about whether your treatment model protocol
12 is based on evidenced-based studies?

13 A. Yes. It's an evidenced-based model.
14 There have been extensive -- there is
15 extensive research. The National Center for
16 Childhood Trauma recognizes trauma focused
17 cognitive behavioral therapy as an evidenced-
18 based model to treat -- to treat childhood
19 trauma.

20 Q. And what does evidenced-based mean?

21 A. So evidence based means that it's
22 not just a good idea or a style of the
23 therapist, but it's been scientifically
24 proven that this model, this protocol, has
25 evidence to show that it helps and it has

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1 efficacy. It has truth in it, produces
2 results in reducing symptoms. So it doesn't
3 just come from your own thoughts. It comes
4 from some scientific research.

5 Q. And along those lines, do you
6 discuss or consult with other professionals
7 in your area about the trainings you receive,
8 the cases that your own?

9 A. Absolutely. Part of what I do every
10 week in my job is we consult and have a
11 clinical staffing. And at that clinical
12 staffing, there are other fellow clinicians,
13 as myself, supervisors, as well as a doctor
14 and a nurse. And we staff cases, present
15 cases, talk about diagnoses as well as
16 treatment and any clinical issues that might
17 arise that we need to work together as a team
18 to solve.

19 Q. How many children do you estimate
20 you've provided therapy to over the course of
21 your career?

22 A. Probably around -- around five
23 hundred I would say give or take. There's a
24 lot.

25 Q. And how many children have

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1 experienced trauma who you've treated as a
2 result of sexual abuse?

3 A. There are many children -- I would
4 say probably around -- like, between, like
5 one twenty, one fifty.

6 Q. And have you been qualified to
7 testify as an expert in either Circuit or
8 Family Court before?

9 A. Yes, I have; two times.

10 THE COURT: Yes, ma'am.

11 SOLICITOR PATTERSON: Your Honor,
12 at this point that completes the State's
13 questions in terms of qualification. I don't
14 know if you'd like to hear any proffer
15 testimony as to what she will be talking
16 about generally at trial. But for purposes
17 of qualification, we would move at this time
18 to qualify her as an expert in the areas of
19 child trauma and child sexual abuse dynamics.

20 THE COURT: All right. Mr. Quinn,
21 any questions for her related to qualifica-
22 tions?

23 MR. QUINN: Yes, sir, if you'll
24 give me a second, please?

25 THE COURT: Okay.

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1 MR. QUINN: Child trauma and child
2 sexual abuse?

3 SOLICITOR PATTERSON: Dynamics.

4 MR. QUINN: Dynamics.

5 CROSS-EXAMINATION

6 BY MR. QUINN:

7 Q. Ms. Rich, have you had any specific
8 training in child trauma?

9 A. Yes.

10 Q. And is that the training that's
11 listed on your CV?

12 A. Yes.

13 Q. And so long was -- in terms of the
14 training itself, how long was the Stewards of
15 Children training?

16 A. The Stewards of Children training, I
17 believe, was about an hour to two hours.

18 Q. And that was in October of 2015, you
19 had one or two hours training then?

20 A. Yes.

21 Q. And that was to be an expert in
22 child trauma or child sexual abuse dynamics
23 or both?

24 A. That was specifically about child
25 sexual abuse.

1 Q. And you're apparently on the Project
2 BEST Roster?

3 A. Yes.

4 Q. Have you gotten any cases through
5 Project BEST?

6 A. I've gotten cases through Project
7 BEST through the Department of Mental Health.
8 So I've had some people call but they have to
9 go through the Department of Mental Health?

10 Q. And so how many Project BEST cases
11 have you had?

12 A. As in they looked at the roster and
13 I'm going to call you from Project BEST?

14 Q. As I understand, the Project BEST
15 screens cases and assigns them to therapists?

16 A. No, that's not what they do.

17 Q. Well then tell me how you can define
18 a Project BEST case.

19 A. Sure. So Project BEST is a learning
20 collaborative that helps training clinicians
21 in order to be able to provide the trauma
22 focused cognitive behavioral therapy.

23 So during the time of Project BEST when I
24 was in the learning collaborative, what I did
25 was identify cases that I already had or that

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1 were being then referred to me, that were
2 already within my agency that had trauma,
3 sexual abuse, other types of trauma. And
4 then from there, they would have to meet a
5 certain qualification through Project BEST,
6 through the diagnostic tools. And then that
7 was submitted to Project BEST on a case-by-
8 case basis. So I had to have a number of
9 cases that were proved by them that said that
10 this is a case that you can use for the
11 project BEST as far as the requirements.
12 Then what the Project BEST roster is, is it's
13 a tool for the community to use or for
14 caseworkers to use to say these clinicians
15 are trauma informed, are also Project BEST
16 certified as far as they have they trauma
17 informed treatment. And they know how to do
18 TFCBT. So there's not -- they don't take
19 specific cases and then distribute them.

20 Q. And so how many have you gotten
21 through the second portion, being on the
22 roster?

23 A. Being on -- I'm not sure.

24 Q. Do you know if you've gotten any?

25 A. I'm not sure. I think there was one

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1 that a foster mother looked up and I was in
2 their catchment area. I'm limited as far as
3 what I can do because my job says that I work
4 with a certain amount -- certain demographic
5 of people.

6 So for working for the Department of
7 Mental Health, when I worked as an outpatient
8 clinician, it's based off of the geographic
9 area, so our catchment area. And then from
10 that catchment area, then we would get
11 referrals from Julie Valentine Center,
12 referrals from DSS, referrals from different
13 things, different people. And so sometimes
14 they would say, 'hey, are you Project BEST
15 certified?' Most of the time they would say
16 do you -- 'are you qualified to provide
17 trauma focused therapy?'

18 Q. And at some point in your answer I
19 thought you indicated that you were doing
20 Project BEST cases; but no longer?

21 A. The only time you do a Project BEST
22 case is when you have been -- during the time
23 of the training.

24 Q. Okay. Well, your CV says that you
25 did them from January 2014 to present. I'm

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1 assuming present means today.

2 A. So present means -- no. Present
3 means that I'm on the roster, that I've been
4 on the roster. So the roster is like -- is a
5 list of clinicians that are -- that have gone
6 through, completed Project BEST.

7 Q. Right.

8 A. But not -- there's not Project BEST
9 cases. There are just trauma cases that are
10 all over. You don't have to go through
11 Project BEST to be able to given trauma-
12 focused cognitive behavioral therapy.

13 Project BEST is a vehicle to train
14 clinicians, not a -- not a gatekeeper for
15 trauma-focused cognitive behavioral therapy

16 Q. So when did you finish you training
17 with Project Best?

18 A. I finished my training in 2014.

19 Q. And how long was that training?

20 A. A year.

21 Q. And was it every day for a year?

22 A. No.

23 Q. So how many hours was it over a
24 year?

25 A. Well, it was -- so the type of

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1 training that it has, so there were learning
2 collaboratives, which were two-day trainings
3 that we all went to as clinicians and were
4 trained by a certified instructor. And so
5 those were -- there were two of those and
6 then other one. Like -- so basically about
7 -- basically, three, so three of those.

8 And then from there, while this is
9 happening -- so there was one at a certain --
10 at the beginning. And then we developed the
11 case, found the cases.

12 Then there was one in the middle.

13 And then there was one, kind of towards
14 the end.

15 And then all throughout that, all
16 throughout those -- in between the learning
17 collaborative times, what I was doing was
18 actually doing the therapy with the children
19 and identify cases that I had. And calling
20 in every week, every other week, to talk with
21 experts to get help with how I was providing
22 it. So it was a learn and do model over the
23 whole course of the year. We had to complete
24 three cases in the course of the year.

25 Q. And those three cases, were they all

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1 involved with child trauma?

2 A. Yes.

3 Q. Were they also involved with child
4 sexual abuse dynamics?

5 A. Yes.

6 Q. So all three involved a child that
7 had been traumatized by sexual abuse?

8 A. Yes.

9 Q. That's your testimony?

10 A. I believe so, (affirmative nod) --
11 yes.

12 Q. Okay. And you completed that in
13 2014?

14 A. Yes.

15 Q. And then you also had the two days
16 training in the TREM model in 2013?

17 A. Yes.

18 Q. And other than your education,
19 that's the only additional training you've
20 had listed on your CV?

21 A. Yes.

22 Q. Are you a member of any professional
23 associations?

24 A. I'm a member of the American -- I
25 just started it. And so the AACC, the

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1 American Association of Christian Counselors.

2 Q. And you began that in August; isn't
3 that right?

4 A. Yes.

5 Q. Because you've only been licensed in
6 South Carolina from June 27th; isn't that
7 right?

8 A. I've only been licensed as a
9 licensed professional counselor.

10 I was licensed as a licensed professional
11 counselor intern since 2000 and -- two years
12 before, then 2013.

13 Q. I think it's June 11, 2014.

14 A. Oh, okay.

15 Q. And I just cheated. I have it in
16 front of me.

17 A. Great. That's great because I'm
18 very bad at math. I'm a therapist for a
19 reason, not a mathematician

20 Q. And when you're an intern, you're
21 studying under someone else; isn't that true?

22 A. When you're an intern, you still
23 provide the therapy and you still provide the
24 treatment that you would as I am now. But I
25 had a supervisor that I discussed cases with

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1 and that I looked -- but I still signed my
2 own documentation.

3 Q. But isn't the supervisor the one
4 responsible for diagnosis and the treatment
5 plan?

6 A. No.

7 Q. You diagnosed as an intern?

8 A. Yes.

9 Q. Okay.

10 A. The State Department of Mental
11 Health allows me to do that.

12 Q. And you've not ever been in private
13 practice so it's always been under DMH?

14 A. Yes.

15 MR. QUINN: I don't have any other
16 questions. Thank you.

17 THE COURT: Okay. All right.
18 I'm not necessarily concerned with the
19 qualification. I'm more concerned with the
20 opinion to be offered. So can you tell me
21 and summarize what the opinion it is that the
22 expert intends to offer to the jury?

23 SOLICITOR PATTERSON: Certainly,
24 Judge. And we are -- we'll certainly stay
25 far, far away from the Cromer (phonetic)

1 issues. Ms. Rich will not be testifying as
2 to the victim's credibility. She will not be
3 testifying as to whether or not she believes
4 this victim, whether or not her symptoms were
5 indicative, that she was, in fact, sexually
6 abused.

7 What we will have her go through is a
8 general, from an expert point of view, what
9 some symptoms of trauma the child may
10 experience be. If there are particular
11 symptoms a child may experience as a result
12 of sexual trauma, why those may be different.
13 She will talk about delayed disclosure,
14 piecemeal disclosure.

15 And then we will move into some details
16 of her treatment of this victim. You know,
17 was she diagnosed with anything? What was
18 that diagnosis? What symptoms did **Minor**
19 exhibit? What therapy model she exhibited.
20 And then whether or not there was, in fact,
21 a disclosure and time and place of that
22 disclosure.

23 THE COURT: Okay. Mr. Quinn, do
24 you to take exception to that evidence, sir;
25 and the offering of that opinion?

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1 MR. QUINN: Well, -- and I'm not
2 trying to be flippant. I swear, Judge.

3 THE COURT: I know.

4 MR. QUINN: It's very difficult to
5 object when the Solicitor phrases in the way
6 she does. If they stick specifically to
7 those exact questions, those are great
8 questions. I have no idea what the answers
9 are going to be.

10 THE COURT: Uh-huh.

11 MR. QUINN: So I am at a loss to
12 be able to say to you today standing here no,
13 I'm not going to object to that. I am very
14 likely going to object to most all of that.

15 I think that many of the questions
16 including some that were asked today of
17 Christine Carlsberg, go to believability of
18 the child. And I think that's going to be an
19 ongoing difficulty in this case.

20 So I certainly think that the scope of
21 the questions as the Solicitor outlines it
22 are appropriate things to ask, assuming Your
23 Honor qualifies her as an expert. And
24 depending on her answers, then we get through
25 it with no difficulty. But I'm leery

1 promising at this point her answers are going
2 to be acceptable to me.

3 THE COURT: I didn't anticipate a
4 promise from you. What I'm trying to make
5 sure of is that we all go forward on the same
6 sheet of music and we all recognize what's
7 admissible and what's not admissible.

8 This is my concern about this
9 witness and why I'm somewhat circumspect. We
10 have a long line of cases which discuss
11 expert witnesses buttressing the credibility
12 of minor witnesses. And although I think
13 that most of what she talked about in a
14 vacuum is okay, my concern is that she begins
15 to talk about the specific treatment and
16 discussions with this child and without
17 saying 'that makes her believable', she is
18 suggesting that that makes her believable.

19 And I want to make sure that what
20 we're not doing is an end run around forensic
21 interviewers being qualified as expert
22 witnesses and thereby buttressing the
23 credibility of witnesses.

24 So I don't have an issue with the
25 qualification. I think the qualification is

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1 fairly airtight. It's -- the question is,
2 what opinion will be offered and how close
3 are we going to get to her saying, 'I talked
4 to her. I diagnosed her as being a victim of
5 childhood sexual trauma and all of her
6 answers were consistent with my diagnosis for
7 childhood sexual trauma.'

8 SOLICITOR PATTERSON: If it sets
9 your mind at-ease, Judge, we are -- Ms. Rich
10 and I have already discussed that that
11 specific diagnosis will not be discussed on
12 the stand.

13 THE COURT: Okay.

14 SOLICITOR PATTERSON: And she has
15 testified in a post-criminal world. We have
16 talked pretty extensively about walking this
17 line. I understand your concerns. You know,
18 I think the courts have been clear that this
19 sort of expert testimony is very important in
20 these kinds of cases where juries do not
21 necessarily understand the dynamics of what
22 has gone on or why a child may not disclose
23 immediately, why it may come out in pieces.
24 So from the State's perspective the case law
25 is supportive of this type of expert

1 testimony, understanding that there have been
2 directives given to us by the higher courts
3 of a fine line that we need to walk.

4 THE COURT: And generally I agree
5 with you. I've admitted any number of times,
6 blind experts. The distinction here is that
7 she is actually an attending expert. That's
8 the one distinction that I've drawn. And I
9 may be wrong, but I haven't seen a case which
10 addresses that specifically. Blind experts,
11 I've seen.

12 SOLICITOR PATTERSON: And there are
13 cases that address blind experts, Judge.
14 There has been no case to my knowledge where
15 a treating therapist, separate from a
16 forensic interviewer, has not been allowed
17 because they were, in fact, a treating
18 therapist.

19 And I believe Ms. Rich has testified
20 actually in front of you as the treating
21 therapist before. So it is -- we understand
22 the concern that the Court has and we'll be
23 sure that we walk that line.

24 THE COURT: All right. Mr. Quinn?

25 MR. QUINN: Well, my client is

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1 desperate to go to the restroom so I'll be
2 very brief.

3 THE COURT: I am too, Mr. Makins.
4 So we're on the same ---

5 MR. QUINN: The Solicitor, I
6 think, is correct that there's no case saying
7 the treating cannot also be the witness.
8 That's because it's never gone up.

9 THE COURT: Yeah. Well, I was
10 just asking ---

11 MR. QUINN: The question of
12 suppression, it hasn't come up. So there's
13 no case that says either side. I think it's
14 much more difficult -- and apparently they
15 aren't going to talk about diagnosis, because
16 that would be the first objection because
17 you're assuming they're telling the truth.
18 So anyway, it'll be interesting, Judge. I
19 don't know any other way to say it.

20 THE COURT: Yeah. I think -- I
21 tend to agree with that. I haven't seen a
22 case law that -- I haven't seen a case which
23 has rejected that testimony. There's no
24 question about that.

25 But on the other hand, I haven't

1 seen one where the court has accepted
2 anything, other than the blind testimony.

3 So again we know the public policy
4 and the theory behind not allowing forensic
5 experts to be qualified and buttress the
6 credibility. We just need to make sure,
7 insofar as we -- or inasmuch as we're in
8 uncharted waters here, that we're not doing
9 an end run around that holding, okay?

10 So I don't think that her testimony,
11 because she's an attending witness, would be
12 automatically *ab initio* thrown out. I do
13 think that there are things that she can say
14 and that are admissible. But I think as
15 well, there are things that should be
16 excluded.

17 I haven't heard the testimony. And
18 I'm really not inclined to listen to the
19 testimony right now. I prefer contemporan-
20 eous objections.

21 But you've obviously read the case
22 law. You know -- you understand exactly what
23 I'm saying.

24 SOLICITOR PATTERSON: I do.

25 THE COURT: It is a tight line.

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1 SOLICITOR PATTERSON: Uh-huh.

2 THE COURT: And you're going to
3 have to walk that tight rope, okay?

4 SOLICITOR PATTERSON: Yes, sir.

5 THE COURT: And when and if she gets to
6 the point that says anything that suggests --
7 and I understand that she's not going to say
8 it verbatim and she's not going to articulate
9 it very, very clearly. But anything that
10 suggest that 'I diagnosed this girl and
11 because she shows all of these signs, she's
12 telling the truth', that's where we can't go.

13 SOLICITOR PATTERSON: I understand.
14 And just to be clear, Judge, she is not going
15 to testify about a diagnosis of child sexual
16 abuse. She will discuss a diagnosis of post-
17 traumatic stress disorder. But we will not
18 get into the diagnosis of child sexual abuse.

19 THE COURT: Okay. And so what I'm
20 hearing you say is she's not going to say --
21 basically what she's going to say is this
22 young lady is suffering from trauma. But
23 she's not going to get into any detail about
24 what kind of trauma that is or the genesis of
25 that trauma.

1 So the way I'm conceiving of it
2 right now, if she is more in the nature of a
3 medical doctor at an emergency room and/or a
4 medical doctor who analyzes a rape or
5 administers a rape kit, where she just speaks
6 to the facts: 'This is what was present. I
7 can't tell you why it's present.'

8 SOLICITOR PATTERSON: She's going
9 to speak to the facts. And the child has
10 made multiple disclosures of sexual abuse to
11 her. So we will, in keeping with the hearsay
12 exception, ask her if **Minor** did, in fact,
13 disclose sexual abuse and time and place.

14 THE COURT: Okay. Okay. And
15 she's the one -- I presume she is testifying
16 after the forensic interview?

17 SOLICITOR PATTERSON: Correct,
18 Judge.

19 THE COURT: Okay. All right.

20 MR. QUINN: My one concern then is
21 why is she being offered as an expert on
22 child sexual abuse dynamics?

23 As soon as she gets into saying
24 anything about this is what we see for child
25 sexual abuse, 'these are the symptoms, I

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1 found them, they exist in this case', we're
2 going to have trouble. And as soon as she
3 gets qualified in front of the jury, that's
4 an expert in that. It's the same as saying
5 to the jury, 'She's an expert in it. Guess
6 what? The reason we have her here she's an
7 expert in child sexual abuse dynamics. So
8 this child suffered sexual abuse.'

9 THE COURT: All right. Well, this
10 is what I'm going to do -- we'll take it
11 under consideration. You can make
12 contemporaneous objections.

13 It may be, and I want you to just,
14 Ms. Patterson, prepare testimony of a blind
15 expert as opposed to a fact expert or an
16 expert witness who attended to the child,
17 okay?

18 SOLICITOR PATTERSON: Okay. So ---

19 THE COURT: So you -- so at some
20 point you'll be able to go either way, okay?
21 I'm going to let her testify because I'm
22 convinced of her credentials. And you can
23 ask her questions to put her credibility into
24 dispute.

25 But with respect to the actual

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1 factual testimony, again, I'm going to be
2 veering pretty significantly toward the blind
3 expert as opposed to the attending expert,
4 okay? All right.

5 Again, if you get a conviction in
6 this case, this is where you're going to lose
7 it on appeal, okay? Okay. So I'll consider
8 it. If you have any additional case law at
9 all, you're welcome to e-mail it to me.

10 SOLICITOR PATTERSON: Okay.

11 THE COURT: Which discusses
12 specifically this particular instance, I'd be
13 happy to look at it, from this state or
14 another. But we'll consider it tomorrow
15 again. I'm more inclined to treat it as a
16 blind expert as opposed to an attending
17 expert, okay?

18 SOLICITOR PATTERSON: Judge, would
19 you be inclined to allow the State to add a
20 blind expert to our witness list?

21 THE COURT: I would not. I mean,
22 you're welcome to do that.

23 SOLICITOR PATTERSON: Well, we --
24 thank you.

25 THE COURT: Yeah. I don't mind

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1 and I'm not so certain that this witness,
2 inasmuch as the broad qualifications that
3 you've given her can't testify as to some of
4 the blind information. Again, which is
5 delayed disclosure or things of that sort.
6 Okay. All right.

7 SOLICITOR PATTERSON: Thank you,
8 Judge.

9 THE COURT: Anything else for this
10 witness?

11 SOLICITOR PATTERSON: Nothing for
12 this witness, Your Honor.

13 THE COURT: Okay. Thank you.

14 WITNESS: Thank you.

15 THE COURT: We'll see you, maybe
16 tomorrow. Have a good evening.

17 (WITNESS STEPS DOWN)

18 MR. QUINN: Judge, we need to take
19 a short break just to let my client step out
20 here and use the restroom. I think there's
21 one back here in the jail cell.

22 THE COURT: Yes, that's fine.
23 We'll do that. We'll come back in about five
24 minutes then, okay?

25 (BRIEF RECESS)

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1 (DEFENDANT PRESENT)

2 THE COURT: Are we ready to
3 proceed? You may call your next witness.

4 JACKSON V: DENNO HEARING

5 SOLICITOR PATTERSON: David Picone.

6 (WITNESS TAKE STAND)

7 DAVID PICONE, having been duly
8 sworn to tell the truth, and nothing but the
9 truth, testified as follows:

10 DIRECT EXAMINATION

11 BY SOLICITOR PATTERSON:

12 Q. State your full name for the record,
13 please?

14 A. David Daniel Picone.

15 Q. And where do you work?

16 A. Greenville County Sheriff's Office.

17 Q. And in what capacity do you work for
18 the sheriff's office?

19 A. Currently, I'm assigned as an
20 investigator with the violent crimes unit.

21 Q. Okay. And what unit were you in in
22 March of 2015?

23 A. Crimes against children.

24 Q. Okay. And were you investigating a
25 child sexual abuse case that began on March

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1 20th of 2015?

2 A. Yes.

3 Q. And did that case involve this
4 defendant?

5 A. It did.

6 Q. Did you meet with this defendant at
7 some point and talk to him about the case?

8 A. March 23rd, 2015.

9 Q. And why did you meet with him on
10 that date?

11 A. The initial investigation started on
12 March 20th. After I got a basic understand-
13 ing of what the case was about, after talking
14 to the victim, I'd been doing some follow-up
15 investigations and had gone out to the
16 Defendant's house and talked with his girl-
17 friend. And he wasn't home at the time. And
18 after I talked with her, she said that she
19 was going to bring him to my office later on
20 in the afternoon, after he got home from
21 work; which she eventually did later in the
22 afternoon.

23 Q. And at this point, the victim had
24 made allegations against the Defendant?

25 A. Yes.

1 Q. And you had met with the victim at
2 this point?

3 A. Yes.

4 Q. All right. And were you the primary
5 investigating officer on the case?

6 A. I was.

7 Q. Did Mr. Makins come in voluntarily
8 to speak with you?

9 A. Yes. Like I said, he showed up at
10 my office. At first when he showed up DSS
11 was there. DSS had actually put a safety
12 plan together. So he met with DSS to go over
13 the safety plan.

14 After that, he said he would be willing
15 to talk with me. So we went back to our
16 interview room. At that time, I was under
17 the assumption that when you enter the room,
18 the recording system was supposed to come on.
19 Later I found out that they had changed the
20 system, previous days, weeks before and I
21 hadn't been in there hadn't been an interview
22 since then. And you're supposed to turn a
23 switch on, so it wasn't recorded. But, yes,
24 he voluntarily came.

25 Q. And was he free to say no that he

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1 did not wish to speak to you?

2 A. Yes. When we went in the room I,
3 you know, told him he was not under arrest,
4 that he didn't have to speak to me. That if
5 he wanted to leave, he could just tell me and
6 we'd end the interview. Told him that
7 anytime he wanted to leave to use the
8 bathroom just let me know. He also asked for
9 a glass of water, which I provided to him.

10 Q. And was anyone with you during the
11 course of the interview?

12 A. Yes. Investigator Robertson, Mike
13 Robertson was in there as well.

14 Q. Was the defendant handcuffed at any
15 time?

16 A. He was not.

17 Q. Was he free to leave at any time?

18 A. Yes.

19 Q. And how did the discussion with the
20 defendant begin?

21 A. I explained to him that there was
22 some allegations made against him of sexual
23 abuse. He denied the allegations.

24 And I asked him to determine whether he
25 was actually alone with the child or had an

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1 opportunity to do so. He did disclose or
2 tell me that he was alone with the child
3 certain times when he was watching her.

4 Q. Did he express any reservations
5 about speaking with you?

6 A. No.

7 Q. About how long did you speak with
8 the Defendant?

9 A. It was about one hour.

10 Q. And he was free to leave at any
11 point during that hour?

12 A. Yes.

13 Q. Did he ever ask for an attorney?

14 A. No, he did not.

15 Q. Did he ever ask to take a break?

16 A. No.

17 Q. Did he ask to have anyone with him?

18 A. No.

19 Q. Did he ask if he could come back
20 later?

21 A. No.

22 Q. And did he, in fact, leave after he
23 made the statement that you just mentioned?

24 A. Yes, he did leave.

25 Q. Thank you.

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1 SOLICITOR PATTERSON: No further
2 questions from the State for this witness,
3 Judge.

4 THE COURT: Yes, sir.

5 CROSS-EXAMINATION

6 BY MR. QUINN:

7 Q. I assume you didn't reduce any
8 statement to writing because you thought it
9 was being recorded; is that correct?

10 A. That's correct.

11 Q. Okay. Did you ask Detective
12 Robertson to do a report in this matter?

13 A. I did not.

14 Q. Okay.

15 MR. QUINN: I don't have any other
16 questions. Thank you.

17 SOLICITOR PATTERSON: Your Honor,
18 at this point the State would put on the
19 record and argue that the statement of the
20 Defendant was freely and voluntarily given
21 and that it is appropriate to be admitted at
22 trial.

23 THE COURT: Okay. Mr. Quinn?

24 MR. QUINN: Well, I wouldn't agree
25 that it's admissible. That's taking it one

1 step too far. But I'll agree that it was not
2 taken in violation of any of the *Jackson v.*
3 *Denno*.

4 THE COURT: Okay.

5 MR. QUINN: He was not even under
6 arrest, so it was noncustodial.

7 THE COURT: Okay. Good enough.
8 Okay. As a threshold finding, I do find that
9 all of the particulars to *Jackson v. Denno*
10 -- particularly *Jackson v. Denno*, obviously
11 at trial I'll determine whether in fact it's
12 admissible or not. However, the threshold, I
13 find that it does meet the requirements of
14 *Jackson v. Denno*.

15 I presume that any objections would
16 be as to authentication and laying an
17 appropriate foundation for the admissibility
18 of the same.

19 MR. QUINN: Those would be the
20 obvious ones; maybe relevance, although I
21 suspect it's relevant.

22 THE COURT: Okay. Good enough.
23 All right. Okay.

24 SOLICITOR PATTERSON: Your Honor,
25 the State has nothing further for this

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1 afternoon until tomorrow.

2 THE COURT: I need to get the rape
3 shield in writing but that's not an issue, I
4 presume?

5 SOLICITOR PATTERSON: I don't think
6 -- typically, Judge, as I understand the case
7 law the courts are considering *Boiter* and
8 rape shield as kind of simultaneous motions.

9 THE COURT: Right.

10 SOLICITOR PATTERSON: So I think
11 that there is an appropriate discussion on
12 that that can be had tomorrow. But I think
13 that we will lean more toward the *Boiter* than
14 the rape shield in this case with the child.

15 THE COURT: Okay.

16 SOLICITOR PATTERSON: Unless Mr.
17 Quinn has a prior-knowledge-argument you'd
18 like to make.

19 MR. QUINN: No. And I agree with
20 her. Analysis of the situation would
21 probably more in arguing under *Boiter*.

22 THE COURT: Sure.

23 MR. QUINN: And we'll need to put
24 that record up tomorrow.

25 THE COURT: Good enough. Okay.

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1 All right. Okay. We'll come back on the
2 record tomorrow at 9:00. I think we
3 indicated to the jury to come back at 1:00.
4 So we'll start at 9:00 and try to get that
5 hearing done as quickly as possible.

6 MR. QUINN: Yes, sir.

7 THE COURT: So as to afford all of
8 the staff a lunch and we can come back at
9 1:00 and begin opening statements, okay? All
10 right. Thank you. Y'all have a great
11 evening.

12 SOLICITOR PATTERSON: Thank you,
13 Judge.

14 MR. QUINN: Thank you, Judge.

15 (COURT IN RECESS)

16 (TRANSCRIPT CONTINUED NEXT PAGE)

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1 have any case law that we'd like to
2 present to the Court.

3 THE COURT: Sure.

4 SOLICITOR PATTERSON: There is one
5 case and I have a copy for defense counsel as
6 well, *State v. Henry*; which I'm happy to
7 discuss it at the appropriate time. But I
8 think it does address the issue and still is
9 considered to be positive law in South
10 Carolina.

11 THE COURT: Okay. We'll take it
12 up at the appropriate time. I'll sit here
13 quietly and read it while we wait for the
14 witness.

15 SOLICITOR PATTERSON: Thank you,
16 Judge.

17 (COURT AT-EASE)

18 MR. QUINN: Is the Court ready?

19 THE COURT: Yes, sir.

20 MR. QUINN: I would call Minor

21 to the stand.

22 THE COURT: Okay.

23 (WITNESS TAKES STAND)

24 Minor, having been duly
25 sworn to tell the truth, and nothing but the

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1 truth, testified as follows:

2 DIRECT EXAMINATION

3 BY MS. PATTERSON:

4 Q. Minor, I'm going to ask you some
5 questions, okay? And I know you've got a
6 microphone in front of you. You don't have
7 to worry about speaking into it. It'll pick
8 you up as long as you talk loud enough; okay.

9 A. (Nods head)

10 Q. And unfortunately, you have to
11 answer out loud because this lady (court
12 reporter) is taking down everything that's
13 said and she can't take down a nod. She has
14 to have you either say yes or no, okay?

15 A. (Nods head)

16 Q. So can you say yes or no for me, to
17 the questions?

18 A. Yes.

19 Q. And your name is Minor; is
20 that correct?

21 A. Yes.

22 Q. And Minor we don't know each
23 other; is that right? We've never met
24 before?

25 A. No.

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- 1 Q. May I call you Minor [REDACTED] or would you
2 prefer I call you Minor [REDACTED] ?
- 3 A. Minor [REDACTED].
- 4 Q. Okay. And Minor [REDACTED], you understand
5 you're here to talk about 'Tari; is that
6 right?
- 7 A. Yes.
- 8 Q. Okay. And is the fellow you call
9 'Tari, Ontario Makins?
- 10 A. Yes.
- 11 Q. Now, I want to talk to you about
12 some other things besides 'Tari here these
13 few minutes; okay?
- 14 A. (Affirmative nod) -- yes.
- 15 Q. Thank you. You also accused some
16 other people of doing improper things or
17 wrong things to you; isn't that right?
- 18 A. Yes.
- 19 Q. Okay. And did you accuse Malayah,
20 M-A-L-A-Y-A-H ---
- 21 A. Yeah.
- 22 Q. --- of doing something to you?
- 23 A. Yes.
- 24 Q. Okay. And who is Malayah? Can you
25 tell me her last name?

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Pretrial Testimony of **Minor**

1 A. Is it Smith, Mama?

2 Q. Okay. If you don't know,
3 unfortunately nobody can help you answer,
4 okay? If you don't know, you can say you
5 don't know.

6 A. I don't know.

7 Q. Okay. And who is Malayah to you?
8 What relationship do you have?

9 A. She's my cousin.

10 Q. And can -- do you know about how old
11 she is?

12 A. (Negative gesture).

13 Q. You have to say it out loud for me.
14 I'm sorry.

15 A. No.

16 Q. Thank you. And does she live near
17 you or faraway; can you tell me that?

18 A. She lives in North Carolina now.

19 Q. And do you two visit very often?

20 A. No.

21 Q. All right. And so did you accuse
22 Malayah of touching you inappropriately?

23 A. Yes.

24 Q. And tell me what you accused her of
25 doing?

1 A. Touching me on my private part.

2 Q. Okay. And is that the words you
3 used? Do you remember?

4 A. I'm not sure.

5 Q. And were you able to say how many
6 times that happened?

7 A. Uh-uh, (negative gesture):

8 Q. Is that a no?

9 A. "No."

10 Q. Okay. And were you able to say
11 where it happened?

12 A. I think Tiffany's house.

13 Q. Okay. And whose house is that?
14 Please tell me the name again?

15 A. Tiffany.

16 Q. And who is Tiffany.

17 A. My sister.

18 Q. And how -- is your sister an adult?

19 A. Yes.

20 Q. And she lives in a separate house
21 than you do?

22 A. Yes.

23 Q. And does she live in South Carolina
24 or North Carolina?

25 A. North Carolina.

1 Q. And do you know, does she live close
2 to Malayah?

3 A. Yes.

4 Q. How far, can you give me an idea?

5 A. Malayah is her child.

6 Q. Okay. So Malayah and Tiffany are
7 mother and daughter?

8 A. Yes.

9 Q. Okay. So they live in the same
10 house; is that right?

11 A. Yes.

12 Q. Okay. So you're saying Malayah did
13 that in Malayah's house?

14 A. Yes.

15 Q. And did that happen or did that not
16 happen?

17 A. It did.

18 Q. And when did you report that?

19 A. I'm not sure.

20 Q. Who did you tell?

21 A. I think my mom.

22 Q. And do you remember, did you tell
23 any police officers about it?

24 A. I think.

25 Q. And do you remember which, if any

1 police officers?

2 A. Uh-uh. No.

3 Q. Thank you. Do you remember, did you
4 tell any of your teachers about it?

5 A. Maybe Ms. Columbia.

6 Q. But do you remember if you did or
7 not?

8 A. Ms. Columbia, (affirmative nod).

9 Q. You did tell Ms. Columbia, okay.

10 A. (Affirmative nod).

11 Q. And did you tell your counselor?

12 A. My mom did.

13 Q. Do you remember talking to Ms. Rich
14 about this?

15 A. (No verbal response).

16 Q. About the accusations against
17 Malayah, do you remember if you talked to Ms.
18 Rich about it?

19 A. I don't know who that is.

20 Q. Kristin? Do you call her Ms.
21 Kristin?

22 A. I call her Kristin.

23 Q. Okay. And do you know that Kristin
24 is your therapist?

25 A. Yes.

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1 Q. Okay. Did you talk to Kristin about
2 it?

3 A. No, my mom did.

4 Q. Okay. But you didn't talk to
5 Kristin about it?

6 A. No.

7 Q. And did you also accuse two other
8 people of molesting you?

9 A. Yes.

10 Q. And who was that?

11 A. Messiah and Caesar.

12 Q. And can you tell the Judge what you
13 say Messiah and Caesar did to you?

14 A. No.

15 Q. No, you can't?

16 A. (Negative gesture).

17 Q. And why is that?

18 A. I don't want to.

19 Q. Okay. What you accused Messiah and
20 Caesar of, is it the truth; did it really
21 happen?

22 A. Yes.

23 Q. When?

24 A. I can't remember.

25 Q. Where?

- 1 A. At Toi's house.
- 2 Q. At Toi's house.
- 3 A. (Affirmative nod).
- 4 Q. And who else lives at Toi's house?
- 5 A. 'Tari.
- 6 Q. Okay. And let's explain to the
- 7 Judge who all these people are. How are Toi
- 8 and 'Tari related?
- 9 A. They are boyfriend and girlfriend.
- 10 Q. And is Toi some relative of your
- 11 mother's?
- 12 A. She's my sister.
- 13 Q. Toi is your sister?
- 14 A. Yes.
- 15 Q. Okay. And who are Messiah and
- 16 Caesar to you, if anything? What relation-
- 17 ship are they?
- 18 A. They are my nephews.
- 19 Q. Okay. Where does Toi live?
- 20 A. (No verbal response).
- 21 Q. In South Carolina or North Carolina?
- 22 A. Oh, South Carolina.
- 23 Q. Close to your house or faraway?
- 24 A. (No verbal response).
- 25 Q. Let's do it this way. Can you walk

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1 to her house from your house?

2 A. No.

3 Q. Okay. And so when you go to her
4 house, how do you get there?

5 A. In a car.

6 Q. And who usually takes you?

7 A. My mom.

8 Q. Okay. And does your mom stay with
9 you or leave you there?

10 A. She leaves me.

11 Q. And did you claim that Messiah and
12 Caesar touched you inappropriately?

13 A. Yes.

14 Q. And had anal intercourse with you?

15 A. (No verbal response).

16 Q. Do you know what that is?

17 A. No.

18 Q. That they messed with your bottom?

19 A. I can't remember.

20 Q. Okay. You're saying that that's
21 true, that that actually happened?

22 A. Yes, sir.

23 Q. Did anybody see it, that you're
24 aware of?

25 A. No.

- 1 Q. And this accusation about Messiah
2 and Caesar, did you tell the police about it?
- 3 A. I'm not sure.
- 4 Q. Do you remember, did you tell any of
5 your teachers about it?
- 6 A. Miss -- no, I don't think so.
- 7 Q. Did you tell your mom about it?
- 8 A. Yes.
- 9 Q. Did you tell anybody else about it?
- 10 A. Maybe Kristin.
- 11 Q. Okay. That Kristin being your
12 therapist; that Kristen?
- 13 A. (Affirmative nod).
- 14 Q. Okay. Anybody else?
- 15 A. No.
- 16 Q. And do you know, were Messiah or
17 Caesar or Malayah ever arrested?
- 18 A. No.
- 19 Q. "No," or do you know? Were they
20 arrested?
- 21 A. (Negative gesture).
- 22 Q. "No," they weren't?
- 23 A. I don't think so. I don't know.
- 24 Q. And do you understand that it's very
25 important to tell the truth here today?

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1

A. Yes.

2

Q. And it's your testimony that all

3

three of these -- well, let me ask you this.

4

I'm sorry. How old is Messiah?

5

A. Nine.

6

Q. And how old is Caesar?

7

A. Three or six. I think he's six now.

8

Q. Okay. And when they were messing

9

with you, did you bop either of them up the

10

side of the head?

11

A. No.

12

Q. And you're older than both of them;

13

aren't you?

14

A. I'm not sure if I was older than

15

Messiah.

16

Q. Okay. So Messiah is about your age,

17

about ten?

18

A. Yeah.

19

Q. Okay. But you're certainly older

20

and bigger than Caesar; right?

21

A. Yes.

22

Q. So did you bop him up the side of

23

the head?

24

A. No.

25

Q. Hit any of the people that tried to

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- 1 hurt you?
- 2 A. (No verbal response).
- 3 Q. Did any of them leave any marks on
- 4 you that you were able to show anybody?
- 5 A. No.
- 6 Q. Did you put any marks on them ---
- 7 A. No.
- 8 Q. --- defending yourself?
- 9 A. No.
- 10 Q. And as far as you know, did anybody
- 11 see any of this?
- 12 A. No.
- 13 Q. Was anybody else in the house when
- 14 Malayah was doing any of these things to you?
- 15 A. I think everyone was outside.
- 16 Q. And did you yell so that they might
- 17 hear you?
- 18 A. No.
- 19 Q. What about when Caesar and Messiah
- 20 were supposedly doing something to you. Was
- 21 there anybody else in the house?
- 22 A. I don't know.
- 23 Q. Do you remember were they outside?
- 24 Was there anybody outside?
- 25 A. I think Isis.

1 Q. And who's Isis?

2 A. My sister.

3 Q. And how old is your sister?

4 A. Eighteen.

5 Q. And did you yell so Isis would come
6 help you?

7 A. No.

8 Q. And when you say Toi's house, did
9 they live in a house or an apartment or where
10 do they live?

11 A. An apartment.

12 Q. And so were there people in the
13 apartments next door?

14 A. Yes, I think so.

15 Q. Okay. You think people live there?

16 A. Yeah, because there was an upstairs
17 and a downstairs.

18 Q. And did you yell to see if any
19 people from either of those apartments would
20 come help?

21 A. No.

22 Q. All right. What about where Malayah
23 lives, is it an apartment or house or what?

24 A. Now, I think it's just a neighbor-
25 hood but back then I think it was an

1 apartment.

2 Q. And the same thing, do you know if
3 people lived in the apartments nearby?

4 A. I'm not sure.

5 Q. Did you yell or make any noise to
6 try to get help from any of those people?

7 A. No.

8 MR. QUINN: I don't have any other
9 questions at this time, Your Honor.

10 THE COURT: Ms. Patterson, any
11 questions?

12 SOLICITOR PATTERSON: Just a few,
13 Your Honor.

14 THE COURT: Okay.

15 CROSS-EXAMINATION

16 BY SOLICITOR PATTERSON:

17 Q. **Minor**, can you tell me again how
18 old Caesar and Messiah are?

19 A. Caesar is six and I think Messiah's
20 nine.

21 Q. And you said earlier that you didn't
22 want to talk about what happened with them.
23 Why don't you want to talk about that?

24 A. Because I don't want to.

25 Q. Okay. Have you seen them since all

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1 of this happened, and since 'Tari was
2 arrested? Have you seen Messiah and Caesar?

3 A. No.

4 Q. No?

5 A. (No verbal response).

6 Q. Do you miss seeing them?

7 A. Yes.

8 Q. Okay.

9 SOLICITOR PATTERSON: Judge, if I
10 may have just a moment.

11 THE COURT: Sure.

12 CROSS-EXAMINATION CONTINUED

13 BY SOLICITOR PATTERSON:

14 Q. **Minor**, I know you said you didn't
15 know exactly how old Malayah is. Is she an
16 adult like your mom?

17 A. No.

18 Q. No. Is she a kid like you?

19 A. She's older than me.

20 Q. She's a little older than you. Is
21 she still in school; do you know?

22 A. I think middle school.

23 Q. You think middle school.

24 A. (Affirmative nod).

25 SOLICITOR PATTERSON: Thank you,

1 Judge. I have no further questions for this
2 witness.

3 MR. QUINN: I don't have any
4 further questions for this witness. Could
5 I ask the Court to give me five minutes in
6 recess and let me speak to my client?

7 THE COURT: Okay. Good enough
8 All right. Thank you, ma'am. I appreciate
9 it. You may step down.

10 (WITNESS STEPS DOWN)

11 THE COURT: Okay. We'll be in
12 recess for five minutes. Thank you.

13 (BRIEF RECESS)

14 (DEFENDANT PRESENT)

15 MR. QUINN: Judge, may we
16 approach?

17 THE COURT: Sure. Yes, sir. Yes,
18 sir.

19 (OFF RECORD BENCH CONFERENCE)

20 THE COURT: Yes, sir. You may
21 proceed.

22 MR. QUINN: Thank you, Your Honor.
23 Your Honor, I believe that's all the
24 testimony we will have on the Boiter issue.
25 And if the Court will allow me to address the

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Pretrial Testimony of Minor [REDACTED]

1 Court a bit further on it, particularly for
2 the record. The case that we're discussing,
3 of course, is *State v. Boiter*, B-O-I-T-E-R,
4 the *State v. Sprouse*, S-P-R-O-U-S-E, that's
5 also discussed in the case.

6 It appears that the burden is on the
7 defense to first prove that the allegation
8 made by the reported victim was false.

9 Then you go to other considerations
10 about timeliness, the factual similarity to
11 determine relevance.

12 As the Court has heard, Minor [REDACTED] has
13 testified these allegations did occur.
14 Whether I believe that or no, it becomes an
15 impossibility, even though I have the
16 children here available to testify that --
17 with denial of these allegations, I think it
18 becomes a factual impossibility to prove the
19 allegations false when there are no
20 witnesses, there is no physical evidence,
21 there are no reports that police -- there was
22 no investigation. At best what I'm going to
23 have is a swearing contest.

24 And even if -- and I agree there's a
25 question about what the standard might be --

1 but even if the standard is preponderance of
2 evidence, I don't know I get past fifty
3 percent to fifty-one percent. Rather than
4 putting three minor children witnesses up,
5 when I do not believe that I can establish to
6 the Court even to a preponderance of the
7 evidence that the allegations are false --
8 because it would be a straight swearing
9 contest. One will say yes, they did it. And
10 they'll say, 'no, I didn't.' That's all the
11 testimony we will have.

12 I have discussed with my client, of
13 course, that if we stop at this point the
14 allegations, the other allegations made will
15 not come out before the jury. They will not
16 be aware of any of these allegations, whether
17 they are true or false, that no testimony
18 about that would be admissible. So my client
19 understands that and that's all the testimony
20 that I would have.

21 THE COURT: Okay. All right.
22 Good enough. All right. I don't know if any
23 response from the State is necessary or not.

24 SOLICITOR PATTERSON: Your Honor, I
25 don't believe it's necessary so long as Mr.

1 Quinn has conceded that these allegations
2 would be absolutely inappropriate at trial.
3 The State does -- position would be that the
4 standard of *Boiter* has not been met -- the
5 Defense has not proved these false.

6 And the State's position if we went
7 forward would also be that these were not
8 factually similar, so that the allegations
9 against the other children are appropriately
10 kept out of trial.

11 THE COURT: Okay. All right. I
12 do find that based on the evidence that's
13 been submitted on the record, I cannot
14 determine under any standard of proof,
15 whether it's preponderance of the evidence,
16 clear and convincing or beyond a reasonable
17 doubt, that the accusations made by the
18 victim, prior accusations were false.

19 I recognize the Defense's position
20 that is, that under the relevant standard
21 articulated by the Supreme Court that it's a
22 futile endeavor to try to prove the falsity
23 of prior accusations. I don't know if that's
24 precisely true. However, I would say that it
25 is an unwieldy burden. And for the record,

1 I'm not so sure that it's a fair burden to
2 impose upon a defendant either. I don't know
3 if that issue has been waived by the Defense.

4 However, I will tell you from the
5 trial court perspective, I would love to have
6 additional guidance from the Supreme Court
7 about the burden of proof required for
8 proving the falsity of the accusation.

9 And I think that it should more
10 particularly be that the -- the proof should
11 be that the accusation was in question, not
12 that it was absolutely false. Because I
13 think that visits ultimately an unfairness
14 upon a defendant in not being able to explore
15 prior allegations of sexual abuse that may be
16 questionable. That is, that had not been
17 adjudicated but weren't proven specifically
18 false in any tribunal or in any in-camera
19 proceeding.

20 Okay. For that reason, I find that
21 any cross-examination of prior allegations of
22 sexual abuse or inadmissible in accordance
23 with *Boiter*.

24 Yes, sir?

25 MR. QUINN: I apologize to the

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1 Court because I had originally had planned on
2 putting all of the witnesses up. I do not
3 have anything else for the Court this
4 morning. I know the jury's coming back at
5 1:00. I don't know if the State has
6 anything.

7 SOLICITOR PATTERSON: Nothing from
8 the State at this time, Judge.

9 THE COURT: Okay. With regard to
10 the case that you had passed up, *State v.*
11 *Henry* concerning the testimony of an expert
12 witness, I think in reviewing that case that
13 I agree with that finding entirely. And that
14 goes to the qualification of the therapist or
15 the expert witness to testify as to post-
16 traumatic stress disorder. But in that case,
17 they didn't specifically address our concern
18 in this case.

19 And that is whether that -- in
20 context of the recent case law concerning the
21 testimony of expert witnesses vouching for
22 the credibility of minor victims, this really
23 doesn't touch upon that because that wasn't
24 the objection that was made at the time. And
25 it certainly wasn't made in context with our

1 current jurisprudence. So I still have the
2 same concern about the expert witness
3 vouching for the testimony of the minor
4 victim.

5 I don't know what this expert
6 witness is going to say. I don't have any
7 issue with her qualification as an expert
8 witness. I don't think -- and I haven't
9 heard the testimony yet -- I don't think I
10 have any issue with her saying that she
11 talked to her, and that she exhibits symptoms
12 of post-traumatic stress disorder.

13 Beyond that, I'm concerned that if
14 she starts matching up her testimony with her
15 symptoms, we are essentially establishing a
16 circumstance where she is vouching for the
17 credibility of the witness. If that happens,
18 I don't think that I have any choice but to
19 declare a mistrial and I don't want to get
20 there.

21 You can put her in the -- on the
22 stand to testify as a fact witness without
23 any vouching for the credibility. And then
24 use a blind witness if you want to. Or you
25 can use a blind witness. But don't get to

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1 the point where she's vouching for the
2 credibility, okay?

3 SOLICITOR PATTERSON: Your Honor,
4 can I just be sure that I'm clear on your
5 ruling on that?

6 THE COURT: Yes.

7 SOLICITOR PATTERSON: So if Ms.
8 Rich gets up and testifies as an expert in
9 the areas that we discussed yesterday, if she
10 testifies as to piecemeal disclosure, delayed
11 disclosure. And then from what I understand
12 you to say, she can testify that she saw the
13 child. That the child was diagnosed with
14 PTSD and that these were the symptoms?

15 THE COURT: Everything up to "and
16 these were the symptoms." Okay?

17 SOLICITOR PATTERSON: Okay.

18 THE COURT: Because I think when
19 you start talking about symptoms, that is
20 you're matching the expert opinion to her
21 specific testimony, to her disclosures. I
22 think that's where you start getting into the
23 vouching part.

24 SOLICITOR PATTERSON: But can talk
25 about the diagnosis of PTSD?

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1 THE COURT: Yes, ma'am.

2 SOLICITOR PATTERSON: Okay.

3 THE COURT: And now we're talking
4 about generally. I don't want ---

5 SOLICITOR PATTERSON: Understood.

6 THE COURT: Again, the problem is,
7 I think, when she starts getting very
8 specific in the diagnosis of PTSD as it
9 relates to this client, then she begins to
10 vouch. Now, she's also going to -- you
11 intend to ask her about additional
12 disclosures of sexual abuse; correct?

13 SOLICITOR PATTERSON: I do.
14 Correct.

15 THE COURT: Okay. Do you have any
16 objection to that, Mr. Quinn?

17 MR. QUINN: Additional concerning
18 'Tari, is what we're talking about; right?

19 SOLICITOR PATTERSON: Correct.

20 THE COURT: Right.

21 MR. QUINN: No. I don't -- at
22 this time, I don't have an objection.

23 THE COURT: Okay. All right.
24 And, again, Ms. Patterson, I'm not telling
25 you precisely how to examine your witness and

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1 what to bring out. I'm just telling you what
2 to stay away from.

3 SOLICITOR PATTERSON: I understand

4 THE COURT: Okay. All right.

5 Because I'm very careful in these kind of
6 cases, like we've talked about, these
7 evidentiary rulings are very important
8 because they have the effect of cutting the
9 legs out from under one side or the other.
10 So I'm trying to be as far as I possibly can
11 to each side in allowing both of you to
12 present that evidence, which is admissible
13 and appropriate to represent your respective
14 clients. But we've got to stay within those
15 parameters, which have been loosely defined
16 by the Supreme Court, okay?

17 Okay. Anything else that we need to
18 take up this morning?

19 MR. QUINN: No, sir. Not that I'm
20 aware of?

21 THE COURT: Okay.

22 SOLICITOR PATTERSON: Nothing from
23 the State, Judge.

24 THE COURT: Okay. All right.

25 Then I'll see y'all back at 1:00. If you

1 need me just let me know, okay?

2 MR. QUINN: Thank you.

3 SOLICITOR PATTERSON: Thank you.

4 (COURT IN RECESS)

5 (DEFENDANT PRESENT)

6 THE COURT: Mr. Quinn, do you need
7 this, the transcript back?

8 MR. QUINN: No, thank you.

9 THE COURT: All right. If you
10 need it to refer to during the trial, just
11 let me know.

12 MR. QUINN: I will. Thank you.

13 THE COURT: Okay. We're ready for
14 the jury.

15 (JURY IN @ 1:10 P.M.)

16 THE COURT: All right. Welcome
17 back, ladies and gentlemen. I hope you had a
18 good evening. I hope you had a good morning.

19 We're going to start this afternoon
20 with opening statements from attorneys. And
21 I remind you, as I told you yesterday, that
22 opening statements are not evidence to be
23 considered by you. Opening statements are an
24 opportunity for the parties to introduce
25 themselves and their theory of the case, and

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1 so they're fairly short.

2 Before we get started with the
3 opening statements, I'm going to get the
4 clerk of court to swear you in. Now,
5 yesterday morning you took the oath to tell
6 the truth. This is a different oath. This
7 is an oath to truly and verily try the case
8 in accordance with the law and the evidence.
9 So ladies and gentlemen, I'll defer to the
10 clerk of court to administer the oath.

11 (WHEREUPON JURY SWORN)

12 THE COURT: All right. Ms.
13 Patterson?

14 SOLICITOR PATTERSON: Thank you,
15 Your Honor.

16 THE COURT: Yes, ma'am.

17 SOLICITOR PATTERSON: May it please
18 the Court.

19 THE COURT: Yes, ma'am.

20 OPENING STATEMENT

21 BY SOLICITOR PATTERSON:

22 Ladies and gentlemen, when we think
23 about childhood fears, we often think about
24 think about things like being afraid of the
25 dark or monsters under the bed.

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1 But for some kids, including kids
2 here in Greenville, those fears take on a
3 very different and very real shape. They
4 look like a regular person, a person who's
5 part of their family, and who looks like
6 their mom and their dad, but who, behind
7 closed doors, is abusing that child.

8 That someone would abuse a child,
9 much less sexually abuse a child, is not
10 something you normally think about much less
11 talk about. But it is a reality. It's a
12 reality here in Greenville and it's what
13 we're here to talk about today.

14 As the Judge told you during jury
15 selection, my name is Kate Patterson. I'm
16 one of the prosecutors on the case. That
17 means I represent the State of South Carolina
18 in the criminal charges against this
19 defendant. It's my job to present evidence
20 to prove to you beyond a reasonable doubt
21 that the Defendant committed the crimes we're
22 going to talk about today.

23 In other words, I must firmly
24 convince you that the Defendant is guilty.
25 And I want to talk to you very briefly about

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1 how I'm going to do that. As you heard
2 yesterday when the Judge read the indictments
3 and when the clerk of court swore you in, the
4 defendant in this case has been charged with
5 three crimes related to child sexual abuse:

6 Criminal sexual conduct with a minor
7 first degree, lewd act, and criminal sexual
8 conduct with a minor, third degree.

9 You also may have noticed when the
10 Judge read the indictments yesterday that the
11 victim related to these charges has the
12 initials **Minor** You'll learn today that **Minor**
13 **Minor**, a little girl who turned ten
14 years old yesterday.

15 The evidence in this case will show
16 that from the time **Minor** was about five
17 years old, the Defendant, Ontario Makins, her
18 sister's boyfriend was chronically sexually
19 abusing her.

20 Now, at the end of the trial, the
21 Judge is going to tell you about the law in
22 the case. The Judge is always right as to
23 the law. So if I tell you something
24 different, you should go with what the Judge
25 says. But I want to tell you a little bit

1 about the law and the elements or parts of
2 the crime so that you can listen for certain
3 elements or parts of the crime(s) as we go
4 through the testimony in the next couple of
5 days.

6 First, criminal sexual conduct with
7 a minor first degree. Criminal sexual
8 conduct with a minor first degree is a sexual
9 battery on a child under the age of eleven.
10 A sexual battery is a penetration into the
11 victim's body. That can be penile, vaginal,
12 digital or oral penetration. In this case,
13 the evidence will show that the Defendant
14 would put his penis in **Minor** mouth.

15 Second, the defendant has been
16 charged with a lewd act. To be guilty of a
17 lewd act, a defendant must commit a lewd act
18 on a child under the age of sixteen. And
19 what is a lewd act? It sounds like kind of a
20 strange word. A lewd act is touch, rubbing,
21 or fondling the victim's body in a way that
22 is meant to arouse either the defendant or
23 the child.

24 Third, the defendant has been
25 charged with criminal sexual conduct with a

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1 minor third degree. You probably didn't
2 notice yesterday but as the Judge read the
3 indictment, the elements or parts of the
4 crime for criminal sexual conduct with a
5 minor third degree are the same as lewd act.
6 That can get a little confusing.

7 Why are the crimes named something
8 different? The South Carolina Legislature
9 changed the name of the crime in June 2012.
10 So the kind of touching, rubbing and fondling
11 of a child that I've described that happened
12 prior to the law change in June of 2012 is
13 charged as a lewd act. Touching, rubbing or
14 fondling of a child that occurred after June
15 2012 when the law changed is charged as
16 criminal sexual conduct with a minor third
17 degree.

18 As I mentioned, the evidence in this
19 case will show that the defendant was
20 chronically sexually abusing **Minor**. He
21 would put his hand on her vagina. He would
22 put her hand on his penis. This touching
23 went on from before the law changed and
24 after. Hence, we have the two separate
25 crimes with the two different names.

1 Now, that we've talked a little bit
2 about the three crimes that we're going to be
3 talking about in the next couple of days, I
4 want to tell you what you can expect from the
5 State's case. You're going to hear from
6 several witnesses. You'll hear from **Minor**
7 herself. You're going to hear from her mom.
8 You'll hear from her second grade teacher,
9 who's the first person **Minor** told about
10 this abuse. You're going to hear how the
11 disclosure came about. You're going to hear
12 from the investigator, Investigator Picone
13 from the sheriff's department and from
14 **Minor** therapist.

15 What I want you to keep in mind as
16 you listen to the evidence is that child
17 sexual abuse is a secret crime. It is not
18 done out in the open or with an accomplice.
19 It is done behind closed doors. There's not
20 a video like in a DUI. There aren't
21 fingerprints like in a burglary. There
22 aren't even visible injuries that you
23 sometimes have in a traditional assault.

24 Because it is done behind closed
25 doors, **Minor** is the eyewitness to the crime

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1 in this case and what she tells you is of the
2 utmost importance. She is going to have to
3 give you the details of what happened. Keep
4 in mind as you listen to **Minor** tell her
5 story that she has just turned ten. And when
6 she first came forward with these
7 allegations, she was eight years old.
8 Children often remember and recount things
9 different than adults may. And she is going
10 to have to come into this courtroom, a very
11 adult setting, and talk about very difficult
12 things.

13 Some of what you're going to hear
14 her talk about is graphic. Some of what
15 you'll hear me talk about afterwards in
16 closing arguments may be graphic. This is
17 not done to upset or offend you in any way
18 but because the State is required to prove
19 the elements of the crime in a certain way.

20 Again, the Judge will talk to you
21 about the elements of the crime at the end of
22 the trial. I'll also have a chance after the
23 end of the trial to come back, talk to you
24 about the case, the evidence and what it
25 means. Until then, I thank you for your

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1 time, for your patience and your
2 attention to this very important case.

3 THE COURT: Mr. Quinn.

4 MR. QUINN: May it please the
5 Court?

6 THE COURT: Yes, sir.

7 OPENING STATEMENT

8 BY MR. QUINN:

9 Ladies and gentlemen of the jury, I
10 want to start where the Judge started. He
11 has spoken with you a couple of times and
12 both times he's started with the presumption
13 of innocence. And as he's told you that's
14 just not words. It's not just a concept or
15 an idea that you can put aside. It is the
16 starting point, which is why the Judge began
17 with it in his discussions with you. In any
18 criminal case, it is that Mr. Makins, as he
19 sits with me, is innocent. Not 'not guilty',
20 not accused. He's innocent. There is no
21 evidence of guilt just because he's in a
22 courtroom.

23 This will be the first time -- as
24 the Judge said yesterday, he hasn't heard the
25 evidence. I have access to the police

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1 reports I normally receive, but I've not seen
2 anything this witness is testifying until
3 this week. So this will be the first time
4 that Mr. Makins and I have had the
5 opportunity to see these witnesses. We're
6 going to learn the evidence just as you do.
7 That's one reason the opening statement's got
8 to be pretty brief. There's not much to talk
9 to you about. You haven't seen the evidence
10 yet. I haven't, the Judge hasn't, so we're
11 all going to get the opportunity in this next
12 day or two to see it together.

13 But the presumption of innocence
14 will be your starting point in all
15 discussions in this case, just as it is for
16 the Judge when he's discussing it with you.

17 That means if there comes a point
18 where you're not sure whether something
19 happened. If one person says one thing and
20 one person says another and there's nothing
21 really that balances one higher than the
22 other -- and we'll talk about what the
23 standard is. And it's much higher than that
24 -- that the presumption of innocence says in
25 other words, any benefit of the doubt goes to

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1 Mr. Makins. If, at the end of this case
2 you're not sure of what happened, if there's
3 pause, if there's lots of questions, then Mr.
4 Makins gets the benefit of that doubt.
5 That's what the presumption of innocence
6 means. And it is your starting point. In
7 every discussion, every point, you start with
8 the idea that Mr. Makins is innocent. Then
9 'Did the State convince us by evidence beyond
10 a reasonable doubt of his guilt?'

11 Let's talk about evidence. Proof is
12 what evidence is. There's different kinds of
13 evidence. There are things you can touch.
14 There are witnesses that are not involved.
15 The testimony of a witness may be sufficient
16 for you to decide. If that testimony is
17 clear and convincing and convinces you beyond
18 a reasonable doubt, the testimony of a
19 witness may be enough. In this case from
20 what the prosecutor has told you so far, this
21 was a chronic -- no, this was occurring
22 chronically, I believe was her word. So
23 we'll wait and see what witnesses there are,
24 what people may have suspected that something
25 was going on or actually found something was

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1 going on or collected evidence about
2 something going on. We'll find out what
3 proof there is, if any.

4 What medical testimony there is; if
5 they had this child evaluated; if they had
6 the child examined by a doctor and what
7 evidence there might have been of any sexual
8 assault or any injury to this child.

9 And that proof, this evidence, has
10 to convince you beyond a reasonable doubt of
11 the defendant's guilt. The judge is going to
12 define reasonable doubt for you. A
13 reasonable doubt is a doubt which causes you
14 to hesitate to act. A question that makes
15 you go, 'wait a second.' 'Wait a second.
16 That doesn't make a lot of sense. I've got a
17 problem with that.' That's what a reasonable
18 doubt is. It's a doubt for which you can
19 assign a reason. But a doubt that makes you
20 say, 'Wait a minute. That's not right.
21 There's something wrong here.' That is a
22 reasonable doubt, a doubt which causes you to
23 hesitate to act.

24 Mr. Makins does not have the burden
25 of proving his innocence, which in some cases

1 would be impossible. The State has to prove
2 him guilty and prove him guilty beyond a
3 reasonable doubt.

4 The testimony's going to take a
5 couple of days, ending tomorrow, I suspect.
6 I don't know if we'll finish tomorrow or
7 Thursday but at the end of the case I'll get
8 an opportunity to speak with you again. I'll
9 get an opportunity to speak with you again.
10 And unfortunately, lawyers fall in love with
11 the sound of their own voices. So the next
12 time when I have the evidence to discuss,
13 you'll get real tired of me. But for opening
14 statement, you get a break because there's
15 not to tell you except, I'd ask for your
16 consideration, listen to all of the
17 testimony, including that brought out on
18 cross-examination. You'll see what questions
19 that I have as we go and I'll discuss those
20 with you again at the end.

21 I think that if you listen to the
22 entirety of the case, listen to what the
23 proof is, not the fluff, not what we're
24 adding, not what we're trying to make the
25 package look pretty when the present inside

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1 is really crummy, you're going to find
2 that there's not evidence of proof beyond a
3 reasonable doubt that Mr. Makins is guilty of
4 anything, and your verdict should be Not
5 Guilty on all of these charges.

6 THE COURT: All right. Ms.
7 Patterson, you may call your first witness,
8 ma'am.

9 SOLICITOR PATTERSON: Thank you,
10 Your Honor. The State would call Mary Jill
11 Kroske.

12 (WITNESS TAKES STAND)

13 MARY JILL KROSKE, having been duly
14 sworn to tell the truth, and nothing but the
15 truth, testified as follows:

16 DIRECT EXAMINATION

17 BY SOLICITOR PATTERSON:

18 Q. Ms. Kroske, where do you work?

19 A. Mitchell Road Elementary.

20 Q. And what do you do at Mitchell Road?

21 A. I teach school.

22 Q. And how long have you been a
23 teacher?

24 A. About twelve years.

25 Q. And what did you do before you

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1 taught?

2 A. Well, I've been teaching about
3 thirty years, so that's all I've done.

4 Q. And do you know the victim in this
5 case, Minor [REDACTED]?

6 A. I do.

7 Q. How do you know her?

8 A. I taught her in second grade.

9 Q. And what year did you teach her
10 second grade?

11 A. The 2014-'15 school year.

12 Q. So that was two years ago?

13 A. Yes.

14 Q. And during that 2014-2015 school
15 year, did the Julie Valentine Center come to
16 talk to your class?

17 A. They did.

18 Q. And what did they come to talk
19 about?

20 A. They came to talk to the children
21 about inappropriate touching.

22 Q. And were you at school on March 20th
23 of 2015?

24 A. I was.

25 Q. Was Minor [REDACTED] in your class that day?

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1 A. Yes, she was.

2 Q. And what happened that day with
3 Minor ?

4 A. That day as we went out to recess,
5 most of the children had went on ahead and
6 Minor kind of -- they ran out to the
7 playground all together. Minor kind of
8 hung back to talk to me a little bit. And
9 she said, 'Ms. Kroske, do you remember those
10 ladies that came to us?' I said yes. She
11 said, 'well that happened to me.'

12 Q. And so Minor disclosed that day
13 that she had been sexually abused?

14 A. Yes.

15 MR. QUINN: Object to the leading
16 nature of the question.

17 THE COURT: Overruled.

18 DIRECT EXAMINATION CONTINUED

19 BY SOLICITOR PATTERSON:

20 Q. And did she tell you when and where
21 she had been abused?

22 A. No.

23 Q. After Minor disclosed sexual abuse
24 to you, what did you do?

25 A. I went to the guidance counselor to

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1 report it.

2 Q. Okay. And is that standard
3 protocol?

4 A. Yes.

5 Q. What is standard protocol if you had
6 a student come forward with a disclosure such
7 as this?

8 A. Depending on how and what they're
9 disclosing, the guidance counselor kind of
10 tells us the protocol as to whether we call
11 law enforcement or whether we call DSS, or
12 who we report it to. And so he kind of
13 guides us through the process.

14 Q. And are you trained to deal with
15 these types of situations?

16 A. Every year at the beginning of the
17 school year we get training from the guidance
18 counselor as to how to do that.

19 Q. Okay. Are you a mandatory reporter
20 in these instances?

21 A. Yes.

22 Q. After **Minor** disclosed, how did she
23 act?

24 A. I would not say that she acted very
25 different. She's a serious kid sometimes

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1 anyway, so it would be hard to say that
2 she acted differently afterwards.

3 Q. And you mentioned that you have been
4 trained to deal with these situations. In
5 these situations are you supposed to, as part
6 of your training, follow up with additional
7 questions to ---

8 A. No. We're not supposed to ask any
9 questions at all.

10 Q. Thank you.

11 SOLICITOR PATTERSON: No further
12 questions for this witness, Judge.

13 CROSS-EXAMINATION

14 BY MR. QUINN:

15 Q. Did you ask any other questions?

16 A. I did not.

17 Q. Did she volunteer any more informa-
18 tion, other than what you've testified to the
19 jury about?

20 A. No, she did not.

21 Q. And this, I believe you said was
22 March 20th; is that right?

23 A. It was in March, yes.

24 Q. And I assume this was a normal
25 school year for you. So you began teaching

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1 second grade that year in August/September?

2 A. Uh-huh.

3 Q. Do you remember when; was it August
4 or September?

5 A. I would guess around the 22nd,
6 somewhere around in there.

7 Q. Of which month?

8 A. Oh, that we started school?

9 Q. Yes, ma'am?

10 A. August, yes.

11 Q. So had you known **Minor** before she
12 started in your class?

13 A. Yes.

14 Q. Just as a student at the elementary
15 school?

16 A. Uh-huh.

17 Q. I assume that she had gone to first
18 grade at the elementary school also?

19 A. Kindergarten, as well. Uh-huh,
20 (affirmative nod).

21 Q. Okay. And you were there those two
22 years?

23 A. Uh-huh, (affirmative nod).

24 Q. And had you ever spoken with her
25 before then, just about anything?

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1 A. No.

2 Q. Okay. And so she was in your class
3 from August 'til March; is that right?

4 A. Uh-huh.

5 Q. And had she approached you about
6 this issue before ---

7 A. No.

8 Q. --- at any time?

9 A. No.

10 Q. And did you have anything else to do
11 with this case after that?

12 A. No.

13 Q. All right. Thank you, Ms. Kroske.

14 MR. QUINN: I don't have any other
15 questions.

16 THE COURT: Anything?

17 SOLICITOR PATTERSON: Your Honor,
18 just one follow-up question.

19 REDIRECT EXAMINATION

20 BY SOLICITOR PATTERSON:

21 Q. Ms. Kroske, do you remember how soon
22 prior to **Minor** disclosure the Julie
23 Valentine Center came to speak to your class?

24 A. I'm thinking about two weeks before
25 that.

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1

Q. Thank you.

2

SOLICITOR PATTERSON: Judge,

3

nothing ---

4

THE COURT: Okay. Any recross,

5

Mr. Quinn?

6

MR. QUINN: No. Thank you.

7

THE COURT: Thank you, Ms. Kroske.

8

I appreciate it.

9

(WITNESS STEPS DOWN)

10

SOLICITOR PATTERSON: Your Honor,

11

we would ask that this witness be released

12

from her subpoena.

13

THE COURT: Any objections to

14

that, Mr. Quinn?

15

MR. QUINN: No, Your Honor. And I

16

don't have objection to any witness being

17

released once they've testified.

18

THE COURT: Okay. Good enough.

19

All right. And unless there's some exception

20

any witness who testifies may be excused.

21

SOLICITOR PATTERSON: Your Honor,

22

at this time, the State would call Jenna

23

Toney to the stand.

24

(WITNESS TAKES STAND)

25

JENNA TONEY, having been duly sworn

1 to tell the truth, and nothing but the truth,
2 testified as follows:

3 DIRECT EXAMINATION

4 BY SOLICITOR PATTERSON:

5 Q. Ms. Toney, where are you currently
6 employed?

7 A. The Julie Valentine Center.

8 Q. And how long have you been with the
9 Julie Valentine Center?

10 A. Three years in January.

11 Q. And can you tell the jury what the
12 Julie Valentine Center is?

13 A. We are a Greenville sexual assault
14 and child abuse recovery center.

15 Q. And what is your job title at the
16 Julie Valentine Center?

17 A. Education specialist.

18 Q. And what exactly does that mean?

19 A. My primary job is to go all over
20 Greenville County schools and I talk to kids
21 about personal safety. And specifically, we
22 teach kids how to stay safe if anyone ever
23 has given them a secret unsafe touch or what
24 they can do if anybody ever does.

25 Q. And can you tell us a little bit

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1 about your education and background?

2 A. Sure. I went to North Greenville
3 University from 2010 to 2012. And I have a
4 degree in interdisciplinary studies, that's
5 English, History and Political Science.

6 Q. And you mentioned you've been with
7 Julie Valentine since 2014. Have you been an
8 education specialist since then?

9 A. Yes. 2013.

10 Q. Excuse me. 2013?

11 A. Uh-huh.

12 Q. And as part of being an education
13 specialist, you mentioned you go into the
14 schools?

15 A. Uh-huh.

16 Q. How, exactly -- what is your role
17 when you go into those schools? What do you
18 do for them?

19 A. So whenever I go into the schools, I
20 go into primarily second-grade classrooms,
21 but I also provide fourth grade and fifth-
22 grade classrooms. And we teach kids about
23 personal safety.

24 We start out with "stranger danger"
25 scenarios.

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1 We transition into tricky people. Tricky
2 people can be strangers or they can be people
3 that we know and trust. Those are people who
4 try to get kids to do things that are not
5 safe or things they're not normally going to
6 do.

7 And then we teach kids about child
8 molesters.

9 Q. And how often do you give these
10 programs?

11 A. I'm at multiple schools throughout
12 the week, so on a regular basis. I'm in a
13 different school just about every week during
14 the school year.

15 Q. And what's the purpose of the
16 presentations?

17 A. The purpose of the presentation is
18 to teach kids how to be safe. It's a
19 personal safety presentation.

20 Q. Did you give a program to students
21 at Mitchell Road Elementary on March 10th and
22 March 11th of 2015?

23 A. Yes, I did.

24 Q. And what grade did you give that
25 program to?

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1 A. Just second grade.

2 Q. And the program, how long does it
3 last?

4 A. About thirty to thirty-five minutes.
5 And it's a two-day presentation.

6 Q. So the thirty to thirty-five minutes
7 both days?

8 A. Yes, ma'am.

9 Q. I'm going to show you what has been
10 marked for State's demonstrative purposes as
11 Exhibit 3. Do you recognize that?

12 A. Yes.

13 Q. And how do you recognize it?

14 A. I put my PowerPoint presentation on
15 a CD.

16 Q. Okay. And how do you know it's your
17 PowerPoint presentation?

18 A. I dated it.

19 Q. Okay. And are your initials on the
20 CD?

21 A. Yes.

22 Q. And is this the presentation you
23 gave to the second grade class at Mitchell
24 Road Elementary on March 10th and 11th of 2015?

25 A. Yes, it is.

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1 SOLICITOR PATTERSON: Your Honor,
2 at this time I would ask permission to
3 publish this to the jury for a demonstrative
4 -- for Ms. Toney to be able to go through her
5 presentation. Defense counsel has seen it.

6 THE COURT: Okay. Any objections
7 to that Mr. Quinn?

8 MR. QUINN: No objection.

9 THE COURT: Okay. Without
10 objection you may publish. And you're just
11 asking it to be published as a demonstrative
12 tool, not admitted as evidence?

13 MR. QUINN: Correct, Your Honor.

14 THE COURT: Okay. Good enough.

15 (SO MARKED AS STATE'S EXHIBIT 3 FOR ID)

16 DIRECT EXAMINATION CONTINUED

17 BY SOLICITOR PATTERSON:

18 Q. And Ms. Toney, if you would briefly
19 go through the presentation and let me know
20 when you need me to click it over. And
21 summarize what presentation you gave to the
22 second grade class at Mitchell Road that day?

23 A. Oh, sure.

24 Q. (PowerPoint displaying).

25 A. So I begin by introducing myself and

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1 telling a little bit about the Julie
2 Valentine Center. I just tell them it's a
3 place where kids can go anytime they've been
4 in a tricky or dangerous situation.

5 My job specifically at the Julie
6 Valentine Center is to go all over Greenville
7 County schools and talk to kids about
8 personal safety.

9 I talk about personal safety as being
10 ways that we practice -- or personal safety
11 is practicing ways to keep ourselves safe.
12 And I tell them that 'today we're going to go
13 through some pretend, potentially dangerous
14 situations so that we can figure out the best
15 ways to stay safe.' So if you'd go to first
16 slide.

17 Q. (Displaying).

18 A. So the first situation is a stranger
19 danger situation. It's about being at a gas
20 station. We say that mom asked us to wait in
21 the car real quick while she goes and gets
22 her gas. But shortly after mom goes into the
23 store, a car pulls up next to mom's car and
24 there's someone in this car that we don't
25 know. So I ask them what that means. That

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1 means that person's a stranger. And then --
2 so then that stranger rolls down his window
3 or their window and says, 'hey, it's a lovely
4 evening out.' And whenever he does this, it
5 gives us a funny feeling in our tummies. We
6 call it the butterflies or the willies. It's
7 the nervous, uh-oh feeling we get sometimes.
8 And I ask them if they know what I'm talking
9 about and they say they do.

10 And then we say -- I say, you know, we
11 get this feeling because mom, dad and grandma
12 has told us not to, what? "Don't talk to
13 strangers." So we turn away from him because
14 we're not going to and he sees that. So he
15 gets out of his car and he starts to walk
16 towards the store. But then he changes his
17 mind and he starts to walk back towards mom's
18 car. So what can we do to stay safe in the
19 situation? So we go through -- they give me
20 a bunch of ideas on what they can do to stay
21 safe in this situation. But ultimately what
22 I tell them is they lock the doors, they roll
23 up the windows, and they honk the horn. Now,
24 we honk the horn to draw attention to
25 ourselves, let mom or dad know that we're in

1 trouble and we need help, even though they're
2 in the gas station. And it'll let other
3 adults know in the parking lot that we need
4 help.

5 And we say this part's really, really
6 important because we call this person a
7 tricky person. And tricky people don't want
8 other adults to know what they're trying to
9 do. So when you start to honk the horn and
10 draw attention to ourselves, it would scare
11 that tricky person away. So that's why we
12 draw attention to ourselves.

13 So then 'you did a really good job' with
14 that first one so I'm going to say go on to
15 the next situation.

16 Now, this next situation has to do with
17 us being at home. And as we get older, mom,
18 dad or grandma, whoever we stay with, they
19 may let us have a little bit more
20 responsibility. And today mom says she's
21 going to go down to a neighbor's house. And
22 this neighbor lives just two doors down from
23 us. So we ask if we could stay at home and
24 watch our favorite TV show. And it's light
25 out. So mom says okay. Whenever she leaves,

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1 she locks the door behind her.

2 After she's been gone for a few minutes,
3 we hear a knock at the door. And we look out
4 the window. We see there's a mailman stand-
5 ing there holding some packages. I ask them
6 how they should handle this situation. So we
7 go through ignoring the door, call mom or dad
8 if they have any questions. And if anybody's
9 ever at our house and they start to do
10 something they're not supposed to do, we
11 teach them to call 9-1-1.

12 Then the next slide.

13 Q. (Displaying)

14 A. Some of them will help me read this
15 word. It's kind of a hard word. Instinct.
16 And our instinct, what I teach them, is our
17 body's warning system. It lets us know
18 anytime we get into a tricky or dangerous
19 situation. I teach them it's kind of like an
20 alarm that goes off in our bodies if somebody
21 tries to do something unsafe or makes us feel
22 comfortable.

23 And I have them go back to the gas
24 station. I'll say 'hey, you guys remember
25 being at the gas station? Remember that

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1 feeling you got whenever that strange tried
2 to talk to us?' And they'll say yeah. 'What
3 did it feel like?' I want them to identify.
4 Feels like the butterfly feeling that nervous
5 uh-oh feeling in our tummies. And I'll say
6 'well, that's our instinct.' That's what our
7 instinct feels like sometimes.

8 So I'll say this next situation I want to
9 see if we can use our instinct. And raise
10 your hand if you see anything weird or
11 strange about this picture. And so they'll
12 point out there's a person in a car behind
13 them that's trying to get the little girl's
14 attention. And so I'll say 'yeah, that's
15 exactly what I wanted you to see. If you had
16 to tell me how you think this girl's feeling,
17 how do you think she's feeling? And they say
18 nervous or scared. And so I'll say let me
19 tell you about this picture. So this girl,
20 she's in her neighborhood. It's after school
21 and she's on the sidewalk just like she's
22 supposed to be and she's walking home from
23 her friend's house. And this man is trying
24 to get her attention. And he says to her,
25 'hey, kid, I know you don't know me but I

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1 promise I'm safe. I just moved in down the
2 street and I was hoping you could help me.
3 I'm giving a fifty dollar reward for anyone
4 helps me find my lost dog.' I made up all
5 these questions.

6 You can go to the next slide.

7 Q. (Displaying)

8 A. He lost his puppy. He's really
9 upset about it and he's hoping that she could
10 pass these around and help him find him. And
11 I ask them whether or not we should take the
12 posters? The puppy's really cute, so lot of
13 kids aren't really sure exactly how to handle
14 the situation. But ultimately, they say no.
15 And we'll say, 'why do you think we shouldn't
16 take the posters from the stranger?' And we
17 go through all these different scenarios.
18 And I'll say, 'well, you really can't know
19 whether a stranger is going to do something
20 tricky or unsafe. So that's why we don't
21 take the posters from him because we can't
22 know if a stranger's going to do something
23 good or bad. So we don't take the posters
24 from a stranger. Strangers really shouldn't
25 be asking kids for help anyway. They should

1 ask adults for help.' So then I teach them
2 we ignore the man and try to get away.

3 And while we're trying to get away from
4 him, you run to trusted adults. And while
5 we're trying to run to trusted adults, we
6 scream once again to draw attention to
7 ourselves.

8 And then I'll say 'goodness, we've been
9 talking a lot about strangers and tricky
10 people today.' And I want you to know tricky
11 people use three things to get kids to do
12 things that are not safe or things they would
13 not normally do.

14 And I'll say 'once again I need your help
15 with some words.' So I'll go ahead and say
16 what's this first word right here? "Bribes."
17 Bribes are things that tricky people will use
18 to get kids to do thing for them in exchange
19 for a reward. Rewards can be money, candy,
20 games, prizes or toys, things that kids like.

21 The next word is "tricks." Tricks can be
22 like bribes. It can be somebody saying 'hey,
23 kid, if you do what I'm asking you to do,
24 there's a reward in it for you.' And then
25 I'll say 'does the kid get the reward?' And

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1 I say no. So a trick is the same thing as a
2 lie. Many times a tricky a person tries to
3 lie to a kid.

4 And the last word is "threats." Now,
5 threats can make us feel kind of scared
6 sometimes. Threats are anything a tricky
7 person says 'if you don't do what I'm asking
8 you to do, there's going to be a terrible
9 price to pay. I'm going to hurt you or I'm
10 going to hurt someone or something you care
11 about. So you better do it or else.'

12 And I say that's exactly what tricky
13 people will use to get kids to do things that
14 are not safe or things they would not
15 normally do, bribes, tricks, and threats.

16 So then I say while I'm here today and
17 I'll be back again tomorrow to talk some more
18 about a certain type of tricky person, but I
19 want you to know that tricky person is called
20 a child molester. And those are people who
21 try to touch kids on the private parts of
22 their body. Or they'll try and get that kid
23 to touch them on their private parts and they
24 tell them to keep the touching a secret. And
25 I'll say, 'You guys are big kids now. You're

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1 not little kids anymore. You already know
2 the private parts of your body are covered by
3 your clothing and your bathing suits and no
4 one should ever touch a kid on the private
5 parts of their body, telling you to keep it a
6 secret because it's against the law. And
7 it's really unhealthy and unsafe for kids.'

8 So I'll say 'why do you think that person
9 tells the kid the touching is secret?' And
10 they'll say 'well, they don't want to get in
11 trouble.' And I'll say, 'well, what do you
12 think could happen to adults who get in
13 trouble -- and get in trouble if something's
14 against the law?' And they'll say 'well,
15 they could go to jail.' And I'll say, 'yeah,
16 that's right and child molesters do not want
17 to go to jail. They do not want to get in
18 trouble and they do not want other adults to
19 know when they're trying -- they tell that
20 kid to keep the touching a secret.'

21 So then I'll send them home with home-
22 work. I'll say I've got some homework for
23 you guys. Before I come back tomorrow, I
24 want you to go home tonight and think about
25 what a child molester might look like? What

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1 kind of hair do you think they have? What
2 kind of clothes do you think they'd wear and
3 you can draw me a picture and just tell me
4 about it tomorrow.

5 So then the next day we run through
6 everything that you've seen so far. We do a
7 little review on all of the stranger danger
8 situations. And then I asked them, just like
9 I went through a second ago, I'll ask them,
10 'okay, what did you guys come up with?' And
11 sometimes I'll get pictures and sometimes
12 they'll just describe a person to me and what
13 they think a child molester might look like.
14 Ninety percent of the time or, you know, most
15 of the time it's somebody who's wearing all
16 black clothing or camouflage and they jump
17 out of the bushes and grab kids. But
18 sometimes, you'll have kids to say 'oh, well,
19 they look like a normal person.' And I'll
20 say okay. "Maybe."

21 I say maybe to all of that and then I go
22 to this next part. You can show the next
23 picture.

24 Q. (Displaying).

25 A. So I'll say, 'So this person right

1 here is stretching and he's stretching
2 because he's on a track team and he runs
3 miles and miles and miles every single day.
4 He eats all his fruits, all his vegetables.
5 He's a really heathy guy. So now that you
6 know that about this person, raise your hand
7 if you think this person could be a child molester,
8 somebody who makes bad decisions about
9 touching kids on the private parts of their
10 body.' Then I'll ask them to put their hands
11 down.

12 'Raise your hand if you think this person
13 is probably not a child molester, someone who
14 does not make bad decisions about touching
15 kids on the private parts of their body.'

16 Then after they put their hands down I'll
17 say, 'Okay, I've got another picture to show
18 you. But this is one of a man who just lost
19 his job and he doesn't take very good care of
20 himself. He's got a really dirty room. He's
21 wearing really dirty clothes and he's even
22 smoking a cigarette.' So now that we know
23 about this person, raise your hand if you
24 think this person could be a child molester,
25 someone who makes bad decisions about

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1 touching kids on the private parts of their
2 body and tells them to keep a secret. And
3 I'll ask them to put their hand down.

4 And then I'll ask them to raise their
5 hand if they think this person is probably
6 not a child molester, someone who does not
7 make bad decisions about touching kids.

8 Now, the first picture whenever I ask
9 them to raise their hand if they think that
10 person is a child molester, you may get one
11 or two that'll raise their hand that they
12 think he is. But most of them will say no,
13 that person's not a child molester.

14 Whereas, most kids will raise their hand
15 to say this person definitely is a child
16 molester. You'll have a lot kids yell,
17 'gross' or 'yeah, that guy definitely is.'
18 And then -- if you'll go to the next slide.

19 Q. (Displaying).

20 A. So I'll say, 'So based on your
21 responses, what I'm hearing you guys say,
22 what I'm seeing you guys say is you think
23 that this person right here is more likely to
24 be a child molester than this person right
25 here.' And they'll say yeah, yeah, yeah.

1 And I'll say okay, well, I'm just curious why
2 do you guys think that? Why do you think
3 this person is more likely to be a child
4 molester than this person? So, of course,
5 most of the time the kids will point out he's
6 got a really dirty room. He's wearing really
7 dirty clothes. He smokes a cigarette. Every
8 time they state a response I say, 'okay, so
9 that means that he would make bad decisions
10 about touching kids? That means that he is a
11 bad person?' And they'll say yeah.

12 And then they'll point out 'well, he's
13 really, really healthy. He probably is a
14 nice person. He probably has a nice house.
15 He probably is a good person and he would not
16 make bad decisions about touching kids.'

17 So I say, 'Okay, I've got a few questions
18 for you guys. And just like we did a second
19 ago, if you agree with what I'm saying, raise
20 your hand. Nobody make any comments or
21 anything like that. Just let me see by show
22 of hands if you agree with what I'm saying.'

23 And I'll say, 'Okay, how many of you in
24 here have ever had a dirty room before?'
25 They all, for the most part, raise their

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1 hand. I say okay. Put your hands down.

2 How many of you have ever worn dirty
3 clothes, like when you play outside, play
4 sports?' Okay. Most of them raise their
5 hand for that.

6 And I'll say okay. 'Once again, I don't
7 want to hear any comments. But how many of
8 you know someone who smokes a cigarette by
9 show of hands?' So most of them raise their
10 hand for that.

11 I say, 'Okay, my point is boys and girls,
12 just because someone has a dirty room or
13 wears dirty clothes, that does not make them
14 a bad person, doesn't make them a tricky
15 person, doesn't make them a child molester.
16 Just because someone smokes them a cigarette
17 does not make them a bad person either.'

18 Now I'll say, 'I know you guys know, I
19 know that smoking cigarettes is not good for
20 us. It's not healthy. It's not good for our
21 bodies, but it does not make someone a child
22 molester.'

23 And then I'll ask them, 'Just because
24 someone is really healthy does that make them
25 a good person?' And they'll say no. And

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1 I'll say, you're right. The only way we can
2 know whether someone's a good person, a bad
3 person, a tricky person or even a child
4 molester is by their actions, by their
5 behavior and by the things that they do. By
6 using one two or three things to get kids to
7 do things that are not safe or things they
8 would not normally do.

9 I'll ask them what those three words are
10 again. And they'll say bribes, tricks and
11 threats. I'll say, 'Exactly. That's what
12 child molesters typically do to get kids to
13 keep secrets they're not supposed to keep and
14 get them to do things they're not supposed to
15 do.'

16 So I'll say, 'Do you guys want to know
17 what a child molester actually looks like?'
18 And they'll say yeah. I say they look like a
19 normal person. They have normal hair. They
20 wear normal clothes. They can be anybody.
21 They could be someone a kid knows and trust,
22 even somebody that loves and cares about.

23 So then I'll say okay. 'Now that you
24 guys know that, could a woman be a child
25 molester?' And they'll say yeah.

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1 'What about an older person?' Yeah.

2 'What about a teenager?' Yeah.

3 'What about someone a kid knows and
4 trusts like a neighbor?' Yeah.

5 'What about someone in a kids family,
6 whether an uncle or an auntie or a cousin?'
7 Yes.

8 And I'll say, 'Boys and girls, I've got a
9 really hard question for you. Could a mom or
10 a dad be a child molester?' And they'll say
11 yes.

12 And then I'll say, 'Okay I need you guys
13 -- I need all eyes on me because this part is
14 really, really important. I don't want there
15 to be any confusion. Because sometimes we
16 sick and mom, dad and the doctor, well they
17 do have to check us on the private parts of
18 our body to make sure that we are healthy and
19 make sure that we are safe. So as long as
20 mom, dad and the doctor, they are not telling
21 that kid to keep the touching a secret. And
22 they are not trying to get that kid to touch
23 something on their private parts, they're
24 probably not doing anything wrong. They're
25 just trying to make sure that you're healthy

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1 and make sure you're safe.'

2 Then I ask if they have any questions.
3 So before I leave them I want to make sure
4 that they have three easy rules that they can
5 use if anyone ever tries to do something
6 unsafe, tries to give them a secret, unsafe
7 touch or makes them feel uncomfortable or in
8 danger.

9 The first one is to say to that person --
10 I want them to know they have the right to
11 say no to that person, a strong and firm no.

12 The second rule is we try to get away
13 from that person. We do everything we can to
14 get away from them. And if we can't, we
15 scream and draw attention to ourselves. So
16 safety rule number two is try to get away.

17 I tell them the last rule is the most
18 important rule of all and that's to tell
19 someone. And I say, 'Each of you in here has
20 something that's called a support system. A
21 support system is made up of the people in
22 our lives who care about us the most. And I
23 tell them you can tell somebody in your
24 support system if anyone ever tries to give
25 you a secret unsafe touch before or tries to

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1 do something tricky or dangerous.' And I'll
2 say I want to know who are those people that
3 care about you the most. And, of course,
4 they'll identify family members. So first
5 they say, usually, mom and dad. And I'll say
6 okay, 'Awesome. Mom and dad care about you.
7 Mom, dad, grandma, grandpa, aunts and uncles,
8 brothers and sisters, cousins, absolutely,
9 you can tell your family.'

10 But I say, 'Who else besides family could
11 we tell?' Because I want to hear them
12 identify, especially if it is a caregiver or
13 somebody that is related to them, that they
14 have other people besides just their family
15 that they can tell. So I want to hear them
16 say teachers, school counselors, principals,
17 nurses, doctors. A lot of times they'll say
18 police officers. I say absolutely, you can
19 tell any of those people and they care a lot
20 about your safety too.

21 But then I say I've got a really hard
22 question for you guys. What do we do if we
23 tell someone in our support system about a
24 secret unsafe touch or a tricky or a
25 dangerous situation and they say 'No, I don't

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1 believe you. I don't think so and so would
2 do that to you. You're lying. Stop lying to
3 me. So what do you think we need to do then
4 to keep ourselves safe?' What I want to hear
5 them say is tell someone else. And we say
6 right. We keep telling it until someone
7 believes us because you guys deserve to be
8 safe.

9 And then I say I want you to know that it
10 is never ever under any circumstances is it
11 ever a kid's fault. Secrets or unsafe
12 touches always is always the child molester's
13 fault. It is always the adult's fault. It
14 is never ever the kid's fault. And I tell
15 them it's never too late to tell someone
16 about a secret unsafe touch. It doesn't
17 matter if it happened a week ago, a month ago
18 or even years ago. It's never too late to
19 tell someone because like I said, "you guys
20 deserve to be safe."

21 So that's a summation of my presentation.

22 Q. Okay. You use the word child
23 molester a lot ---

24 A. Uh-huh.

25 Q. --- as you were talking to the jury

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1 today. Do you actually use that word with
2 the children?

3 A. Yes, I do.

4 Q. And why is that?

5 A. I think it's really important that
6 we identify that person for what they are.
7 We identify child molesters as someone who
8 touches kids on their private parts of their
9 body.

10 Q. During your presentation do you ever
11 talk specifically about penises or vaginas?

12 A. No.

13 Q. Do you talk about digital
14 penetration or other different kinds of
15 genital touching?

16 A. No.

17 Q. Do you talk at all about oral sex?

18 A. No.

19 SOLICITOR PATTERSON: Your Honor,
20 if I may have just a moment.

21 THE COURT: Sure.

22 SOLICITOR PATTERSON: Judge, no
23 further questions from the State for this
24 witness.

25 THE COURT: Mr. Quinn?

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1

MR. QUINN: Just a few.

2

CROSS-EXAMINATION

3

BY MR. QUINN:

4

Q. Ms. Toney, do you remember teaching Ms. Kroske's class?

5

6

A. No, not specifically. I remember being at Mitchell Road but not specifically.

7

8

Q. Did you meet Minor while you were at Mitchell Road; do you know?

9

10

A. No.

11

Q. You were not approached by her during this presentation either day?

12

13

A. No.

14

Q. Do you identify yourself -- well, let me ask you this. Do you present by yourself or does somebody else help you?

15

16

17

A. I present by myself.

18

Q. Okay. Do you identify yourself as someone that they could report it to?

19

20

A. Absolutely. I don't typically offer that because I'm only there with them for two days. But if somebody, if a child were to say, 'Well, Ms. Toney, you're a safe person that we could tell.' I'll say 'absolutely but unfortunately, I'm only here today.'

21

22

23

24

25

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1 'You guys probably won't see me again', so I
2 make sure to tell them that 'there are people
3 you see every day that you could tell.'

4 Q. And do you teach them to report any
5 difficulties immediately?

6 A. I don't say any language like that,
7 no.

8 Q. Okay. Do you tell them to wait?

9 A. No.

10 Q. Okay. And is the whole point of
11 your presentation that they should tell
12 immediately or very quickly tell somebody
13 about these difficulties?

14 A. Not necessarily. I teach them if
15 anything ever happens to them, that they
16 could tell. I give them ways that they can
17 stay safe. I teach them even if they weren't
18 to follow any of those things, that it's
19 still not their fault if something bad
20 happens to them.

21 Q. But you teach them to blow the horn
22 if they're in the car?

23 A. Uh-huh.

24 Q. That would be an immediate response;
25 is that right?

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1 A. Sure.

2 Q. You teach them not to answer the
3 door and to call their parents if the postal
4 worker comes; right?

5 A. Uh-huh.

6 Q. So these are things you teach them
7 to immediately react to?

8 A. Sure.

9 MR. QUINN: I don't have any other
10 questions. Thank you.

11 THE COURT: Redirect, ma'am?

12 SOLICITOR PATTERSON: No redirect,
13 Your Honor.

14 THE COURT: Okay. Thank you,
15 ma'am. I appreciate your being here.

16 (WITNESS STEPS DOWN)

17 THE COURT: Yes, ma'am.

18 SOLICITOR PATTERSON: Your Honor,
19 the State would call Portia Easterling.

20 (WITNESS TAKES STAND)

21 PORTIA EASTERLING JOHNSON, having
22 been duly sworn to tell the truth, and
23 nothing but the truth, testified as follows:

24 DIRECT EXAMINATION

25 BY SOLICITOR PATTERSON:

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- 1 Q. Excuse me. I called you Ms.
2 Easterling, but Ms. Johnson.
3 A. That's fine.
4 Q. Do you know the victim in this case,
5 Minor [REDACTED] ?
6 A. Yes.
7 Q. How do you know her?
8 A. She's my daughter.
9 Q. And how old Minor [REDACTED] ?
10 A. Ten years old.
11 Q. And do you have other children?
12 A. I do. Three other children.
13 Q. And what are their names and how old
14 are they?
15 A. Tiffany Wilson, she is twenty-nine;
16 Toi Tisdale, she will be twenty next Monday.
17 Isis, which is eighteen, and Minor [REDACTED].
18 Q. You need, just need to speak up just
19 a little bit. I'm not sure if people ---
20 A. Okay.
21 Q. Thank you so much. And do any of
22 those children still live at home with you?
23 A. Two of them do.
24 Q. Which ones?
25 A. Isis and Minor [REDACTED].

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1 Q. And tell us a little bit about
2 yourself. Where do you work?

3 A. National Health Care on Boiling
4 Springs Road. I've been there twelve years
5 and, uh, I enjoy it.

6 Q. And do you live here in Greenville?

7 A. I live in Taylors.

8 Q. How long have you been in Taylors?

9 A. About five years now.

10 Q. And how long have you been in the
11 Greenville area?

12 A. Seventeen years.

13 Q. You mentioned that you have two
14 older children who no longer live at home.
15 Where do they live?

16 A. My oldest daughter Tiffany lives in
17 North Carolina. And right now we are not
18 sure where Toi stays.

19 Q. Prior to this, has Toi been in
20 Greenville?

21 A. Uh-huh. Yeah.

22 Q. Do you know the defendant in this
23 case?

24 A. I do.

25 Q. How do you know him?

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1 A. It's Toi's boyfriend, the father to
2 my grandchildren, my grandsons.

3 Q. And when did you first meet the
4 Defendant?

5 A. At least fifteen, sixteen years ago.

6 Q. So how long have he and Toi been
7 together?

8 A. Well, they were friends. Initially
9 went to school together. And later they
10 became boyfriend and girlfriend, maybe in
11 middle school.

12 Q. So have they been together since
13 middle school?

14 A. Yeah.

15 Q. And what was your relationship like
16 with the Defendant before Minor
17 disclosure?

18 A. I loved 'Tari. He was like a son to
19 me. I never called him anything other than
20 my son and my children's brother.

21 Q. You mentioned that they have been
22 together since middle school. Have you felt
23 that way about him since then?

24 A. When I met 'Tari, he was, you know,
25 a young boy. I didn't feel bad or anything

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1 about him. He was just a child, just a boy.
2 And as he got older, Toi would say to me that
3 I usually favored 'Tari's side a lot because
4 I cared so much for him. And I never had any
5 problems with 'Tari.

6 Q. Did he spend a lot of time with your
7 family?

8 A. He did.

9 Q. Well, what would that look like?

10 A. 'Tari would come into the house, you
11 know, sometimes and he -- as they got older
12 and he had children, he would drop the kids
13 off sometimes or Toi dropped them off.

14 Earlier on, 'Tari would come -- when Toi
15 was living with me, 'Tari would come over and
16 sometimes 'Tari stayed the night at my house.
17 Family dinners, he was there. He needed
18 something from me, he always got it. And
19 whenever he needed something or Toi needed
20 anything, I was always willing to give it to
21 them.

22 Q. You mentioned grandchildren, do Toi
23 and 'Tari have children?

24 A. Two boys.

25 Q. And those are your grandsons?

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1 A. (Affirmative nod).

2 Q. And how old are your grandsons?

3 A. Messiah's nine. And I think
4 Caesar's six now.

5 Q. And prior to these disclosures
6 coming out, were you all a close family?

7 A. Very close.

8 Q. How often during the week would you
9 see them?

10 A. Multiple days during the week.
11 Sometimes if one of them were working a hard
12 schedule, they would call schedule for the
13 other. Somebody would drop them off or I
14 would pick them up from their after-school
15 program where they lived. I mean, we were
16 always together. Either they were with me or
17 my girls were over there at Toi and 'Tari's
18 house, but they always stayed together.

19 Q. You mentioned you don't know where
20 they're living right now, but when Minor
21 told about the abuse, do you know where they
22 were living?

23 A. I believe they was staying on
24 Woodruff Road, because they -- they stayed on
25 Woodruff Road, then they moved to Mauldin and

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1 then they moved back to Woodruff Road, to the
2 same place. So I believe they were staying
3 on Woodruff Road.

4 Q. Do you know what county in South
5 Carolina that's in?

6 A. I believe it's Greenville County.
7 I'm not sure.

8 Q. Let's talk a little bit more about
9 the Defendant. At the time when these
10 disclosures came out, where was the Defendant
11 working?

12 A. I think 'Tari was working -- I
13 believe he was working Mitsubishi. I'm not
14 really sure where he was working because I'm
15 not sure if it was Mitsubishi or his other
16 job.

17 Q. That's fine. But he was working at
18 the time?

19 A. Uh-huh, (affirmative nod).

20 Q. And was Toi working at the time?

21 A. Toi always worked.

22 Q. And do you know what shifts they
23 would work? Were they always home at the
24 same time?

25 A. No, they weren't always home at the

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1 same time. Toi, she would work 7:00 p.m. to
2 7:00 a.m. sometimes. Sometimes she would
3 pick up extra hours. She might go in and not
4 work as many hours and -- she was always
5 working. They weren't always home at the
6 same time.

7 Q. And when Toi was working, who
8 usually kept their children?

9 A. 'Tari would keep them or they would
10 see if I could keep them. Toi sometimes
11 would call me and see if I could keep them or
12 'Tari would see if I could keep them. Or if
13 Isis and Minor would go over to the house,
14 they would stay at their house with Messiah
15 and Caesar.

16 Q. And you also mentioned that you
17 worked.

18 A Uh-huh, (affirmative nod).

19 Q. Were you a single mom for a part of
20 this time?

21 A. Uh-huh.

22 Q. And so who would keep the children
23 while you worked?

24 A. I work 7:00 to 3:00, 7:00 a.m. to
25 3:00 p.m. They usually were in school and

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1 then in the summertime when school was out,
2 it would be flexible. They would be a lot of
3 times at Toi's house or -- well, they would
4 come to my house. But a lot of times, you
5 know, they were over there because it was a
6 little more freedom at Toi's house.

7 Q. And did the Defendant end up baby-
8 sitting **Minor** at times?

9 A. Uh-huh.

10 Q. And how often would that occur,
11 would you say?

12 A. It wasn't really every three days.
13 It would be different times. Sometimes it
14 would only be him home. Other times it would
15 be just Toi at home. Sometimes, both of them
16 would be there. Sometimes, Isis would be
17 there with the boys and with **Minor**.

18 Q. How often would you say that
19 **Minor**, before the allegations of abuse came
20 out, was over at Toi's and the defendant's
21 house?

22 A. Out of seven days, they were at
23 least five or six days sometimes, four or
24 five days; different times. They were always
25 together.

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1 Q. Did **Minor** disclose to you that she
2 was sexually abused?

3 A. Not -- I wasn't the first one. When
4 it came out she did disclose it to me, but
5 once she had already told.

6 Q. Did she say when that abuse took
7 place?

8 A. You mean when it took place as if
9 she was there or at my house?

10 Q. No. Did she tell you when, as in
11 how old she was when it took place?

12 A. She did.

13 Q. And how old was she?

14 A. She told me she was five.

15 Q. And did she say how long it went on?

16 A. She said until now, when she told
17 me.

18 Q. And when did you find out about
19 these allegations?

20 A. When the school called.

21 Q. And do you remember what day or what
22 month that was?

23 A. I don't remember what day it was.
24 I remember the time of day it was. It was
25 close to the end of my workday. I was at

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1 work when they called me.

2 Q. And did they call the same day that
3 she told Ms. Kroske?

4 A. Yeah.

5 Q. Did she say where the abuse took
6 place?

7 A. She did.

8 Q. And where did she say?

9 A. Well, she told me it took place at
10 Toi's house. And, uh, -- it was when 'Tari
11 had stayed with me for a while and she told
12 me that it also took place at my house.

13 Q. And tell the jury a little bit about
14 -- you mentioned that you were at work and
15 got a phone call. Tell me a little bit about
16 how the disclosure came about and what you
17 did after you got that call?

18 A. The school called me and told me
19 that I needed to come to the school and -- it
20 was Ms. Kroske that called me. She told me
21 that **Minor** had told her that she had been
22 abused by her brother. And that she had to
23 call the police and I told her, I said
24 'that's fine, Ms. Kroske.' I went to the
25 school.

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1 On my way to the school, I called Toi and
2 I told Toi. I knew that this couldn't have
3 happened because the only brother that she
4 had was 'Tari. And we were close.

5 So I got to the school. Once I got to
6 the school, I was sitting there in the
7 waiting room. And it was a couple of people
8 in there that started talking to me. It was
9 an officer and -- it was another person,
10 another office, a lady officer, I believe.

11 They had to get Minor from class. And
12 when Minor came up upstairs, I looked at
13 Minor and I told Minor I said "tell the
14 truth." And she told me, she said "I am."
15 That was it.

16 Q. I want to talk a little bit about
17 Minor and what was going on during this
18 time period when she's between five and
19 eight. Was Minor showing any changes or
20 any particular symptoms during this time
21 period?

22 A. She was acting out a lot. I would
23 go in her room sometimes at night just to
24 check on her when she was in bed. And she
25 would have her hand in her panties and I

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1 really didn't think much of it. I just
2 thought, you know, that she discovered that
3 she was a little girl. And she was just
4 acting out at school and she just -- she just
5 seemed like a busy little girl to me. But
6 she was wetting the bed a lot and when it --
7 it would be times that she and her sister
8 Isis would have to go over to Toi's house and
9 she was adamant about not going sometimes.
10 And I would tell her, you know, 'mama got to
11 work or', you know, 'Toi's got to work and
12 you guys got to stay.' And she just --
13 sometimes she just really didn't want to go.
14 And I -- well, I just -- I didn't think much
15 of it.

16 Q. What about after she told about the
17 abuse?

18 A. Well, after she told about the abuse
19 I took her to Julie Valentine and they talked
20 to her and questioned her about it. I wanted
21 her to feel free to tell me what she wanted
22 me to know, what she wanted me to know. She
23 went to counseling and she's still in
24 counseling. She also really wasn't sleeping
25 at night. She didn't want to sleep in her

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1 bed alone: She wouldn't let me close my
2 bedroom door. She was scared for her bedroom
3 door to be closed. She just, she just wanted
4 to get in bed with me every night and sleep
5 with me. She went to counseling and she had
6 to take medicine to sleep. And she had to
7 take medicine daily, Cymbacol (phonetic).
8 She wasn't focusing in school. She was
9 misbehaving quite a bit in school.

10 Q. I want to talk a little bit about --
11 tell me about what's happened in your family
12 since the abuse disclosures came out?

13 MR. QUINN: Your Honor, I'm going
14 to object. This is not relevant.

15 THE COURT: Rephrase the question,
16 please ma'am.

17 DIRECT EXAMINATION CONTINUED

18 BY SOLICITOR PATTERSON:

19 Q. Have you seen the Defendant since
20 Minor disclosed before today?

21 MR. QUINN: Judge, I still don't
22 know how it's relevant.

23 THE COURT: Okay. All right.
24 I'll overrule.

25 I'll let you have some latitude in

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1 that regard.

2 You can restate your objection to
3 the specific questions on the same basis.

4 But you can ask that question.

5 SOLICITOR PATTERSON: Thank you,
6 Your Honor.

7 DIRECT EXAMINATION CONTINUED

8 BY SOLICITOR PATTERSON:

9 Q. Have you seen the Defendant before
10 today since **Minor** made these disclosures?

11 A. I saw him one day. Well, I actually
12 saw him twice. The one day he didn't see me,
13 we were passing in cars. But I saw him one
14 day in a store on Woodruff Road. But that
15 was it.

16 Q. Have you had any interaction? Have
17 you had family dinners? Have you all gotten
18 together since this happened?

19 A. (Negative gesture).

20 Q. Have you seen your grandchildren?

21 A. Well, I saw them. Toi came by my
22 house and, uh, -- when she came by my house,
23 she was trying to ask me what ---

24 MR. QUINN: Objection. That's
25 hearsay.

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1 THE COURT: Sustained.

2 WITNESS: Yes, I saw Toi.

3 DIRECT EXAMINATION CONTINUED

4 BY SOLICITOR PATTERSON:

5 Q. You have seen Toi?

6 A. Yes.

7 Q. Are you seeing her on a regular
8 basis?

9 A. No.

10 Q. Are you seeing your grandsons on a
11 regular basis?

12 A. No.

13 Q. Has this been difficult for you and
14 your family?

15 A. Yes.

16 MR. QUINN: Objection. I don't
17 know how this is relevant. I mean, I
18 appreciate that it's emotional but it's got
19 nothing to do with whether he is innocent or
20 guilty.

21 THE COURT: I understand. I'll
22 let you ask that one question. I overrule as
23 to that question. But I agree you're getting
24 -- don't go too far afield in that part, but
25 you can ask that question.

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1 SOLICITOR PATTERSON: Thank you.

2 DIRECT EXAMINATION CONTINUED

3 BY SOLICITOR PATTERSON:

4 Q. Do you need me to repeat the
5 question?

6 A. (Affirmative response).

7 Q. Has this been a difficult time for
8 you and your family?

9 A. Yes.

10 SOLICITOR PATTERSON: Your Honor,
11 if I may have just a moment?

12 THE COURT: Sure.

13 SOLICITOR PATTERSON: Judge,
14 nothing further from this witness.

15 THE COURT: Mr. Quinn.

16 CROSS-EXAMINATION

17 BY MR. QUINN:

18 Q. Ms. Johnson, tell me if you would,
19 please, about where Toi and 'Tari lived on
20 Woodruff Road. Was it an apartment or
21 trailer?

22 A. Yes.

23 Q. I'm sorry.

24 A. An apartment.

25 Q. It was an apartment?

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1 A. Yes.

2 Q. Were there apartments on either side
3 it or above or below it or can you tell me
4 how it was set up?

5 A. They lived on the third floor of the
6 building. And I mean, I'm sure somebody was
7 in front or behind.

8 Q. And do you know how many floors the
9 building was? Was the third floor the top
10 floor?

11 A. Uh-huh. The third was the top floor
12 and that was all the floors in the building.

13 Q. And how big an apartment was it; two
14 bedrooms, three bedrooms?

15 A. Their apartment was a two-bedroom.
16 Yeah.

17 Q. And were there other kids in the
18 neighborhood?

19 A. Yes. It was a community run
20 complex.

21 Q. And were the windows very often open
22 in the summer?

23 A. Toi's windows?

24 Q. Yes, ma'am?

25 A. No, not usually.

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1 Q. Were the apartments air-conditioned?

2 A. Yeah.

3 Q. Okay. So did the kids play outside
4 together?

5 A. My children and Toi's children?

6 Q. Yes, ma'am.

7 A. Sometimes, but **Minor** was in a car
8 accident and so she had a cast on one leg in
9 the summertime. So she couldn't go outside
10 sometimes after she had her leg broken.
11 Before her leg was broken, she was outside to
12 play with them.

13 Q. Okay. And after her leg was broken?

14 A. She couldn't go out.

15 Q. So did the kids come in and play
16 with her?

17 A. Yeah. Sometimes, uh-huh.

18 Q. And so did the kids play together
19 like kids normally would?

20 A. They did.

21 Q. All right. And do you remember how
22 old **Minor** was when her leg was broken?

23 A. That was. I think **Minor** was
24 seven. I don't remember. Wait a minute.
25 I'm really not sure exactly. **Minor** was in

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1 third grade. It was the end of second grade.
2 I think it was the end of second grade, the
3 summer. But she had, -- yeah.

4 Q. And she broke her leg in the summer?

5 A. It was right at the end of school.

6 Q. At the end of second grade?

7 A. Uh-huh.

8 Q. Did any of these other children ever
9 say anything about a relationship between
10 **Minor** and 'Tari?

11 A. Did Toi's children say anything ---

12 SOLICITOR PATTERSON: Objection,
13 Judge. Hearsay.

14 THE COURT: I don't think he asked
15 what they said but if they said anything.
16 I'll allow that question but not the
17 substance of what they said.

18 CROSS-EXAMINATION CONTINUED

19 BY MR. QUINN:

20 Q. You can answer the question if ---

21 A. Did Toi's children say anything
22 about ---

23 Q. Or any of the children they played
24 with?

25 A. Not to me.

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1 Q. Okay. As I understand your
2 testimony they also lived in Mauldin for some
3 time?

4 A. Uh-huh.

5 Q. And in Mauldin, can you tell me was
6 it an apartment, a house, a trailer?

7 A. It was an apartment. They lived on
8 the ground floor.

9 Q. And were there apartments above
10 them?

11 A. I believe so, yeah.

12 Q. And were there other children in the
13 neighborhood?

14 A. I'm sure.

15 Q. And did all of the children play
16 together sometimes?

17 A. When I was there, I can't recall
18 them being out with the kids in the
19 neighborhood playing when they stayed in
20 Mauldin.

21 Q. And how long did they live in
22 Mauldin?

23 A. I believe it was a year.

24 Q. And the other kids, did you ever
25 meet any of the other kids from the

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1 neighborhood inside the apartment?

2 A. No.

3 Q. Okay. Did you ever see any other
4 children?

5 A. Maybe coming in. Where they stayed
6 was at the end. So it wasn't a lot of kids
7 at the end, but at the -- it was a couple
8 kids at the swimming pool, when they were at
9 the pool but not like at where the apartment
10 was.

11 Q. And when your girls -- you said your
12 girls would go to Toi and 'Tari's sometime?

13 A. Uh-huh.

14 Q. Do you mean Isis and Minor, your
15 two youngest?

16 A. Yes.

17 Q. Okay. And would they generally go
18 together?

19 A. Yes.

20 Q. And do they play together and hang
21 together or -- your girls?

22 A. Do my children hang together?

23 Q. Yes, ma'am. Do they tend to stay
24 together?

25 A. They live together, so -- yeah,

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1 some.

2 Q. Yeah. But I mean when they're out
3 playing. Some siblings get along and you run
4 with your brother and some others don't want
5 to have anything to do with them.

6 A. There's a nine-year age difference
7 so many -- they play to a point, card games
8 maybe. An occasional board game, but they
9 don't play jump rope or anything like that
10 together.

11 Q. And would Isis be allowed to leave
12 or did she have to stay around Toi and
13 'Tari's apartment?

14 A. Yes. She didn't drive so she
15 stayed.

16 Q. Okay. And Isis is nine years older
17 than Minor

18 A. She is.

19 Q. So she was a teenager?

20 A. Yes.

21 Q. She was fourteen, I guess, when
22 Billie was five?

23 A. Okay.

24 Q. And at one point you said that the
25 girls had a little more freedom at Toi's

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1 house. Can you tell me what you meant by
2 that?

3 A. I don't allow for them to watch TV
4 so much. And just come and drink as much
5 soda or juice that they want to. Toi would
6 let them pretty much have whatever they want
7 when they wanted it.

8 Q. And you and Minor have talked
9 about her allegation; isn't that right?

10 A. Yes. Well, Minor told me what she
11 felt as though she wanted me to know. I
12 never questioned her about anything.

13 MR. QUINN: May we approach?

14 THE COURT: Sure.

15 (OFF RECORD BENCH CONFERENCE)

16 CROSS-EXAMINATION CONTINUED

17 BY MR. QUINN:

18 Q. Ms. Johnson, I don't have any other
19 questions right now. Thank you.

20 THE COURT: Any redirect Ms.
21 Patterson?

22 SOLICITOR PATTERSON: Just briefly,
23 Your Honor.

24 REDIRECT EXAMINATION

25 BY MS. PATTERSON:

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1 Q. Ms. Johnson ---

2 A. Uh-huh.

3 Q. --- you mentioned that **Minor** broke
4 her leg; is that correct?

5 A. Yeah.

6 Q. With a car accident?

7 A. Right.

8 Q. And you said -- remind me when you
9 think that occurred?

10 A. I'm not sure of the exact time when
11 she broke her leg. They were out of school
12 that summer.

13 Q. Let me ask it a different way then.

14 A. Uh-huh.

15 Q. Did she break her leg before or
16 after she disclosed the abuse?

17 A. She broke her leg before she
18 disclosed.

19 Q. And so she broke her leg at the end
20 of the school year prior to her disclosing?

21 MR. QUINN: I object to the
22 leading nature of the question.

23 THE COURT: Okay. I overrule.

24 REDIRECT EXAMINATION CONTINUED

25 BY SOLICITOR PATTERSON:

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1 A. Did she -- ask the question again?

2 Q. You said that she disclosed after
3 she broke her leg. So did she break her leg
4 the school year before at the end of the
5 year?

6 A. I'm not sure. When she broke her
7 leg was during the summer. And when she did
8 disclose it was after the leg was broken.
9 I'm not quite following you.

10 Q. What I'm asking is did she disclose
11 the abuse after she broke her leg?

12 A. Yeah.

13 Q. And was she in second grade when she
14 disclosed the abuse?

15 A. Was she in second grade when she
16 disclosed? She was in second grade when she
17 disclosed it, yeah. She was in Ms. Kroske's
18 class, yeah.

19 Q. Did Isis and **Minor** always go to
20 Toi's and the defendant's house together?

21 A. Not every time.

22 Q. And you mentioned at the end of your
23 testimony with Mr. Quinn that the children
24 did not have as much access to TV and phone
25 at your house. Did you limit their access to

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1 TV and to your phone and to the internet?

2 A. It wasn't really the internet. It
3 was just snacks and the TV.

4 SOLICITOR PATTERSON: Nothing
5 further, Your Honor.

6 THE COURT: Recross?

7 MR. QUINN: No, Your Honor. Thank
8 you.

9 THE COURT: All right. Thank you,
10 ma'am. Please step down. I appreciate it.

11 (WITNESS STEPS DOWN)

12 THE COURT: All right. Ladies and
13 gentlemen, anybody need to take a break?
14 We've done openings and we've done three
15 witnesses. Everybody okay? Is there anybody
16 who wants to take a break. Don't be shy.
17 (No response). Okay. Call your next
18 witness.

19 SOLICITOR PATTERSON: Your Honor,
20 may we approach for just a moment?

21 THE COURT: Sure.

22 (OFF RECORD BENCH CONFERENCE)

23 THE COURT: All right. They say
24 we are going to take a break. The next
25 witness may be a long witness. And so the

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Testimony of Minor [REDACTED] - Direct Examination

1 prosecution has advised me that this is
2 probably a good time to take a break, because
3 when we come back in we may be here for a
4 while. So let's take a break. Return to
5 your jury room. Please don't discuss the
6 case.

7 (JURY OUT @ 2:35 P.M.)

8 THE COURT: Okay. When y'all have
9 her over here and you're ready to go, just
10 let me know, okay?

11 SOLICITOR PATTERSON: Thank you.

12 (BRIEF RECESS)

13 (DEFENDANT PRESENT)

14 THE COURT: Bring the jury in,
15 please.

16 (JURY IN @ 2:50 P.M.)

17 THE COURT: Solicitor, you may
18 call your next witness.

19 SOLICITOR PATTERSON: The State
20 calls Minor [REDACTED].

21 (WITNESS TAKES STAND)

22 [REDACTED] Minor [REDACTED], having been duly
23 sworn to tell the truth, and nothing but the
24 truth, testified as follows:

25 DIRECT EXAMINATION

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Testimony of **Minor** - Direct Examination

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- 1 BY SOLICITOR PATTERSON:
- 2 Q. **Minor**, how old are you?
- 3 A. Ten.
- 4 Q. And when's your birthday?
- 5 A. **Minor**.
- 6 Q. So did you just turn ten?
- 7 A. Yesterday.
- 8 Q. And what grade are you in?
- 9 A. Fourth.
- 10 Q. Where do you go to school?
- 11 A. Mitchell Road Elementary.
- 12 Q. Who's your teacher at school?
- 13 A. Ms. McGaha.
- 14 Q. Tell me a little bit about your
- 15 family. Who do you live with?
- 16 A. My mom, Isis and Terrance.
- 17 Q. And who's Terrance?
- 18 A. My mother's husband.
- 19 Q. And where do you live right now?
- 20 A. I don't know.
- 21 Q. Do you live in Greenville?
- 22 A. Yes.
- 23 Q. Do you live close to your school?
- 24 A. I'm not sure.
- 25 Q. Who do you live with? I've already

1 asked you that. I'm sorry. Tell me a little
2 bit about -- do you have pets in the family?

3 A. (Affirmative nod).

4 Q. What kind of pets do you have?

5 A. I have two German Sheppards and a
6 Pit Bull and a German Sheppard puppy.

7 Q. And you said you lived with Isis.

8 Who's Isis?

9 A. My sister.

10 Q. And do you have other sisters
11 besides Isis?

12 A. (Affirmative nod).

13 Q. Who are they?

14 A. Tiffany and Toi.

15 Q. And do you know where they live?

16 A. Toi live -- I mean, Tiffany lives in
17 North Carolina. I don't know where Toi
18 lives.

19 Q. Do you know where Toi used to live?

20 A. Same place.

21 Q. Same place as what?

22 A. I don't remember where she used to
23 live at. Every time she moves, she usually
24 going to a different place in that apartment.

25 Q. In that apartment. So do you know

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Testimony of [Minor] - Direct Examination

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- 1 what city she lived in?
- 2 A. (Negative gesture).
- 3 Q. Did she live close to you?
- 4 A. Kind of.
- 5 Q. Did you drive to her house?
- 6 A. Yeah.
- 7 Q. How long would it take you drive; do
- 8 you know?
- 9 A. About five minutes.
- 10 Q. Did you go over to Toi's house very
- 11 often?
- 12 A. Yes.
- 13 Q. And who did Toi live with?
- 14 A. 'Tari and Messiah and Caesar.
- 15 Q. And who are they?
- 16 A. Messiah and Caesar are my nephews.
- 17 Toi is my sister and 'Tari is her boyfriend.
- 18 Q. And did you spend a lot of time at
- 19 Toi and 'Tari's house?
- 20 A. Yeah.
- 21 Q. How often would you go over there?
- 22 A. Like the weekends.
- 23 Q. Would you go every weekend?
- 24 A. I don't think so.
- 25 Q. Did you ever go during the week?

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Testimony of [redacted] - Direct Examination

1 A. Not that I'm aware of.

2 Q. And who was usually there when you
3 went to Toi and 'Tari's house?

4 A. Usually, it's Toi. But half the
5 time I go over there, my Isis would come
6 because there was no one there to take care
7 of Messiah and Caesar.

8 Q. Who else would be there when you
9 went over there?

10 A. 'Tari sometimes, and Toi.

11 Q. And were there times when 'Tari was
12 there and Toi wasn't there?

13 A. Yes.

14 Q. And where was Toi during those
15 times?

16 A. The hospital.

17 Q. And why was she at the hospital?

18 A. She works there.

19 Q. Did you have fun times when you went
20 over to Toi and Tari's house?

21 A. Yes.

22 Q. What would you do?

23 A. I played the Xbox with Messiah and
24 Caesar.

25 Q. And would you do other things with

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1 Messiah and Caesar?

2 A. We had a water fight in the bath-
3 room.

4 Q. When you were over there, did 'Tari
5 ever do things to you that you didn't like?

6 A. Yes.

7 Q. Can you tell me the first time he
8 did something to you that you didn't like and
9 what it was?

10 A. Like when, when was the first time?

11 Q. Can you tell me when and then what
12 happened?

13 A. I do not remember when.

14 Q. Do you remember how old you were?

15 A. No.

16 Q. Can you tell me what happened?

17 A. I can't remember.

18 Q. You said that there were times 'Tari
19 did things you didn't like. Can you tell me
20 about one of the times 'Tari did that?

21 A. Yes.

22 Q. Can you tell me about it?

23 A. No.

24 Q. Do you need a second? Maybe we'll
25 get some water?

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Testimony of [Minor] - Direct Examination

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(WITNESS PROVIDED WATER)

DIRECT EXAMINATION CONTINUED

BY SOLICITOR PATTERSON:

Q. [Minor], you said one time that you
and Messiah and Caesar had a water fight?

A. Yes.

Q. Tell me what happened that day?

A. We were bored and we went in the
room, so we went into the bathroom, filled
the cups up the water and threw it on each
other.

Q. What happened after that?

A. I got in trouble.

Q. Who did you get in trouble with?

A. 'Tari.

Q. And what happened when you got in
trouble?

A. He called us all, one by one, into
the living room.

Q. And what happened then?

A. When I went in there, he wanted me
to suck his penis.

Q. And when that happened, [Minor],
were your clothes on or off?

A. On.

- 1 Q. And can you tell me, did he say
2 anything when that happened?
- 3 A. I can't remember.
- 4 Q. Is that the only time that that
5 happened with 'Tari?
- 6 A. Like, what do you mean?
- 7 Q. You just said that 'Tari made you
8 suck his penis. Is that the only time that
9 that happened?
- 10 A. No.
- 11 Q. Did it happen other times?
- 12 A. Yes.
- 13 Q. Can you tell me about another time?
- 14 A. Yes. We were on the bed and Messiah
15 and Caesar were playing the Xbox, and he put
16 a blanket over me.
- 17 Q. Tell me what happened then?
- 18 A. He wanted me to go under the blanket
19 and suck his penis.
- 20 Q. How many times did 'Tari make you
21 suck his penis?
- 22 A. More than I can remember.
- 23 Q. Would it happen every time you went
24 over to Toi and 'Tari's house?
- 25 A. No.

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1 Q. Did it happen most times you went
2 over there?

3 A. Yes.

4 Q. Do you remember the last time it
5 happened with 'Tari?

6 A. No.

7 Q. Did 'Tari touch you in other places?

8 A. Yes.

9 Q. Tell me about that. Where would he
10 touch you?

11 A. My butt.

12 Q. Where else?

13 A. That's it.

14 SOLICITOR PATTERSON: Your Honor,
15 may I approach?

16 THE COURT: Sure.

17 DIRECT EXAMINATION CONTINUED

18 BY SOLICITOR PATTERSON:

19 Q. [Minor], I'm going to show you a
20 drawing. Can you circle on there for me
21 where a butt is?

22 A. (Witness complies)

23 Q. Can you circle on there for me, is
24 there anywhere else 'Tari would touch you?

25 A. Not that I remember.

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1 SOLICITOR PATTERSON: Your Honor,
2 may I publish this to the jury.

3 MR. QUINN: If I could see it?

4 SOLICITOR PATTERSON: Excuse me.
5 I'm sorry -- (tenders to Mr. Quinn).

6 MR. QUINN: (Upon review), I have
7 no objection.

8 THE COURT: All right. You may.

9 COURT REPORTER: That's State's
10 Exhibit Number 5 for identification.

11 (SO ENTERED AS STATE'S EXHIBIT 5)

12 SOLICITOR PATTERSON: Your Honor,
13 if I may in my technologically un-savvy way
14 simply publish this to the jury by passing it
15 ---

16 THE COURT: You may.

17 (STATE'S EXHIBIT 5 CIRCULATED AMONG JURY)

18 DIRECT EXAMINATION CONTINUED

19 BY MS. PATTERSON:

20 Q. **Minor** did Tari ever make you
21 touch him on his body?

22 A. Yes.

23 Q. Where did he make you touch him?

24 A. His penis.

25 Q. And what did he make you touch him

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Testimony of Minor - Direct Examination

1 with?

2 A. My hand.

3 Q. Did 'Tari ever show you anything on
4 his phone or on the TV?

5 A. Yes.

6 Q. And what was that?

7 A. He showed this like website on his
8 phone.

9 Q. And what was the website?

10 A. I don't know the name of it.

11 Q. Can you tell me what you saw on it?

12 A. It was like how to suck a penis.

13 Q. I'm going to go back to the water
14 fight that you talked about earlier. Do you
15 know what time of year that was?

16 A. No.

17 Q. Was it hot outside?

18 A. Yes.

19 Q. And how old were you when the water
20 fight happened?

21 A. I don't know.

22 Q. Was there a time that you broke your
23 leg?

24 A. Yes.

25 Q. Do you remember how old you were

1 when that happened?

2 A. No.

3 Q. How old are you now?

4 A. Ten.

5 Q. And how old were you when you told
6 Ms. Kroske what was happening with 'Tari?

7 A. Eight or nine.

8 Q. And did the water fight happen
9 before that?

10 A. Yes.

11 Q. Were you older than five?

12 A. Yes.

13 Q. Did 'Tari ever give you anything?

14 A. A dollar.

15 Q. A dollar. And when did he give you
16 the dollar?

17 A. What do you mean?

18 Q. When did he give it to you? Did he
19 give it to you after something happened?

20 A. Yes.

21 Q. Did he say anything when he gave you
22 the dollar?

23 A. Not that I remember.

24 Q. Did he ever give you anything else?

25 A. No.

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Testimony of [Minor] - Direct Examination

1 Q. Did he give you more money?

2 A. I think that was only once.

3 Q. And did that happen right after he
4 touched you or you touched him?

5 A. Yes.

6 Q. When this was going on, where were
7 Messiah and Caesar?

8 A. Outside.

9 Q. Were they playing outside?

10 A. Yes.

11 Q. And why weren't you playing outside
12 with them?

13 A. Because I did not like the heat.

14 Q. So sometimes when this was happening
15 it was summer?

16 A. Yes.

17 Q. What about other times. You said
18 this happened more than you can count. Do
19 you know where they were other times?

20 A. Other times?

21 Q. Do you know -- you said that this
22 happened with 'Tari more times than you can
23 count. Do you know where Messiah and Caesar
24 were? Were they always outside?

25 A. No.

- 1 Q. Where were they other times?
- 2 A. Inside.
- 3 Q. And what were they doing?
- 4 A. Playing the game.
- 5 Q. And were you in another room?
- 6 A. No.
- 7 Q. Were you in the same room?
- 8 A. Yes.
- 9 Q. Would 'Tari touch you when you were
- 10 in the same room with them?
- 11 A. Yes.
- 12 Q. And where was Toi when this was
- 13 happening?
- 14 A. The hospital.
- 15 Q. And how about Isis?
- 16 A. 'Tari was there and we went to
- 17 babysit.
- 18 Q. Did you like 'Tari?
- 19 A. Yes.
- 20 Q. How come?
- 21 A. I don't know.
- 22 Q. Have you known him for a long time?
- 23 A. Yes.
- 24 Q. How long have you known him?
- 25 A. I don't remember.

1 Q. Do you ever remember a time when he
2 wasn't there?

3 A. Yes. When Toi was there and he was
4 at work.

5 Q. I want to talk a little bit about
6 your nephews. How old are they?

7 A. Six and nine.

8 Q. And is 'Tari their dad?

9 A. Yes.

10 Q. Did you play a lot with your
11 nephews?

12 A. Yes.

13 Q. Were you all good friends?

14 A. We all are good friends.

15 Q. And did you usually want to go over
16 to Toi and 'Tari's house?

17 A. No.

18 Q. How come?

19 A. Well, I would but when I'd get there
20 I'd call my mom and say I want to go home.

21 Q. Why did you want to go home?

22 A. I don't know. I just kept wanting
23 to go home every time I got there.

24 Q. Did you sometimes have good times at
25 Toi and 'Tari's house?

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Testimony of [Minor] - Direct Examination

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1

A. Yes.

2

Q. [Minor], did you ever tell anyone
when that was going on?

3

4

A. Ms. Kroske.

5

Q. Did you tell anyone -- how long --
do you know how long it had been going on
before you told Ms. Kroske?

6

7

8

A. No.

9

Q. Had it been going on for a long
time?

10

11

A. (No verbal response).

12

Q. What made you tell Ms. Kroske?

13

A. When we were at the thing at school.

14

Q. And why did you tell Ms. Kroske?

15

A. Because 'Tari is a child molester.

16

Q. And did you know that word before
the presentation at school?

17

18

A. No.

19

Q. Did you know that what was going on
was wrong?

20

21

A. No. Not until the presentation.

22

Q. [Minor], have you seen 'Tari since
you told about what was happening?

23

24

A. No.

25

Q. Have you seen your nephews since you

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Testimony of **Minor** - Direct Examination

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- 1 told about what was happening?
- 2 A. Yes.
- 3 Q. And how often have you seen them?
- 4 A. It was like a couple weeks and then
- 5 I couldn't anymore.
- 6 Q. You couldn't anymore. And how do
- 7 you feel about not being able to see them?
- 8 A. I'm sad.
- 9 Q. Do you miss them?
- 10 A. Yes.
- 11 Q. Do you see Toi as often as you used
- 12 to?
- 13 A. No.
- 14 Q. Do you miss Toi?
- 15 A. Yes.
- 16 Q. Now, **Minor**, is this sometimes hard
- 17 for you to talk about?
- 18 A. Yes.
- 19 Q. Are there times when it is -- there
- 20 is another way that you are able to talk
- 21 about it or express yourself?
- 22 A. I don't know.
- 23 Q. Let me ask you a different way.
- 24 Have you been going to therapy?
- 25 A. Yes.

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Testimony of [Minor] - Direct Examination

1 Q. And who do you see in therapy?

2 A. Kristin.

3 Q. And do you talk to Kristin about
4 what's happened?

5 A. No.

6 Q. Have you ever talked to Kristin
7 about what's happened?

8 A. Yes.

9 Q. When it's hard for you to talk to
10 Kristin about what has happened, do you ever
11 draw what happened?

12 A. Yes.

13 Q. [Minor] I'm going to show you
14 what's been marked for identification
15 purposes only as State's Exhibit 4.

16 A. Yeah. This is something -- (pause).

17 Q. Do you know what it is?

18 A. A picture.

19 Q. And who drew the picture?

20 A. Me.

21 Q. And what's it a picture of?

22 A. 'Tari and me.

23 Q. And what is he doing?

24 A. Making me suck his penis.

25 Q. Thank you. [Minor] one thing you

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Testimony of Minor [REDACTED] - Direct Examination

1 just said is that 'Tari is a child molester?

2 A. Yes.

3 Q. Do you know what a child molester
4 means?

5 A. A person who touches kids.

6 Q. And where do they touch kids?

7 A. In their private parts.

8 Q. And has 'Tari touched you in your
9 private parts?

10 A. Yeah, my butt.

11 Q. And has 'Tari had you touch his
12 private parts?

13 A. Yes.

14 Q. [REDACTED], I just have a few more
15 questions. You said that you broke your leg?

16 A. Yes.

17 Q. How did you break your leg?

18 A. I got hit by a car riding my bike.

19 Q. And do you remember when that was,
20 what time of year it was?

21 A. No.

22 Q. Was it hot outside?

23 A. Yes. Oh, it was summer.

24 Q. Do you remember how old you were
25 that summer?

1 A. No.

2 Q. Did anything happen with 'Tari while
3 you had a cast on your leg?

4 A. I'm not sure.

5 SOLICITOR PATTERSON: Your Honor,
6 if I may have just a moment.

7 THE COURT: Sure.

8 SOLICITOR PATTERSON: Your Honor,
9 nothing further from the State.

10 THE COURT: All right. Mr. Quinn.

11 CROSS-EXAMINATION

12 BY MR. QUINN:

13 Q. [Minor], did you have any other
14 friends in the neighborhood around Toi and
15 'Tari's house?

16 A. Yes, but I can't remember his name.

17 Q. Okay. And it was just one, a
18 fellow?

19 A. Yes.

20 Q. Did you play with him occasionally?

21 A. I played with him when Messiah and
22 Caesar was playing with him.

23 Q. Okay. And so sometimes it was more
24 than just Messiah and Caesar that played with
25 you?

- 1 A. Yes.
- 2 Q. Okay. And did Isis, your sister, go
3 with you sometimes?
- 4 A. Sometimes.
- 5 Q. Okay. And ---
- 6 A. Wait. Do you mean like to his
7 house?
- 8 Q. Yes?
- 9 A. No.
- 10 Q. So Isis never went to Toi and
11 'Tari's house?
- 12 A. Oh, yes. I thought you were talking
13 about the dude's house.
- 14 Q. You're right. I'm sorry. Did Isis
15 go with you sometime to Toi and 'Tari's
16 house?
- 17 A. Yes.
- 18 Q. Most times or half the time or can
19 you give me an idea how often?
- 20 A. About half the time.
- 21 Q. And the other half the time, was she
22 left at home by herself?
- 23 A. Yeah. No, because my mom was there.
24 The car was there.
- 25 Q. So sometimes you'd go to Toi and

1 'Tari's even though your mom was at the
2 house?

3 A. Yes.

4 Q. And your mom and Isis would stay
5 home and you'd go to Toi and 'Tari's?

6 A. Yes, because my mom would be busy.
7 She has to do stuff.

8 Q. And she'd take Isis to do the stuff
9 but not take you?

10 A. Yes.

11 Q. And you said that you were shown a
12 website. And I believe you say that 'he
13 showed us the website.' Did he show it to
14 other people?

15 A. No.

16 Q. Okay. Just to you?

17 A. (Affirmative nod).

18 Q. Okay. And did you tell the police
19 about that?

20 A. I don't think so.

21 Q. Okay. When you talked to Ms.
22 Kroske, then the next people that came to
23 talk to you were the police; isn't that
24 right?

25 A. Yes.

1 Q. And then your mom. If you need to
2 take a drink, go ahead.

3 A. (Drinks water).

4 Q. Okay. And did you tell the police
5 about what had happened to you?

6 A. Like what do you mean?

7 Q. I mean did the police come and talk
8 with you at the school. Did they come talk
9 to you at school?

10 A. Yes.

11 Q. And did they say 'we need you to
12 tell us about what's happened to you' or
13 words to that effect?

14 A. Not that way. They didn't say it
15 like that.

16 Q. Okay. Did they try to get you to
17 just tell them what you ---

18 A. Yes.

19 Q. --- what had happened to you?

20 A. Yes.

21 Q. Okay. And did you? Did you tell
22 the police about it?

23 A. Yes.

24 Q. And you say you think it was a man
25 and a woman police officer. So two of them

1 were there; right?

2 A. Yes.

3 Q. Okay. And did you tell them the
4 truth?

5 A. Yes.

6 Q. Okay. Tell them everything you knew
7 about it? Did they keep asking you just tell
8 us about it?

9 A. No.

10 Q. Did you tell them everything you
11 knew about it?

12 A. No.

13 Q. Okay. And so there were things you
14 didn't tell the police?

15 A. Yes.

16 Q. Okay. And did you tell the police
17 that you didn't report this sooner because
18 'Tari had threatened you?

19 A. No.

20 Q. Who did you tell that to?

21 A. It might have been the police. I'm
22 not sure.

23 Q. Did you tell your therapist about
24 that?

25 A. I think so.

1 Q. Did you tell the woman who talked to
2 you at the Julie Valentine Center about that?

3 A. No.

4 Q. So you didn't tell her that 'Tari
5 had threatened you and that's why you didn't
6 say anything?

7 A. Yes.

8 Q. And that, in fact, is not true;
9 isn't that right?

10 A. Right.

11 Q. You have since then told the
12 prosecutors and your mom that you were never
13 threatened by 'Tari not to say anything;
14 isn't that right?

15 A. Right.

16 Q. So do you agree, [REDACTED], that
17 that's a lie?

18 A. Yes.

19 Q. Okay. And have you changed your
20 description of what happened since you
21 initially told the police that first day?

22 A. No.

23 Q. So what you told the police the
24 first day is everything that happened to you?

25 A. I didn't tell them everything.

1 Q. That's not what I'm asking you?

2 A. Oh, -- no.

3 Q. Haven't you changed or added to, if
4 you want to say it that way ---

5 A. Yes.

6 Q. --- what you told the police
7 originally? The story has grown; isn't that
8 right?

9 A. Yes.

10 Q. And you told Ms. Kroske in March of
11 2015. You were in second grade, I think. Is
12 that right?

13 A. Yes.

14 Q. So that was a year and a half ago,
15 longer than that?

16 A. I don't know.

17 Q. Okay. You went through all of third
18 grade; right?

19 A. I'm in the fourth grade.

20 Q. So you did all of third grade.
21 That's one year; is that right?

22 A. Yeah.

23 Q. And now you're in fourth grade.
24 You've been in fourth grade several months
25 now; is that right?

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A. Yeah.

Q. So does a year and a half sound fair, that it's been a year and a half?

A. I guess.

Q. Okay. And isn't it true that only about two months ago that you told the prosecutors and your mom that it was a lie about 'Tari threatening you?

A. Yes.

Q. So you kept that secret for a long time; isn't that right?

A. Right.

Q. And you told other people during that time that that was the truth, even though it wasn't; isn't that right?

A. Right.

MR. QUINN: I don't have any other questions. Thank you.

THE COURT: Ms. Patterson on redirect, ma'am?

SOLICITOR PATTERSON: Yes, Your Honor, just briefly.

REDIRECT EXAMINATION

BY SOLICITOR PATTERSON:

Q. **Minor**, why did you make up the

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Testimony of **Minor** - Redirect Examination

1 part about 'Tari threatening you and your
2 mom?

3 A. Because I didn't want to tell
4 anyone.

5 Q. You didn't want to tell anyone what?

6 A. About the things he's done to me.

7 Q. And so why did you say that he
8 threatened you?

9 A. (No verbal response).

10 Q. Were you afraid to tell?

11 A. Yes.

12 MR. QUINN: Object to the leading
13 nature of the question.

14 THE COURT: All right. I'll
15 sustain that.

16 REDIRECT EXAMINATION CONTINUED

17 BY SOLICITOR PATTERSON:

18 Q. And **Minor** -- so you said that that
19 part about him threatening you is not true.
20 And you said that you didn't want to tell.
21 Is the part about 'Tari making you suck his
22 penis a lie?

23 A. No.

24 Q. Is the part about 'Tari touching
25 your butt a lie?

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Testimony of [Minor] - Recross Examination

1 A. No.

2 Q. Is the part about 'Tari making you
3 touch his penis a lie?

4 A. No.

5 Q. Is the part about him showing you
6 websites about sucking penises on his phone a
7 lie?

8 A. No.

9 Q. [Minor], do you see 'Tari in the
10 courtroom today?

11 A. Yes.

12 Q. Can you point to him?

13 A. (Witness points to area of defense
14 table).

15 SOLICITOR PATTERSON: Judge, we'd
16 ask that the record reflect that the witness
17 pointed to the Defendant.

18 THE COURT: All right.

19 SOLICITOR PATTERSON: Nothing
20 further from the State.

21 THE COURT: Any recross, sir?

22 MR. QUINN: Just one.

23 RECCROSS-EXAMINATION

24 BY MR. QUINN:

25 Q. [Minor], if I had asked you last

1 year if 'Tari had threatened you, would you
2 have told me that was the truth?

3 A. Yes.

4 MR. QUINN: Thank you, Your Honor.

5 THE COURT: All right. Minor,

6 thank you. I appreciate your being here.

7 You can step down.

8 (WITNESS STEPS DOWN)

9 THE COURT: Okay. You may call
10 your next witness.

11 SOLICITOR PATTERSON: Thank you,
12 Your Honor. The State calls Investigator
13 David Picone.

14 (WITNESS TAKES STAND)

15 DAVID PICONE, having been duly
16 sworn to tell the truth, and nothing but the
17 truth, testified as follows:

18 DIRECT EXAMINATION

19 BY SOLICITOR PATTERSON:

20 Q. Investigator Picone, where do you
21 work?

22 A. Greenville County Sheriff's Office.

23 Q. And what do you do for the sheriff's
24 office?

25 A. Currently, I am assigned to the

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Testimony of David Picone - Direct Examination

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1 violent crime unit, but previously I was with
2 the crimes against children unit.

3 Q. And how long have you been with the
4 sheriff's office?

5 A. It'll be ten years in February.

6 Q. And tell us a little bit about what
7 you've done during that entire period?

8 A. I graduated from college. Once I
9 got out of college I was hired by Greenville
10 County.

11 I went to the Academy for nine weeks.
12 From the academy, I was assigned to uniform
13 patrol. I was on uniform patrol for five
14 years roughly.

15 From there, I went to property crimes as
16 an investigator.

17 And after property crimes for two years,
18 I went to crimes against children. While at
19 crimes against children, I was promoted to a
20 master deputy; which to be promoted to master
21 deputy, you have to take an examination, oral
22 examination board and -- they choose people
23 to do that.

24 And then after ten years, well, roughly
25 ten years in crimes against children, I am

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Testimony of David Picone - Direct Examination

1 now assigned to violent crimes where I
2 investigate robberies, gang violence and
3 homicide.

4 Q. And were you on duty on March 20th of
5 2015?

6 A. I was.

7 Q. And what unit were you in at that
8 time?

9 A. I was in the crimes against children
10 unit.

11 Q. And in that capacity as an
12 investigator in crimes against children, did
13 you respond to a call at Mitchell Road
14 Elementary?

15 A. I did.

16 Q. What time was that call?

17 A. Maybe a little bit after noon, mid-
18 afternoon, a little bit after lunchtime.

19 Q. And what type of call was it?

20 A. I received a phone call from uniform
21 patrol -- I don't remember if I was on call
22 this day or how I ended up getting the phone
23 call, but somebody called me and advised me
24 that they were out at Mitchell Road
25 Elementary and that there was a juvenile at

1 school that had disclosed some sexual abuse
2 and asked me to respond to help with the
3 investigation.

4 Q. And was it typical for you to get
5 that kind of a call?

6 A. Yeah. Since we're -- obviously we
7 work Monday through Friday. So usually if
8 something happens at a school, a lot of times
9 they'll call us since we handle these kind of
10 cases most of the time. So that way, I can
11 just start the investigation from the
12 beginning.

13 Q. And so at that point, you went out
14 to the school?

15 A. I did.

16 Q. And who did you meet first on scene?

17 A. When I first arrived, I met with the
18 uniform patrol deputy that was out there and
19 his sergeant. They informed me that the
20 victim was in another room. They had not
21 talked to her yet.

22 From there, I went and talked with the
23 mother of the victim, as well as her teacher.
24 Her teacher disclosed that the victim,
25 **Minor**, had disclosed she'd been, you know,

1 sexually assaulted.

2 So then I informed the mother that I
3 would need to talk with her. And as her
4 mother stated earlier, she wasn't quite sure
5 about this. Wasn't quite sure it happened.
6 And then when her daughter came in there,
7 once she said she did make that statement and
8 now she believed her.

9 Q. Were you the primary investigator on
10 the case?

11 A. I was.

12 Q. And did you remain the primary
13 investigator throughout the investigation?

14 A. I did.

15 Q. Did you meet with the victim in this
16 case, Minor [REDACTED]

17 A. Yes.

18 Q. And who was with you when you met
19 with her?

20 A. I brought a victim advocate with me
21 on this day, Dianna Tapp. Sometimes we bring
22 them a female, or male, and it makes the
23 children sometimes feel a little more at-
24 ease; especially since in this case she's a
25 female.

1 Q. And did the -- tell me a little bit
2 about when you got in the room with Minor
3 What her demeanor was like?

4 A. I believe she was playing with some
5 Legos. I introduced myself to her. I always
6 introduce myself to children as, you know,
7 Dave, try to keep it informal with them so
8 they feel a little more comfortable.

9 At first I explained to her that I needed
10 her to tell me what she had told her teacher.
11 I didn't want to get in too much detail and I
12 never do starting off, because children we're
13 going to send to the Julie Valentine Center
14 for a forensic interview. So we kind of just
15 get a baseline of what's going on so we can
16 document this and give them something to
17 interview her about.

18 So at first she said she didn't want to
19 talk about it. I kind of joked with her a
20 little bit, made her feel a little more
21 comfortable, built some rapport, talked about
22 family life, who she lives with. And then, I
23 think the advocate that was with me actually
24 stood up and, you know, we told her that she
25 had told somebody that she had been touched

1 and she pointed at her breast, her vagina and
2 her butt. And she asked 'did he touch you
3 here, touch you here or touch you here'? And
4 when she pointed to the vagina, she said
5 "There."

6 Q. So the victim did disclose sexual
7 abuse to you?

8 A. Yes, at that time she did. I didn't
9 get into any more details at that time. Like
10 I said, that was the baseline. I knew that
11 there was allegations being made. So for the
12 investigation to go further on, I documented
13 that and then I would send that information
14 to the Julie Valentine Center.

15 Q. Did the victim tell you when this
16 abuse occurred?

17 A. Yes. She told me that it started
18 when she was five and at that time had ended
19 when she was eight. And she said that the
20 reason why she told this was there was a
21 class the Julie Valentine Center had put on
22 and that's what made her come forward.

23 Q. And what did you do after the victim
24 reported the abuse to you?

25 A. I took a statement from the teacher

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1 to document what she told the teacher. And
2 then explained to the mom the next step,
3 process; that we would be referring her to
4 the Julie Valentine Center for a forensic
5 interview.

6 I asked the mother not to really question
7 her about this because I wanted her, when she
8 came into the forensic interview to be able
9 to tell what happened and not so much as
10 coached or having told anything to say or not
11 to say. And the mother said she would do
12 that.

13 From there, I documented the case and
14 sent the referral in to the Julie Valentine
15 Center, I believe the next morning.

16 Q. And at some point during the
17 investigation did you learn where **Minor**
18 said the abuse occurs?

19 A. Yes. Throughout the investigation
20 -- like I said first I document this,
21 interviewed some witnesses in the case and
22 was able to identify ---

23 MR. QUINN: Objection. I'm going
24 to object that it's hearsay since I don't
25 know who it came from.

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1 THE COURT: Okay.

2 MR. QUINN: If he's going to say
3 what somebody told him. I don't know who
4 that person is.

5 THE COURT: All right. I don't
6 know that there's been any hearsay entered
7 yet. But I should give a general admonition
8 against hearsay. I haven't heard it yet.
9 But rephrase the question and let's start it
10 over, okay? Being sensitive to that issue.

11 DIRECT EXAMINATION CONTINUED

12 BY SOLICITOR PATTERSON:

13 Q. Did Minor [REDACTED] tell you where this
14 abuse took place?

15 A. Yes.

16 Q. And where did it take place?

17 A. Toi's house.

18 Q. And were you able to determine where
19 Toi's house was?

20 A. I was.

21 Q. And is that house in Greenville
22 County?

23 A. Yes. It's at [REDACTED],
24 which is Rocky Creek Apartments.

25 Q. And you mentioned you took a

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1 statement from the teacher and then sent it
2 to the Julie Valentine Center. Can you tell
3 the jury a little bit about the typical
4 process when you are investigating one of
5 these cases?

6 A. Yeah. So like I said we initially
7 go out to the school on something like this,
8 get briefed, brief information from the child
9 about what's going on, who the perpetrator
10 is.

11 If the perpetrator lives with the child,
12 usually we put safety plans together where
13 the perpetrator won't be allowed to be around
14 the child until the investigation is
15 complete, whether or not they did it.

16 DSS is always contacted. DSS will --
17 they'll put the safety plan together. So
18 they're usually working hand-in-hand with us.

19 From there, if the child is under twelve
20 years old, then we will refer them to Julie
21 Valentine Center where they will have a
22 forensic interview, where there will be a
23 one-on-one interview between the forensic
24 interviewer and the child. Law enforcement
25 is usually present but we're not within the

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1 room. We're actually watching the interview
2 in another room from a monitor. So we're
3 able to see what the child's saying.

4 From there, that's pretty much where we
5 go to at that point.

6 Q. And so you mentioned that the -- did
7 the victim in this case in fact have an
8 interview at the Julie Valentine Center?

9 A. She did. Yes.

10 Q. And were you present for that
11 interview?

12 A. I did observe it, yes.

13 Q. At some point, did you interview the
14 Defendant in this case?

15 A. I did.

16 Q. And how did that interview come
17 about?

18 A. March 23rd, three days after the
19 initial report was taken, I was conducting
20 my investigation and I went over to the
21 apartment complex where they were living,
22 made contact with his girlfriend, Toi, who is
23 the sister of Minor. I explained to her
24 what was going on. She said she already knew
25 about it. She had talked to her mom. She

1 said that 'Tari was at work and that she was
2 going to bring him to my office when he got
3 off work. So I said okay. So I went back to
4 my office. Later on in the afternoon, they
5 did show up at my office.

6 Q. And so the interview took place at
7 your office; is that correct?

8 A. It did.

9 Q. And what did you tell the Defendant,
10 if anything, at the beginning of the
11 interview?

12 A. Well, first when we arrived they
13 actually met with DSS first to go over the
14 safety plan.

15 After that was completed, I brought him
16 back to an interview room to have an
17 interview with myself and another
18 investigator being in there. I explained to
19 him that, you know, there was allegations
20 made against him of touching **Minor** and I
21 wanted to talk to him about it.

22 Q. Did you inform the Defendant that he
23 was free to leave at any time?

24 A. I did.

25 Q. Did you Mirandize the Defendant?

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1 A. I did not.

2 Q. Why not?

3 A. He was not under arrest or in
4 custody.

5 Q. Did the Defendant volunteer to give
6 a statement?

7 A. He did.

8 Q. And what was the substance of that
9 statement?

10 A. Basically that, you know, he denied
11 touching the children or touching **Minor**.
12 Excuse me. But he did state that he had been
13 alone with her at times but he was very
14 adamant as to not touching her at all.

15 Q. But he did admit to being alone with
16 **Minor** at certain times?

17 A. Yes.

18 Q. Was the interview recorded?

19 A. Well, the room I took him to was
20 actually -- it's audio and video recorded.
21 Prior to this interview, the interview room
22 used to be where you would walk in there, if
23 you walked in the light switch flipped on
24 would automatically trigger the system and it
25 would cut on. They had been in the process

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1 of changing that system out and had changed
2 it. I wasn't on duty. I wasn't aware at the
3 time that the new system was activated and I
4 was told you could still walk in and it would
5 motion. What they had done was they had put
6 a toggle switch in there where you turn it
7 off and on and it lights up and recording
8 starts. I didn't activate the system, so it
9 was not recorded.

10 Q. Did you understand that it was being
11 recorded?

12 A. At that time I was under the under-
13 standing that it was, until I went to go
14 retrieve it.

15 Q. So did you have the Defendant write
16 a statement in this case?

17 A. I did not.

18 Q. You mentioned -- was there another
19 investigator with you at the time of this
20 interview?

21 A. Yes. Mike Robertson.

22 Q. At any point in this investigation,
23 did you request a medical exam be done on
24 **Minor**?

25 A. Well, when we send stuff over to

1 Julie Valentine Center with the referral,
2 usually we mark forensic interview. They'll
3 call us and ask us a lot of times if we want
4 a forensic -- if they believe there's a
5 forensic interview needed, they'll ask us.
6 And we'll say yes.

7 You know, a lot of times with cases like
8 this, you know, we're talking about five
9 years -- you know, a three-year time span.
10 There's no physical injuries. She's not
11 going to have bruises on her. She's not
12 going to have a black eye. She's not going
13 to have broken bones. So there's not going
14 to be anything on the x-rays where usually --
15 and the doctors tell us a lot of times
16 there's things they can't see. Things heal
17 over time.

18 Q. What did you do at the conclusion of
19 your investigation?

20 A. Once I observed the forensic
21 interview and determined that the probable
22 cause was there to seek a warrant, I obtained
23 the arrest warrants for Mr. Makins.

24 SOLICITOR PATTERSON: Nothing
25 further from the State, Judge.

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THE COURT: Yes, sir.

CROSS-EXAMINATION

BY MR. QUINN:

Q. So Detective Picone, Ms. Patterson asked you if you took Minor to a doctor for an examination?

A. Yes.

Q. I believe that's a yes or no question. I'd like a yes or no answer?

A. No.

Q. And so you decided -- and I'm sorry -- you don't have a medical degree; do you?

A. No.

Q. So you decided it wasn't worth the effort to make sure that she was seen by a doctor in case any of this evidence was available?

A. No. Uh-uh.

Q. Did you examine either the phone, tablet or computer of Mr. Makins to find this video that's been mentioned by Minor?

A. No. I was not aware of it.

Q. Did you interview the neighbors at Rocky Creek Apartments?

A. No.

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1 Q. Did you interview any neighbors of
2 Toi or 'Tari?

3 A. No.

4 Q. Did you interview Caesar and
5 Messiah?

6 A. Yes.

7 Q. And did either Caesar or Messiah
8 make any statement that was helpful to you?

9 A. No.

10 Q. And 'Tari came in voluntarily,
11 brought by Toi; is that correct?

12 A. That is correct.

13 Q. And did he, at that point know what
14 the allegations were? Had he already heard
15 through the family?

16 A. I can't say whether or not he did.

17 Q. But I believe according to your
18 report he was consistent in saying he didn't
19 touch **Minor**?

20 A. That's right.

21 Q. He did state that there were times
22 -- and I'm reading from your report. So if I
23 misread it, please correct me. He did state
24 that there were times that Toi was at work
25 and he was home alone with the children?

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1 A. Yes, sir.

2 Q. He even stated one time he was home
3 alone with **Minor** and no other persons were
4 in the apartment; is that correct?

5 A. That's correct. Yes, sir.

6 Q. Now, when Ms. Patterson asked you,
7 you said that he said there were times. Do
8 you know if there was more than the one time
9 that he admitted to you?

10 A. If I put one time, that's what he
11 told me.

12 Q. And do you need to see your report?

13 A. No.

14 Q. Did you speak with Isis to determine
15 that she went over to Toi and 'Tari's with
16 her sister?

17 A. I did speak with Isis.

18 Q. And did you determine if Isis did go
19 to Toi and 'Tari's when **Minor** would go?

20 A. Yes.

21 Q. As I understand when you met **Minor**
22 the first time, that Ms. Tapp was with you
23 and pointed at parts, the essential parts of
24 her body; is that fair description?

25 A. That's right. Yes.

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1 Q. And that [Minor] stated that she was
2 touched on her vaginal area?

3 A. Yes, sir.

4 Q. When Ms. Tapp pointed at that area?

5 A. That's right.

6 Q. And, in fact, that [Minor] said it
7 was both over and under her clothes that she
8 was touched in that area; is that correct?

9 A. That's right.

10 Q. And finally [Minor] also stated --
11 and again, I'm reading from your report. If
12 you need to see it, I'll gladly let you
13 review it. [Minor] also stated that 'Tari
14 told her he would kill her if she told
15 anybody?

16 A. That's right.

17 Q. And that was told to you the very
18 first time you ever met [Minor]?

19 A. If that's what I wrote.

20 Q. Have you taken any subsequent
21 statements from [Minor]?

22 A. No.

23 Q. Okay. So there was no mention of
24 oral sex in the initial report to you?

25 A. No.

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1 MR. QUINN: I don't have any other
2 questions. Thank you.

3 THE COURT: Redirect?

4 SOLICITOR PATTERSON: Nothing from
5 the State, Judge.

6 THE COURT: Thank you, sir. You
7 can step down.

8 (WITNESS STEPS DOWN)

9 THE COURT: Just to get a sense,
10 Ms. Patterson of where we stand. I know you
11 have at least two more witnesses. How many
12 do you expect the total you will call?

13 SOLICITOR PATTERSON: Your Honor, I
14 anticipate at this time that we will just
15 call two more witnesses. That may change and
16 go to three. But I expect there'll be two
17 more.

18 THE COURT: Okay. Do you have
19 them all here this afternoon?

20 SOLICITOR PATTERSON: The forensic
21 interviewer, Judge, is late. She is not here
22 yet. She is on standby and will be prepared
23 to be here. It will then be -- we'll need to
24 play the forensic interview.

25 THE COURT: Yes, ma'am. Your

1 forensic interviewer is probably going to
2 take close to an hour, I suspect; maybe as
3 much as an hour and a half with cross-
4 examination?

5 SOLICITOR PATTERSON: Correct.

6 THE COURT: Okay. All right.

7 Just getting of an idea of where you stand.

8 SOLICITOR PATTERSON: I understand.

9 THE COURT: Ladies and gentlemen,
10 we are going to move forward with the
11 introduction of at least one more witness,
12 maybe two. Does anybody need to take a break
13 at this point? Anybody? Don't be bashful.
14 (No response). Okay.

15 SOLICITOR PATTERSON: Your Honor,
16 we will need to take a break to get our
17 witness, who is on standby here.

18 THE COURT: Okay. All right.
19 Well, both of your witness right now are on
20 standby? Do you have one that you can call?

21 SOLICITOR PATTERSON: They are,
22 Judge. I'm sorry if that was unclear. They
23 are both on standby.

24 THE COURT: Okay. Go ahead and
25 call them and get them here. How long do you

1 anticipate it would take for them to get
2 here?

3 SOLICITOR PATTERSON: Your Honor,
4 she is at the Julie Valentine Center
5 downtown, so I would anticipate fifteen
6 minutes, maybe half an hour.

7 THE COURT: Okay. Both of them or
8 just one of them?

9 SOLICITOR PATTERSON: Just one.

10 THE COURT: You don't have one
11 here that you can call?

12 SOLICITOR PATTERSON: I do not,
13 Judge.

14 THE COURT: Okay.

15 SOLICITOR PATTERSON: We went a
16 little faster this afternoon than I
17 anticipated.

18 THE COURT: That's okay.

19 SOLICITOR PATTERSON: But we will
20 get the forensic interviewer here as soon as
21 we can.

22 THE COURT: Okay. So this is what
23 we'll do. I have not indicated to the jury
24 that I intend to keep them past a normal
25 business time; that is 5:00 to 5:30.

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1 And generally speaking, ladies and
2 gentlemen, if I'm going to keep you past 6:00
3 or 6:30 then I want to tell you early in the
4 day so that you can make plans because you've
5 got other things going on in your lives.

6 So what we'll do is call your witness and
7 we'll go until about 5:30.

8 That may mean that she puts up her direct
9 examination today and we do cross-examination
10 tomorrow morning.

11 SOLICITOR PATTERSON: I understand.

12 THE COURT: So if you're
13 comfortable with that, we can proceed in that
14 fashion.

15 SOLICITOR PATTERSON: Thank you.

16 THE COURT: Okay. All right. You
17 comfortable with that, Mr. Quinn?

18 MR. QUINN: No, sir.

19 THE COURT: No?

20 MR. QUINN: I do not like
21 splitting a witness where the jury has heard
22 part of the witness. They go home and think
23 about it all night. Then the next morning I
24 get to ask questions.

25 THE COURT: Okay.

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1 SOLICITOR PATTERSON: And I know
2 it's early but we will easily finish this
3 case tomorrow.

4 THE COURT: I mean -- and I'm not
5 going to hold you to this. But as you stand
6 here right now, do you think you're going to
7 put evidence into the record?

8 MR. QUINN: I don't.

9 THE COURT: Okay. All right. So
10 given that, then we anticipate that we may
11 have two witnesses left, maybe as much as
12 three?

13 MR. QUINN: If there's a third
14 one, it's got to be a short one. I know
15 who's on the list.

16 THE COURT: Okay.

17 MR. QUINN: So you've got two
18 witnesses coming, Judge.

19 THE COURT: Okay. All right.
20 Okay. So if I'm hearing you correctly, it's
21 going to take fifteen to thirty minutes for
22 your witness to get here?

23 SOLICITOR PATTERSON: Correct.

24 THE COURT: And you don't want to
25 split witnesses?

1 MR. QUINN: (Negative response)

2 THE COURT: And you have another
3 witness, I presume. Can you call the other
4 witness this afternoon?

5 SOLICITOR PATTERSON: Your Honor,
6 we may run into the same issue. It is -- the
7 State will be presenting an expert witness,
8 subject to the Court's qualifications. So
9 that witness may also go for some length of
10 time including cross-examination.

11 THE COURT: Okay.

12 MR. QUINN: She'll be even farther
13 away.

14 THE COURT: Okay. All right.
15 Well, let's do this. Ladies and gentlemen,
16 you've heard. And the reason I ask them on
17 the record is because I want y'all to know
18 what I know. There are no secrets. And I
19 want you to know that, you know, if we stop
20 or early or if we go late, why we're stopping
21 early or going late, okay? You know,
22 ordinarily I like to start at 9:00 and end at
23 about 5:00 or 5:30 and get as much into the
24 record as we possibly can. But you heard
25 that. You've heard our conversation.

1 expect you to have requests for charge, but
2 if you do, if you'll hand it up now I can
3 start looking at it and thinking about.

4 MR. QUINN: I have no specific
5 requests, Judge.

6 THE COURT: Okay.

7 SOLICITOR PATTERSON: Nothing
8 specific, Judge. If we do, we'll e-mail you
9 and cc Defense counsel.

10 THE COURT: Okay. Good enough.
11 That'll work. And what we'll do is I'll work
12 with the indictments and prepare a standard
13 charge. And if we get -- or after we
14 introduce all of the evidence, all that gets
15 into the record, then we'll just have a short
16 charge conference in chambers. And talk it
17 through so that y'all will know what I'm
18 charging so you can fashion your closing
19 arguments appropriately.

20 MR. QUINN: Thank you.

21 THE COURT: Okay. All right.
22 Good enough. Y'all have a great evening and
23 I'll see y'all tomorrow.

24 (COURT IN RECESS)

25 (TRANSCRIPT CONTINUED NEXT PAGE)

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DECEMBER 7, 2016

9:00 A.M.

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(DEFENDANT PRESENT)

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7

THE COURT: Okay. I have been
advised that all of our jurors are here. Are
we ready for them?

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SOLICITOR PATTERSON: Your Honor,
if we may have just a moment. We have the
original of the forensic interview ---

11

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15

THE COURT: Okay.

SOLICITOR PATTERSON: --- based on
what happened pre-trial. So we had tested
the other one. We're just going to throw it
in and be sure that it works.

16

17

18

THE COURT: Okay. No worries.

SOLICITOR PATTERSON: Thank you.

19

20

(COURT AT-EASE)

SOLICITOR PATTERSON: Your Honor, I
think we're ready.

21

22

23

THE COURT: Okay. Get our jury.

MR. QUINN: If I may, Judge,
before you bring the jury?

24

25

THE COURT: Sure.

MR. QUINN: Your Honor, it appears

1 that the next witness from the State is going
2 to be Christine Carlberg, and that through
3 Ms. Carlberg they will attempt to introduce a
4 videotaped interview at the Julie Valentine
5 Center.

6 THE COURT: Yes, sir.

7 MR. QUINN: I understand that the
8 Court has earlier found that the video is
9 appropriate under Code Section 17-23-175. I
10 would object to the admission of the
11 videotape. I believe it's self-serving,
12 allowing the State to bolster the child's
13 testimony, by a prior inconsistent statement,
14 which I do not believe is admissible under
15 most rules of the Court. And I believe that
16 the testimony is duplicative as she is going
17 to testify to the jury and, therefore,
18 unnecessary. So I object, even though I
19 recognize there's a statute that you've
20 already found it's appropriate under. I
21 object to the admission of the video.

22 THE COURT: Okay. All right.
23 You're protected on the record in that
24 regard. I think that the law specifically
25 contemplates the admission of the forensic

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1 interview. So far as those particularized
2 guarantees of trustworthiness are met and I
3 understand your concern about bolstering.
4 And I think that the Supreme Court has issued
5 -- published several opinions bearing upon
6 that issue and I trust the State's going to
7 be very careful not to use this witness's
8 testimony an attempt to bolster but merely as
9 a vehicle for introducing the forensic
10 interview established in the context in which
11 it was taken. So you're protected on the
12 record.

13 MR. QUINN: Okay. Thank you.

14 SOLICITOR PATTERSON: Thank you,
15 Your Honor.

16 THE COURT: You ready?

17 SOLICITOR PATTERSON: We're ready.

18 THE COURT: You can bring them in,
19 please?

20 (JURY IN @ 9:10 A.M.)

21 THE COURT: All right. Good
22 morning everybody. I hope you had a good
23 evening.

24 JURY: Good morning.

25 THE COURT: Let's go ahead and get

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1 started. Ms. Patterson, you may call
2 your first witness, ma'am.

3 SOLICITOR PATTERSON: Thank you,
4 Your Honor. The State would call Christine
5 Carlberg.

6 (WITNESS TAKES STAND)

7 CHRISTINE CARLBERG, having been
8 duly sworn to tell the truth, and nothing but
9 the truth, testified as follows:

10 DIRECT EXAMINATION

11 BY SOLICITOR PATTERSON:

12 Q. Ms. Carlberg, can you tell the jury
13 where you work?

14 A. I am employed by the Greenville
15 Department of Mental Health and I'm
16 contracted to work at the Julie Valentine
17 Center.

18 Q. And what is the Julie Valentine
19 Center?

20 A. The Julie Valentine Center is a
21 local organization that deals with sexual
22 abuse in children and sexual assault of
23 adults.

24 Q. And tell us a little bit about
25 yourself, what's your educational background?

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1 A. I have a bachelor's of science
2 degree in rehabilitation services education
3 with a minor in psychology from the
4 Pennsylvania State University. And I have a
5 master's of arts in marriage and family
6 therapy from Reformed Theological Seminary in
7 Jackson, Mississippi.

8 Q. And what's your job title at the
9 Julie Valentine Center?

10 A. I'm a forensic interviewer.

11 Q. And what do your duties involve with
12 that?

13 A.. I conduct forensic interviews.
14 That's my only job there.

15 Q. Okay. And let's take a step back
16 first and tell the jury how a child is
17 referred to the Julie Valentine Center?

18 A. A child is normally referred by
19 either law enforcement or the Department of
20 Social Services.

21 Q. And you mentioned that you do
22 forensic interviews. What is a forensic
23 interview?

24 A. A forensic interviewer, a forensic
25 interview is non-leading, non-suggestive

1 manner of gathering information for purposes
2 of an investigation.

3 Q. And are you specifically trained in
4 conducting forensic interviews?

5 A. Yes, ma'am.

6 Q. And do you have a particular model
7 that you use in conducting forensic
8 interviews with children?

9 A. We use the South Carolina ChildFirst
10 protocol for conducting interviews for
11 children.

12 Q. And what is that protocol, stated
13 just very briefly?

14 A. It's a semi-structured protocol that
15 has several steps including rapport, and then
16 you transition into talking about the alleged
17 allegations. And then you do a rapport
18 exploration, which is where you're talking
19 about what happened, and then a closure,
20 which is where you end the interview.

21 Q. And do you use any sort of diagrams
22 or dolls during these interviews?

23 A. We can, yes.

24 Q. And why would you use those?

25 A. We use those mostly for clarifica-

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1 tion purposes. Like if a child names a body
2 part, I can have them identify that on the
3 drawing so I know exactly what they're
4 talking about. And we might use dolls to
5 have them demonstrate what happened.

6 Q. What kinds of questions do you use
7 when doing a forensic interview?

8 A. We ask open-ended questions, non-
9 leading, non-suggestive questions.

10 Q. Did you conduct a forensic interview
11 with the victim in this case, Minor [REDACTED] ?

12 A. Yes, ma'am.

13 Q. How old was she when the interview
14 took place?

15 A. She was eight.

16 Q. Was the interview recorded?

17 A. Yes, ma'am.

18 Q. Ms. Carlberg, I'm going to show you
19 what has been marked as State's Exhibit 2.
20 Can you tell the jury what that is?

21 A. That's the original copy of her
22 interview that I conducted on April 21st,
23 2015.

24 Q. And how do you know that?

25 A. I marked it as original and then I

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1 reviewed it also.

2 Q. And when did you review it?

3 A. Yesterday.

4 Q. And has this, the interview been
5 altered or tampered in any way from when it
6 was originally recorded?

7 A. No, ma'am.

8 SOLICITOR PATTERSON: Your Honor,
9 at this time the State would move State's 2
10 into evidence.

11 THE COURT: Yes, sir.

12 MR. QUINN: Subject to my earlier
13 objection.

14 THE COURT: Okay. Same ruling. I
15 overrule the objection, noting the same, it's
16 entered as State's Exhibit ---

17 COURT REPORTER: State's Exhibit 2.

18 THE COURT: --- 2. Okay.

19 (SO ENTERED AS STATE'S EXHIBIT 2)

20 DIRECT EXAMINATION CONTINUED

21 BY SOLICITOR PATTERSON:

22 Q. And Ms. Carlberg, did **Minor**
23 disclose sexual abuse to you during your
24 forensic interview?

25 A. Yes, ma'am.

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1 Q. And when did she say the abuse
2 occurred?

3 A. She said that it occurred between
4 the ages of five and eight-years-old.

5 Q. And where did she say it occurred?

6 A. She said that it happened at her
7 sister, Toi's, house.

8 MR. QUINN: Your Honor, if I may
9 have just a moment.

10 THE COURT: Yes, ma'am.

11 MR. QUINN: Your Honor, nothing
12 further from the State from this witness.

13 THE COURT: Okay. Yes, sir.

14 MR. QUINN: Well, if you can
15 assist me with the technology so we can show
16 the tape to the jury.

17 (OFF RECORD DISCUSSION BETWEEN COUNSEL)

18 SOLICITOR PATTERSON: Your Honor,
19 may we go ahead and publish the forensic to
20 the jury?

21 THE COURT: Sure. Absolutely.

22 SOLICITOR PATTERSON: Can we have
23 the witness step down since this is a
24 somewhat lengthy video?

25 THE COURT: Sure.

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1 WITNESS: Thank you, Judge.

2 (WITNESS STEPS DOWN)

3 MR. QUINN: Your Honor, will you
4 advise the witness that as she's been sworn
5 and at this point as a witness that she's not
6 to discuss her testimony or talk to anybody
7 during the showing of the video.

8 THE COURT: She's not, unless
9 there are questions that are posed.

10 MR. QUINN: Oh, I understand if
11 she was still on the stand. I'm concerned
12 about while she's off the stand who she might
13 speak with.

14 THE COURT: Oh, okay. Is she
15 leaving the courtroom or is she going to stay
16 right there?

17 MR. QUINN: I assume she will
18 remain in the courtroom.

19 THE COURT: So, Ms. Carlberg,
20 you're still a witness. So even though
21 you've stepped down, you can't discuss the
22 substance of your testimony with anyone,
23 okay?

24 WITNESS: Yes, sir.

25 THE COURT: You're just down as a

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1 matter of convenience so you won't have
2 that bright light shining in your eyes.

3 WITNESS: Yes, sir.

4 THE COURT: Okay. Thank you.

5 (STATE'S EXHIBIT 2 PUBLISHED)

6 THE COURT: All right. Ms.
7 Carlberg, come back up and take the stand,
8 please, ma'am.

9 (WITNESS RESUMES STAND)

10 THE COURT: And I believe Mr.
11 Quinn, you were ---

12 MR. QUINN: Yes, sir. Thank you.

13 CROSS-EXAMINATION

14 BY MR. QUINN:

15 Q. Ms. Carlberg, I believe you told
16 this jury you ask non-leading and non-
17 suggestive questions; is that correct?

18 A. Yes, sir.

19 Q. Isn't it also true that you ask some
20 questions over and over and over again,
21 hoping for a different response?

22 A. I wasn't hoping for a different
23 response.

24 Q. Then why would you ask the question
25 again if you were satisfied with the response

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1 that you received?

2 A. Some children don't answer things
3 right away and they need time or they will
4 feel comfortable later on in the interview.

5 Q. So when **Minor** told you that he did
6 not touch inside of her the first three
7 times, you felt you had to ask yet again, a
8 fourth time?

9 A. I did ask with the dolls again.

10 Q. Okay. And the police officer was
11 there during this interview? Not in the
12 room, but he was at the Julie Valentine
13 Center; is that right?

14 A. Yes, sir.

15 Q. And he observed this interview?

16 A. Yes, sir.

17 Q. And when you stepped out, is he one
18 of the people you talked to, to determine
19 whether you should ask additional questions?

20 A. He was in the room with other
21 observers.

22 Q. And didn't you ask several times
23 what did he make his hand do, even though
24 **Minor** had already answered "nothing"? Did
25 you ask that question several times?

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1 A. I might have, yeah. I don't
2 remember.

3 Q. And is it fair to say that **Minor**
4 statement to you was that she was touched on
5 her vaginal area more than one time?

6 A. Yes, sir.

7 Q. She, in fact, specifically denied
8 again on several occasions, that there was
9 any other kind of touches or any touches with
10 her mouth; isn't that correct?

11 A. Yes, sir.

12 Q. She denied seeing anything like this
13 in TV or on a movie; isn't that correct?

14 A. Yes, sir.

15 Q. She told you several times that she
16 thought 'Tari was scary and evil and that he
17 told her "I'll kill you" or "I'll kill you
18 and your family"?

19 A. Yes, sir.

20 Q. She said this happened at Toi's
21 house; is that correct?

22 A. Yes, sir.

23 Q. And that nobody else was at the
24 house when it happened?

25 A. Yes, sir.

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1 Q. And I believe you specifically asked
2 about Caesar and she said Caesar was outside?

3 A. I do not know.

4 Q. I think she said he was out playing.

5 SOLICITOR PATTERSON: Your Honor,
6 at this point I'm going to object. This is
7 all in the video for the jury to be able to
8 see and observe for themselves.

9 THE COURT: Okay. I overrule.

10 CROSS-EXAMINATION CONTINUED

11 BY MR. QUINN:

12 Q. She said he was outside?

13 A. She just said he wasn't there. I
14 don't know if she said he was outside or not.

15 Q. And did you inquire as to how old
16 Caesar was?

17 A. I think she said he was five.

18 Q. And did you ask if he had a brother
19 or a sister or any other relatives?

20 A. No, I didn't.

21 Q. So in your description for your job
22 as a forensic interviewer, you said forensic
23 simply means that this interview may later be
24 used in court; isn't that right?

25 A. Yes, sir.

1 Q. You're not an investigator. You
2 don't go out and look into this case?

3 A. No, sir.

4 Q. And this interview was conducted in
5 April of 2015; is that correct?

6 A. Yes, sir.

7 Q. Have you done another interview with
8 Minor about this incident since that date?

9 A. No, sir.

10 MR. QUINN: I don't have any other
11 questions. Thank you.

12 THE COURT: Redirect, ma'am?

13 SOLICITOR PATTERSON: Nothing
14 further from the State, Your Honor.

15 THE COURT: Okay. Thank you, Ms.
16 Caldwell. I appreciate it. You may step
17 down.

18 (WITNESS STEPS DOWN)

19 THE COURT: All right. Anybody
20 need a break? (No response). Everybody's
21 good?

22 Okay. You can call your next
23 witness, Ms. Patterson.

24 SOLICITOR PATTERSON: Thank you,
25 Your Honor. The State would call Kristin

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1 Mallick. Excuse me. Kristin Mallick
2 Rich. She's recently gotten married.

3 (WITNESS TAKES STAND)

4 KRISTIN RICH, having been duly
5 sworn to tell the truth, and nothing but the
6 truth, testified as follows:

7 DIRECT EXAMINATION

8 BY SOLICITOR PATTERSON:

9 Q. Ms. Rich, can you tell the jury
10 where you're currently employed?

11 A. Sure. I work for the Department of
12 Mental Health and I work at the Piedmont
13 office in the Greer Clinic.

14 Q. And what do you do for Mental
15 Health?

16 A. I am a clinical counselor. I'm a
17 therapist for children and adolescents. And
18 I currently work in a school at Greer High
19 School. And prior to that I was in the out-
20 patient office at the Greer Clinic.

21 Q. Do you see children of all ages?

22 A. I did when I was at the outpatient
23 office. But now mostly teenagers, but I kept
24 some clients from when I was in outpatient,
25 just so that they could have consistency of

1 care.

2 Q. Tell us a little bit about your
3 educational background?

4 A. Yes. I am a graduate of the
5 University of South Carolina and I got my
6 degree in clinical science and cognate in
7 social work in 2003.

8 And then in -- let's see. I went
9 overseas for a while. I did some
10 humanitarian work.

11 And then after that, I went to Columbia
12 International University and got my master's
13 in clinical counseling.

14 Q. And what about your employment
15 history? Where have you worked since you've
16 been out of school?

17 A. Okay. I worked for a humanitarian
18 organization and was overseas in between
19 undergrad and graduate school, teaching
20 English and critical thinking and debate in
21 universities.

22 And then after that, I was a graduate
23 assistant, so I helped teach the classes that
24 I'd already gone through.

25 And then after that, I worked for about a

1 year with the South Carolina Autism Project
2 and did in-home therapy with autistic
3 children.

4 And then in 2011, started working for the
5 Department of Mental Health in Rock Hill,
6 South Carolina doing the same thing that I do
7 now.

8 And then in -- was it 2013, I transferred
9 back here to Greer because it's my hometown.

10 Q. And tell the jury a little bit about
11 your job and your current duties?

12 A. Sure. So what I basically do is I
13 get to meet with children and teenagers and
14 their parents. And see kind of what's going
15 on, do an evaluation and assessment of any
16 difficulties that they might have, any
17 symptomology that they might be having or
18 issues and then do an assessment, a diagnosis
19 and then provide a treatment plan to help
20 them to feel better and do better.

21 And I also work with doctors and nurses
22 and other therapists, if we do a consultation
23 and staffing as well.

24 So I do individual therapy and family
25 therapy and occasionally group therapy, but

1 mostly individual and family therapy.

2 Q. Do you specialize in any particular
3 type of therapy for children?

4 A. I have different types. I am
5 certified as a Project BEST-certified
6 clinician to do trauma-focused cognitive
7 behavioral therapy, which is particularly
8 related to childhood trauma.

9 Q. Tell the jury a little bit about
10 what trauma is?

11 A. Okay. So trauma is a very bad event
12 where somebody feels like they might be hurt
13 or killed or something very bad might happen
14 to them. And generally, it's shocking in
15 nature where somebody feels helpless or
16 terrorized or horrified, and if that occurs
17 to them. So something out of the ordinary
18 that's bad. It's worse than falling down and
19 skinning your knee. It's something that
20 tragically shifts your life.

21 Q. Can you give some examples of
22 trauma?

23 A. Uh-huh. So a lot of the children
24 that I work with, different types of trauma
25 that they've gone through: car accidents;

1 witnessing domestic violence; physical abuse;
2 sexual abuse; the witnessing the death of a
3 loved one that's traumatic or violent;
4 robberies; kidnappings; house fires; things
5 of that nature.

6 Q. And what therapy model do you
7 generally use with children?

8 A. So for children with trauma, the
9 evidence-based model that I've been trained
10 in is called trauma-focused cognitive
11 behavioral therapy. So it focuses on the
12 trauma.

13 And basically what that model is, is
14 first you provide information about trauma,
15 so that they know what's going on. A lot of
16 times they just feel like they are having
17 these symptoms but they don't know why. So
18 we talk about that.

19 Then some tools that they can use to kind
20 of relax, understand their emotions, under-
21 stand their thoughts.

22 And then the most important part of the
23 trauma is to talk about what happened. When
24 something bad happens; we generally like to
25 avoid and not talk to anybody about it. The

1 problem is, is that we're reminded of it
2 often. So the more we can talk about it and
3 they know that they're safe now, the better
4 that they can feel and do better after a
5 trauma.

6 Q. And are you currently licensed as a
7 counselor?

8 A. I am. I'm a licensed professional
9 counselor for the State of South Carolina.

10 Q. And what's the process to become a
11 licensed professional?

12 A. So the first part is to meet the
13 educational requirements and standards, which
14 I did with my master's degree.

15 Then the next part is to take a national
16 exam, called a national counselor's
17 examination. And after you sit through the
18 exam and pass the exam then you go into --
19 you can apply to be licensed as a licensed
20 professional counselor intern; where, for two
21 years, you work -- and you do basically what
22 you would do as any other therapist. And you
23 meet with a supervisor and they talk to you
24 about your cases and provide more, further
25 direction.

1 And then after you've met those
2 requirements with meeting with clients, as
3 well as with your supervisor, then you apply
4 to transition your license from licensed
5 professional counselor intern to licensed
6 professional counselor.

7 Q. And what are you able to do as a
8 licensed professional counselor?

9 A. So you're able to asses, diagnosis
10 -- diagnose and to treat.

11 Q. Can you talk a little bit about what
12 training you have received, particularly with
13 focus on trauma?

14 A. Yes. I've participated in the
15 Project BEST learning collaborative. It was
16 a year-long training. And throughout the
17 training there were some learning sessions,
18 which are three sessions, two days apiece,
19 getting training in the model.

20 And then as you're going throughout the
21 year-long process, you are actively
22 participating. You have a client that you've
23 identified that has trauma. And you're
24 providing the treatment as you go along. And
25 then there's consultation calls with experts

1 every other week, an hour apiece, that you
2 participate in as well. And you have to
3 complete three cases in order to be put on
4 their roster saying that you have completed
5 the training and you've got a certificate,
6 that you are trained and competent in
7 providing TFCBT, which is the trauma-focused
8 therapy but just for short.

9 Q. And what about other trainings that
10 you've been through?

11 A. I've also done a TREM training,
12 which is Trauma Focused Empowerment Model.
13 That is specifically regarding sexual abuse
14 and it's talking about empowering children
15 and women to be safe and feel space. It's
16 specifically geared towards female. And so
17 that was a two-year training.

18 And then I've also done a Stewardships of
19 Children training, which are strategies and
20 responses for children who have disclosed
21 sexual abuse.

22 Q. And are your treatment models and
23 protocols based on evidence-based studies?

24 A. Yes. So evidence-based means that
25 what I'm providing for a client is based on

1 scientific evidence, not just kind of a 'feel
2 good, oh, I think this might help.' But it's
3 based on a model to say this is how you
4 approach this. And that it has been studied
5 to say that it produces results and that
6 there's scientific evidence for that. And so
7 the TFCBT is a scientific evidence based
8 model that you use with children who have
9 undergone a type of trauma.

10 Q. And in addition to those evidence-
11 based models, do you consult with other
12 therapists, doctors?

13 A. Yes.

14 Q. Can you tell us a little bit about
15 that?

16 A. Yes. Weekly, we have a staffing
17 with our doctor, our nurse and other
18 clinicians like myself. We consult. We talk
19 about cases. How clients are doing. What's
20 the best for them. How they're progressing
21 in their therapy and in their functioning.

22 Q. How many children would you estimate
23 you've provided therapy to over the course of
24 your career?

25 A. About five hundred.

1 Q. And how many children who've
2 experienced trauma as a result of sexual
3 abuse have you provided treatment to?

4 A. Between a hundred and twenty to a
5 hundred and fifty.

6 Q. And have you been qualified as an
7 expert to testify in court before?

8 A. Yes. Two times.

9 SOLICITOR PATTERSON: Your Honor,
10 at this time, the State would move to qualify
11 Ms. Rich as an expert in the treatment of
12 child trauma and child sexual abuse dynamics.

13 THE COURT: Okay. Do you have any
14 *voir dire*, sir?

15 MR. QUINN: Not at this time.
16 Subject to my previous ---

17 THE COURT: Okay. Good enough.
18 Ladies and gentlemen, when a party attempts
19 to introduce a witness as an expert witness,
20 they do so because of the witness's
21 particular education, experience, and
22 expertise in a given field. The reason
23 someone may offer an expert witness as a
24 witness is to further explain the evidence
25 that's been entered. Now, also, the reason a

1 expert witness would be offered is because an
2 expert witness can testify to things that a
3 lay witness can't testify to, such as offer
4 opinion evidence that a lay witness couldn't
5 otherwise offer into the record.

6 Now, I want you to understand that
7 when a witness is qualified as an expert
8 witness, it does not mean that they have any
9 preferred status in court. And it doesn't
10 mean that their testimony has any preferred
11 status or greater weight.

12 Just because somebody is qualified
13 as an expert witness, you, in your capacity
14 as finders of the facts, you look at that
15 testimony. You determine whether it's
16 credible. You determine whether it has
17 weight. And you determine what value it has
18 in your analysis of the evidence. In other
19 words, you consider it just like you consider
20 any other piece of evidence and any other
21 witness's testimony in a case.

22 In this instance, also qualify the
23 witness as an expert witness in the field
24 which you have articulated. You may proceed.

25 SOLICITOR PATTERSON: Thank you,

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Your Honor.

DIRECT EXAMINATION CONTINUED

BY SOLICITOR PATTERSON:

Q. So what are some symptoms a child may show after experiencing trauma?

A. So after experiencing trauma, a child often is going to show some avoidance, not wanting to talk about it, not wanting to go around someplace that reminds them of the trauma or a person that reminds them of the trauma.

They also oftentimes are going to have some, what we call, hypervigilance or watch out for danger, being more aware, fear that it'll happen again.

They also have difficulty -- sleep difficulties, either not wanting to go to sleep, trying to avoid sleep, nightmares, waking up in the middle of the night, different things of that nature.

They also have some difficulties with emotions, behavior disturbances. A lot of time with younger children, you'll see them acting out, you know, at school or at home, more behavior disturbances.

1 There's also some somatic symptoms
2 meaning stomach aches, you know, throwing up,
3 not feeling good, things of that nature.
4 That's very common in children that are
5 younger versus children that are older.

6 You also have some intrusive thoughts
7 thinking about the trauma over and over
8 again. When you don't want to, it pops in
9 your head, flashbacks; difficulty controlling
10 memories, just thinking about things when
11 they don't want to. And, you know, mood
12 disturbances, feeling upset, having
13 difficulty controlling their emotions.

14 Q. Are there symptoms a child may
15 experience that are particular to sexual
16 abuse trauma?

17 A. So sexual abuse trauma is strongly
18 correlated with that. It's sometimes, you
19 know, bedwetting, pulling out hair, wanting
20 to avoid particular situations, being
21 frightened of being in certain situations.

22 Sometimes children who have been abused
23 by a particular type of perpetrator, they
24 want to avoid that. So avoid -- some
25 children want to avoid men. Some children

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1 want to avoid certain situations.

2 Q. And why are the symptoms of trauma
3 and sexual abuse trauma different?

4 A. Well, I think, you know, it tends to
5 be kind of more just situational. You know,
6 with the situation, you know, a lot of times
7 sexual abuse happens very seductively. And
8 so the children -- children -- it's very
9 different than a car accident is -- that's
10 very scary and the car, you know, they'll
11 want to avoid the car. But a lot of times
12 children who have undergone sexual abuse have
13 done that. It's happened in the context of a
14 relationship. And so when a relationship is
15 violated in that way, a lot of times the
16 child can feel a lot of shame, fear,
17 insecurity and display a lot of symptoms of
18 shame, or guilt or secrecy or not understand-
19 ing things. So it's different because it's
20 that relationship in a lot of ways.

21 Q. Is it fair to say that there can be
22 some overlap between the symptoms?

23 A. Yes.

24 Q. Talking specifically about sexual
25 abuse, do all children who have been sexually

1 abused typically tell immediately?

2 A. No. Most children will delay a
3 disclosure. A lot of times that happens due
4 to many different circumstances.

5 Sometimes it's because the abuser has
6 threatened them and they're afraid,
7 threatened them or threatened family members
8 and so they will delay disclosure.

9 Some people are sure -- whether they're
10 told to keep a secret and adults tell them to
11 keep a secret so they shouldn't -- or they
12 fear that they're going to get somebody that
13 they love in trouble. So oftentimes they
14 will delay that disclosure.

15 Studies show that delayed disclosure
16 happens more often when the child or the
17 perpetrator is a family member of the child
18 as well.

19 And, also, the younger the child then the
20 more common it is for the disclosure to be
21 delayed. Oftentimes, they'll also wait until
22 they feel safe.

23 Q. And once a child has told, does a
24 child typically tell everything that happened
25 all at once?

1 A. Well, disclosure is really not an
2 event, it's a process. So it doesn't just
3 happen one time. It happens over the course
4 of time, especially for someone, a child who
5 has had repeated instances of sexual abuse or
6 trauma. They're going to disclose over time.

7 Sometimes they'll tell the thing that's
8 bothering them the most at the moment, the
9 memory that they have at the moment.

10 Sometimes they will say a little bit and
11 see if the parent or whoever they're
12 disclosing to can handle it because they're
13 worried that they're going to make the adults
14 in their life cry or they're going to make
15 them upset. So oftentimes, they'll kind of
16 do a little bit and then a little bit more
17 and then a little bit more, especially as
18 they feel safe or feel comfortable.

19 Q. And does that piecemeal disclosure,
20 can it be situation dependent?

21 A. As in like what happened?

22 Q. Or what situation the child's in?

23 A. Sure. Sure. Some children are
24 going to feel more comfortable talking, you
25 know, to a safe adult, a teacher. Other

1 children are going to be more comfortable
2 talking to their parent. It just depends on
3 the child.

4 Sometimes they're afraid that they're
5 going to get people in trouble again. So
6 they're going to try to talk to somebody that
7 maybe they deem as safe.

8 And it does matter when they disclose if
9 they're believed. You know, a lot of times
10 children will stop saying something if they
11 feel like the adult that they tell doesn't
12 believe them or doesn't want it to be true or
13 doesn't -- kind of denies it or pushes it
14 aside.

15 So a child will kind of close up because
16 they don't want to hurt the adults in their
17 life.

18 Q. If a child closes up, are there ways
19 that you use in therapy to try and get them
20 to express themselves?

21 A. A lot of times what we do is we
22 normalize that, say that that's kind of
23 normal, you know, and that they're safe and
24 that they can share what they need and want
25 to share. Oftentimes, with younger children

1 what we do, they have a hard time talking
2 about things so we allow them to draw or just
3 introduce that to a way -- can you draw what
4 happened. And they're much more likely to
5 draw rather than just to talk.

6 Q. I want to move a little more
7 specifically. Have you provided therapy to
8 the victim in this case, Minor [REDACTED] ?

9 A. Yes.

10 MR. QUINN: Your Honor, I have a
11 Motion I need to take up outside the presence
12 of the jury.

13 THE COURT: Okay. All right.
14 Ladies and gentlemen, we're going to take up
15 a motion. I'm going to have to ask you exit
16 the courtroom. It's in regard to evidence
17 and the introduction of evidence and whether
18 it's admissible or not.

19 I hope it doesn't take us too long,
20 but while you're out I want you to do
21 something. I'm going to give you some
22 homework, okay? One of you needs to serve as
23 foreperson of the jury, okay? And I want you
24 to decide who should be the foreperson of the
25 jury, among the first twelve, okay? The

1 foreperson of the jury has responsibility
2 to ensure that in your deliberations everyone
3 has the opportunity to be heard. In a group
4 of twelve people who don't know each other,
5 there are going to be people who are louder
6 than others and people who are more subdued
7 and more quiet than others. The foreperson
8 needs to be sensitive to that and make sure
9 that everyone in the jury room has the
10 opportunity to be heard and that everyone has
11 a voice. Also, the jury foreperson, if
12 collectively the jury has a question you need
13 to pose to me, you can write that down and
14 give it to the bailiff and he can present
15 that question to me. I'm hopeful that after
16 we have given the charge and we've done
17 arguments, that you won't have any questions.
18 But from time to time, it happens, okay?

19 So I'll ask you, having given you
20 that homework to return to your jury room and
21 we'll try to return as soon as possible.

22 (JURY OUT @ 10:25 A.M.)

23 THE COURT: Okay. Yes, sir.

24 MR. QUINN: Your Honor, at this
25 time I'd move for a mistrial.

1 There are two -- well, there are
2 several ways to vouch for the credibility of
3 a witness. One being obvious if somebody is
4 on the stand and says I believe them.

5 The other is the situation we've got
6 here where Ms. Rich has testified -- and I've
7 waited to make the objection until it was
8 clear that she was the counselor for the
9 child in this case -- where Ms. Rich has
10 testified that she works with a group of
11 people that have suffered trauma. The trauma
12 may come from several possibilities: car
13 accidents, physical abuse, sexual abuse, and
14 I believe there were others. I couldn't
15 write them all down. But clearly the case
16 here, it is a sex abuse case, highlighted by
17 the Solicitor who says:

18 'Well, how many cases have you dealt
19 with?'

20 'About five hundred.'

21 'How many were sex abuse cases?'

22 'A hundred and twenty to a hundred
23 and fifty.'

24 She then delineates the symptoms of
25 the sex abuse and symptoms of trauma and

1 talks about how this is a scientific
2 evidence-based model that they work from.

3 Well, once Ms. Rich says 'I only
4 work with people who have been traumatized,
5 who have suffered...' -- I believe that her
6 description was "a very bad event, one that
7 they can feel that they can be hurt or
8 killed, that was shocking and would leave
9 them horrified", she is saying that, 'Every
10 child I work with or every person I work with
11 has suffered some trauma. That's why I
12 provide counseling to them, is they are my
13 clientele.'

14 By definition then, she is saying
15 **Minor** suffered a trauma. In this case, the
16 trauma was from sexual abuse. And she's not
17 said those words yet.

18 But that is clear that the evidence
19 the State's trying to put forward. So she is
20 vouching for the credibility of the witness
21 by saying in essence, 'if she didn't suffer
22 trauma, I wouldn't be working with her. I
23 only work with people who have suffered a
24 trauma. And that is why **Minor** is my
25 client.' So she is saying, 'I believe

1 Minor ██████████ has suffered a trauma.'

2 The trauma in this case is alleged
3 to be sexual abuse which is the allegations
4 against my client. And so she's vouching for
5 the credibility of the witness.

6 THE COURT: Okay. Ms. Patterson?

7 SOLICITOR PATTERSON: Your Honor,
8 I would say first of all these are the same
9 questions, at least up to this point in the
10 qualification, in terms of we talked about
11 how many children Ms. Rich has seen where she
12 focuses. Ms. Rich's testimony thus far has
13 been completely contained to blind expert
14 testimony.

15 She certainly has not gone anywhere
16 near where Mr. Quinn is insinuating, that
17 every child she has ever treated has
18 absolutely experienced X,Y, or Z type of
19 trauma. She has not articulated that she
20 believes the victim. We have not gone into
21 that at all. We talked about this pretrial.
22 The State is going to contain its questions
23 that will be particular to Minor ██████████ to what
24 the Court allowed pretrial. We are not going
25 to get into what Minor ██████████ symptoms are. We

1 are not going to get into whether or not
2 obviously she believes or thinks that those
3 symptoms are consistent with sexual abuse at
4 all.

5 If we went with Mr. Quinn's
6 argument, I think that would almost
7 eviscerate the State's ability to use an
8 expert in this context, which the court has
9 said it is extremely important to allow the
10 jury to understand the dynamics of what go on
11 in these cases.

12 THE COURT: Yes, sir.

13 MR. QUINN: I'm always impressed I
14 have such ability to control every case
15 that's going to ever come before the court by
16 my arguments.

17 The symptoms have been laid by other
18 witnesses and all they're doing is echoing
19 them through their expert. So to say, 'well,
20 I'm not going to ask this witness was she, in
21 fact, wetting her bed.' It has come out
22 through another witness. And she lists as
23 one of the symptoms, that symptom. 'Is she
24 avoidant?' Well, you can see how she was in
25 the tape with the Julie Valentine Center.

1 So just because this witness doesn't
2 list those symptoms and say they match
3 **Minor** that wouldn't stop the Solicitor, if
4 this evidence was allowed, from in closing
5 argument getting up and saying, 'you heard an
6 expert talk about how these symptoms are
7 indicative of sexual trauma' and 'didn't you
8 see that those symptoms had been spelled out
9 by other witnesses?'

10 So once you cross that line to say
11 'I only deal with traumatized people or
12 traumatized children', that's vouching for
13 the credibility of the witnesses.

14 THE COURT: Do you care to
15 respond?

16 SOLICITOR PATTERSON: Your Honor,
17 it's the State's burden to prove the
18 defendant's guilt beyond a reasonable doubt
19 having other lay witnesses come up and
20 describe the victim's symptoms and then have
21 the expert discuss those symptoms.

22 Again, we're not going to have her
23 get into the specifics. But the State is
24 certainly entitled to tie its evidence
25 together and argue to the jury that with the

1 evidence that's before them, the State has
2 proven its case beyond a reasonable doubt.

3 I also do not believe that Ms. Rich
4 testified that every single child she has
5 treated has trauma. She -- I don't think
6 we're getting far afield. She has stayed
7 very carefully within the bounds of what the
8 Court has laid out and what prior case law
9 was laid out.

10 THE COURT: Yes, sir?

11 MR. QUINN: And I'm sorry to
12 belabor it, but this is obviously crucial to
13 this trial. I believe she testified that
14 either the kids or 'the children I work with
15 have suffered trauma.' I believe that was
16 her exact words. I'm sorry I don't know if
17 it was kids or children. And what the
18 Solicitor is saying is 'yeah, that's exactly
19 what I'm doing. I'm going to get up and
20 match up the symptoms she's testified to.'
21 This is the whole reason to use a blind
22 expert because now I'm in a terrible
23 position. I can't get up and say, 'well, Ms.
24 Rich, the only way your model works is if you
25 believe **Minor** isn't it?' Then I am the

1 one who has opened the door. So I am going
 2 to be prevented from being able to cross-
 3 examine about the dynamics when she's
 4 supposed to be the blind expert is treating
 5 [Minor] and questions about [Minor] Because
 6 as soon as I get up and say 'well, but in
 7 this case, she did' the solicitor's going to
 8 argue it whether it comes out of this witness
 9 or somebody else.

10 THE COURT: Well, what are the
 11 additional questions that you intend to ask
 12 her?

13 SOLICITOR PATTERSON: Your Honor, I
 14 intend to ask whether she provided therapy to
 15 [Minor] when she began her therapy.

16 If she was diagnosed with any
 17 disorder?

18 And as we discussed, that will be
 19 limited to the diagnosis of PTSD and ADHD.
 20 We're not going to into the diagnosis of
 21 child abuse -- child sexual abuse.

22 Ask her what PTSD is. We will not
 23 be going into the symptoms of that.

24 Did [Minor] disclose sexual abuse?
 25 How did she tell you about it? At that

1 point, Your Honor, the State will be moving,
2 based on the foundation that Ms. Rich lays to
3 move the drawing that Minor did into
4 evidence.

5 When did she say this occurred?

6 Where did she say this occurred?

7 And we're done.

8 THE COURT: Okay. Let's take a
9 short break. I'm going to think about it for
10 a while, okay? You do realize that we're
11 precariously close. And what I'm trying to
12 do is preserve the record. This is --
13 there's no question but that this could be
14 construed as an end run around the
15 established case law. And, again, this is
16 definitely an issue on appeal. So I want to
17 think about it and we'll get it as close to
18 right as we can, okay?

19 SOLICITOR PATTERSON: And I would
20 just say, Judge, too, I point -- I
21 understand. I think the case law has been
22 very clear. The *Brown* case, for instance,
23 which I'm happy to find the cite, focuses on
24 the difference between forensic interviewers
25 and therapists. And I know we've gone

1 through that. But we will be very careful.
2 She will certainly never be asked whether she
3 believes this child. And we have taken out
4 any symptoms that she would discuss.

5 THE COURT: Well, you know, we
6 collectively as professionals are less
7 concerned about what case law says and more
8 concerned about what it means.

9 And what we're talking about is an
10 expert witness, adult vouching for the
11 veracity of a minor victim. And I'm not
12 certain how we distinguish the therapist from
13 a forensic interviewer. I know how we do it
14 semantically. I'm not certain how we do it
15 substantively. So we need to be very careful
16 with that.

17 I do have some concerns. And I've
18 been thinking about this for the last two
19 days because it's -- and I told you that it's
20 concerning to me. How does the defendant
21 then conduct a complete and full cross-
22 examination without opening the door? I
23 mean, that's certainly difficult.

24 Now, let me ask you a question, Mr.
25 Quinn. With regard to the disclosure, I

1 think you said yesterday you didn't have any
2 issue with her discussing the disclosure.

3 MR. QUINN: What the child told
4 her?

5 THE COURT: Right.

6 MR. QUINN: Right. In the best of
7 all possible worlds, I wouldn't. Now that
8 she's laid out that symptoms of sexual abuse
9 are that -- and I'm sorry. I can't find the
10 language, but that she wants her to discuss
11 it and she wants her to bring it out. Now
12 I'm not so sure that that's not going to be
13 vouching also. But if the witness had gotten
14 up and said 'look, the child told me this.'
15 Yeah, I wouldn't have had any problems. But
16 now, as I understand what the Solicitor's
17 going to do, assuming that is what she is
18 going to do, I don't think she can.

19 She's going to ask her what PTSD
20 means.

21 And 'oh, by the way, is sex abuse
22 one of the ways you can get post-traumatic
23 stress disorder?' Well, yeah, it is.

24 And, 'Hey, was **Minor** a
25 victim of sexual abuse? Did she tell you she

1 was sexually abused?' Well, 'yes, she did.'

2 If that's not vouching for the
3 credibility of the witness and tying it all
4 in a nice bow, I don't know what is.

5 And I think the point we're at now,
6 she's got -- it's a mistrial. I think all
7 we're going to do is dig that hole deeper.
8 And I, obviously, I don't know what the
9 Court's going to rule. But if the Court does
10 not rule in my favor at this point, we are
11 going to be in a situation of asking a
12 question, I object, the jury goes out and we
13 argue it. Ask a question. I can't imagine
14 there's any question past this point that is
15 not vouching for the credibility of a witness
16 when she has put her in the 'group that I
17 treat is traumatized.'

18 THE COURT: Yeah, I'm not
19 necessarily certain that I agree with that
20 proposition. I think essentially at this
21 point she has testified as a blind witness
22 for all intents and purposes.

23 Now, if she testifies about the
24 disclosure, then obviously she represents to
25 the jury that she has a relationship, a

1 professional relationship with this child.
2 But if she doesn't talk about the diagnosis
3 and all of those other things, then I don't
4 think you get to the point of vouching.

5 Now, whether that testimony is
6 prejudicial to the defendant's case is
7 another matter. Perhaps it is. Certainly if
8 it weren't prejudicial to some extent, the
9 State wouldn't want it admitted. But just
10 like any blind expert would get up and talk
11 about the dynamics of child sexual abuse and
12 delayed reporting and symptomology, things of
13 that sort. You know, that's -- that has been
14 consistently determined to be admissible and
15 fair game.

16 I don't think -- I don't think she's
17 gotten to the point of vouching yet, okay?

18 And I will tell you that with regard
19 to -- when we finish this testimony, if you
20 think that there is a curative instruction,
21 perhaps that should be entered, then I'll
22 consider that. I'm not saying that I think
23 that's appropriate. I would say that I would
24 consider that. But at this point I'm going
25 to deny a mistrial because I don't think

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1 she's vouched yet, but I think she's getting
2 precariously close, precariously close, okay?

3 So let's take a short break and
4 we'll come back in in about five or ten
5 minutes, okay?

6 SOLICITOR PATTERSON: Thank you,
7 Judge.

8 (BRIEF RECESS)

9 (DEFENDANT PRESENT)

10 THE COURT: After having heard the
11 testimony and heard what she has said about
12 the admissibility of the expert's testimony
13 regarding her personal attending diagnosis
14 and treatment of the victim. I know
15 initially I'd said that you could go to a
16 certain point. Well, I think I'm going to
17 retract that, and I think I was wrong. I
18 think, after having heard the testimony and
19 heard what she said, I think that once she
20 starts to say that 'I was the attending
21 physician and I diagnosed this and I treated
22 this', then we are right back where the
23 Supreme Court told us not to go and that's
24 vouching for the credibility of the witness.

25 Now, I recognize that she wouldn't

1 expressly say that she's truthful. But I
2 think it ultimately serves the same end.

3 I also think that from the State's
4 perspective, the testimony that has already
5 been elicited has served its purpose, which
6 is there has been a recitation of symptoms
7 and circumstances, which are in keeping with
8 the minor victim's.

9 So I think, again, that any
10 additional testimony regarding her specific
11 treatment and diagnosis and individual would,
12 first of all, violate the rule against
13 vouching. And secondly, would be gratuitous
14 and superfluous.

15 So moving forward what you can ask
16 her about is -- you can ask her if she had
17 the opportunity to discuss this and if she
18 treated for purposes of introducing the
19 disclosure, okay?

20 SOLICITOR PATTERSON: Okay.

21 THE COURT: And then, Mr. Quinn,
22 you can certainly cross-examine her. I would
23 caution you, though. You're right. There is
24 a potential that you could open the door. I
25 would suggest to you that you should be very

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1 careful in that regard, okay?

2 SOLICITOR PATTERSON: Your Honor, I
3 just want to be sure I'm crystal clear on
4 your ruling?

5 THE COURT: Yes, ma'am.

6 SOLICITOR PATTERSON: We will --
7 the questions that I will ask will be did you
8 treat the victim?

9 Did she disclose sexual abuse?

10 How did she tell you about it?

11 At that point, the State will move
12 to admit the drawing that was done at the
13 time.

14 When did occur?

15 Where did it occur?

16 THE COURT: Okay. Yes, ma'am.

17 SOLICITOR PATTERSON: Thank you.

18 THE COURT: Okay. All right.

19 Anything else we need to put on the record
20 before I bring the jury back in?

21 SOLICITOR PATTERSON: Nothing from
22 the State, Judge.

23 MR. QUINN: Nothing at this time.

24 THE COURT: Bring the jury. And
25 put the foreman in the box. And let me know

1 before they come in who it is, okay?

2 BAILIFF: Your Honor?

3 THE COURT: Yes, sir.

4 BAILIFF: Here's the foreman.

5 THE COURT: Perfect. Thank you
6 very much.

7 BAILIFF: Yes, sir.

8 SOLICITOR PATTERSON: Your Honor,
9 may I ask the witness a quick question in
10 front of everyone? I presumed she was in the
11 courtroom and heard the ruling. I just
12 wanted to be sure.

13 THE COURT: All right. Good
14 enough. Thank you.

15 (WITNESS TAKES STAND)

16 THE COURT: Yeah. You can bring
17 them.

18 (JURY IN @ 10:55 A.M.)

19 THE COURT: Okay. Is it
20 Bonarrigo? Is that how you pronounce it?

21 FOREMAN: Yes.

22 THE COURT: Congratulations, Mr.
23 Bonarrigo. You can put that on your resume
24 as you move forward in your life, that you
25 were a foreman of the jury.

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1 Okay. All right. Having said that,
2 Ms. Patterson, your witness, ma'am. You may
3 proceed.

4 SOLICITOR PATTERSON: Thank you,
5 Your Honor.

6 DIRECT EXAMINATION CONTINUED

7 BY MS. PATTERSON:

8 Q. Ms. Rich, did you provide treatment
9 to the victim in this case, Minor [REDACTED] ?

10 A. Yes.

11 Q. And did Minor [REDACTED] disclose sexual
12 abuse to you?

13 A. Yes.

14 Q. And how did she tell you about this?

15 A. She told me in the context of a
16 therapy session.

17 Q. And did she talk about it? Did she
18 do anything else?

19 A. She drew a picture.

20 Q. Ms. Rich, I'm showing you what's
21 been marked as State's Exhibit 4.

22 A. All right.

23 Q. Do you recognize that?

24 A. Yes, that's the picture that she
25 drew.

1 Q. And in what context did she draw
2 that?

3 A. So I asked her to talk about or to
4 share, draw a picture about the worst time of
5 the sexual abuse that she reports that
6 happened.

7 Q. And was this drawing part of the
8 therapy?

9 A. Yes. Uh-huh.

10 Q. Is this the original drawing?

11 A. It is.

12 Q. And just to confirm, you're saying
13 that **Minor** drew that picture?

14 A. Yes. She drew this part. There are
15 some things that I wrote in when I asked her
16 questions.

17 Q. Has it been altered in any way since
18 it was drawn?

19 A. No.

20 SOLICITOR PATTERSON: Your Honor,
21 at this time the State would move to admit
22 State's Exhibit 4.

23 THE COURT: Any objection, sir.

24 MR. QUINN: No. No objection.

25 THE COURT: Okay. All right.

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1 Without objection the same is admitted as
2 State's Number 4.

3 (SO ENTERED AS STATE'S EXHIBIT 4)

4 MR. QUINN: And permission to
5 publish it to the jury?

6 THE COURT: Yes, ma'am.

7 (STATE'S EXHIBIT 4 PUBLISHED)

8 DIRECT EXAMINATION CONTINUED

9 BY SOLICITOR PATTERSON:

10 Q. Ms. Rich, can you tell us a little
11 bit about this picture?

12 A. Sure. I'm figuring out the laser
13 pointer. Okay. So, I asked Minor to talk
14 about the worst time -- she didn't want to
15 talk about it. I asked her to draw. And
16 this is what she drew right here. I -- this
17 was over the course of two different
18 sessions. So we added -- that's part of the
19 model that you start with what you have and
20 then you continue to ask her questions. So
21 the open-ended -- she drew just this at the
22 beginning. I asked her who those people were
23 and she said 'Tari Makins. And then she
24 said, "you know me, Minor And I -- those
25 are mine, my notations there that I added. I

1 asked her -- the typical part of the model is
2 to ask open-ended questions.

3 Where was this?

4 What happened before?

5 And then what you see?

6 What did you see?

7 What you hear?

8 What you touch?

9 What you think?

10 So basically just an open, open-ended in
11 how you feel.

12 So I asked her where she was and she said
13 she was in Toi's house, which is, I believe
14 also the Defendant's house in the afternoon
15 and -- it's hard for me to see.

16 And "two summers ago", I asked her when
17 it happened.

18 And she said that she was playing with
19 her cousins. "They wanted to play outside
20 but I didn't want to. It was hot and I
21 didn't want to walk with crutches." She had
22 crutches at the time and so that's what had
23 happened before.

24 I asked her what she heard? And she said
25 he said -- she actually wrote that. When I

1 asked her what she heard she wrote "the
2 buckles."

3 And it says "suck my dick."

4 And then it asked her what she said and
5 she said "hummm", that was the bubble that she
6 wrote there.

7 I asked her what she saw. And she would
8 just point to the picture, to this part of
9 the picture.

10 It wasn't until the second session that
11 she would say it because part of the therapy
12 is to be able to say the things that you're
13 scared of. And then the second session she
14 wrote this -- she wrote "dick" and she wrote
15 "dick" again. When I asked her what she
16 touched, she pointed to the picture again and
17 would not write anything else down.

18 Then what she thought. She thought
19 "maybe he'll give me a dollar" and "maybe
20 he'll give me twenty dollars."

21 And she felt scared.

22 She then got angry and upset and started
23 writing the "suck" and then he touched -- and
24 then she said "he touched me in my pussy" and
25 I wrote that down.

1 Q. And when [Minor] told you that she
2 was sexually abused, when did she say that
3 abuse occurred?

4 A. In a different context than this
5 picture, she had said before that the abuse
6 started when she was five and it ended around
7 seven or eight. She was unclear about that.

8 Q. And where did she say the abuse
9 occurred?

10 A. That it always happened in Toi's
11 house and that sometimes on the porch,
12 sometimes in the living room and sometimes in
13 her nephew's room.

14 SOLICITOR PATTERSON: Your Honor,
15 we have no further questions for this
16 witness.

17 THE COURT: All right. Mr. Quinn.
18 Would you like to keep that up or do you want
19 it to be taken down?

20 MR. QUINN: She may need it.

21 CROSS-EXAMINATION

22 BY MR. QUINN:

23 Q. The words pussy, dick and suck, are
24 those words that you provided or were
25 provided by [Minor]?

1 A. They were provided by Minor .

2 Q. And when was this sketch drawn?

3 A. I'll have to look back at my notes.

4 I have that date. This is the second drawing
5 that she drew. She drew another one prior to
6 this. But I don't have that one. Okay. On
7 July the 6th, 2016 is when this was drawn.

8 Q. And did you determine why she was
9 scared?

10 A. Why she was scared? She reported
11 that she was scared because she said that
12 'Tari Makins had threatened to kill her
13 mother.

14 Q. And it was your understanding that
15 she alleges this happened on a porch as well
16 as other places?

17 A. She had said when she reported about
18 the sexual abuse, she had said that
19 originally that it happened so many times
20 that she couldn't count. That it was ---

21 Q. Ms. Rich, I'm sorry to interrupt you
22 and I know you've been qualified as an
23 expert. I was asking you where it happened
24 not how often. Let me repeat the question so
25 you'll understand what I'm asking.

1 A. Okay.

2 Q. Did **Minor** report to you that it
3 happened on the porch as well as other
4 places?

5 A. Are you talking about this
6 particular incident or other incidents?

7 Q. Let's start with this incident.

8 A. This incident she reported that it
9 happened in the living room.

10 Q. Did she report that other incidents
11 happened on the porch?

12 A. She reported another incident on the
13 porch and she reported another incident in
14 the -- when I asked where these -- where the
15 abuse had occurred, she reported multiple
16 places and reported multiple times that it
17 happened.

18 Q. And she reported these multiple
19 places, as I understand it, as a porch; is
20 that correct?

21 A. One of them was a porch with an
22 orange chair.

23 Q. And did you determine where that
24 porch was, what physical location?

25 A. Like an address?

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1 Q. Yes, ma'am?

2 A. I don't believe so. I'm not sure.

3 Q. And the nephew's room. Did you
4 determine which nephew this might have been?

5 A. I believe she said Messiah and
6 Caesar.

7 Q. Okay. And do you know that those
8 boys live in the same room? Are they two
9 separate ---

10 A. I don't know. That wasn't part of
11 the focus of this session.

12 Q. And you didn't speak with any other
13 people in this case except her mother; isn't
14 that correct?

15 A. About? Yes, I've only had contact
16 with Minor and her mother.

17 Q. You didn't speak with Ms. Carlsberg
18 about this case?

19 A. Who is Ms. Carlsberg?

20 Q. Okay. That answers my question.
21 And you have been a licensed professional
22 counselor for not even six months here in
23 South Carolina; is that correct?

24 A. I'm considered a licensed
25 professional counselor, yes, for the six

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1 months. But prior to that for two years I
2 was a licensed professional counselor intern.

3 Q. Which I assume made you work under
4 somebody else's supervision?

5 A. Yes.

6 Q. So you've been able to practice on
7 your own for less than six months?

8 A. I would guess -- I was able to
9 practice prior to -- in the State of South
10 Carolina at the Department of Mental Health,
11 I work under the guise of the mental health
12 system as well as the doctors in the agency.
13 And so I've been allowed to practice, to
14 treat, to diagnose and to provide therapy
15 since 2011.

16 If I wanted to do private, go out on my
17 own off the umbrella of the Department of
18 Mental Health, then in order to do that, I
19 would have to be independently licensed and
20 licensed by the State of South Carolina.

21 So for a long time -- I guess since 2013
22 -- from 2011 to 2013, I didn't pursue any
23 licensure at all. I just worked under the
24 guise of the mental health. And then I
25 believe it was 2013 -- I'm really bad with

1 dates sometimes. In 2013 I submitted all
2 of my information to become a licensed
3 professional counselor intern, which is
4 considered a license to work underneath the
5 super--, to work with a supervisor. So now
6 currently I can do that independently if I
7 wanted to leave the Department of Mental
8 Health.

9 Q. So since June of 2016, you have been
10 licensed where you could practice by
11 yourself?

12 A. Yes.

13 Q. Okay. Before that, you were allowed
14 to practice just because you were working for
15 DMH?

16 A. Correct.

17 Q. And in addition to your masters of
18 Arts from Columbia International University
19 in Columbia, South Carolina, you've been to
20 three seminars; is that correct?

21 Well, two seminars and the Project BEST;
22 is that right?

23 A. Yes.

24 Q. One seminar in October of 2015 had
25 one or two hours on sexual abuse; is that

1 correct?

2 A. Yes.

3 Q. A seminar in 2013 you went to,
4 that's the TREM Seminar?

5 A. Yes.

6 Q. And then you went through this
7 Project BEST, which was apparently six days
8 over the course of a year?

9 A. It was six days of training over the
10 course of a year, but the program was a year-
11 long working with, kind of hands-on
12 experience by providing the treatment to two
13 children over the course of the year with
14 additional supervision.

15 Q. With supervision?

16 A. Right. And supervision means that I
17 consult, not that I don't have -- like, I'm
18 still doing the therapy solely,
19 independently, and then I'm consulting to
20 make sure that we're following the protocol.

21 MR. QUINN: I don't have any other
22 questions. Thank you.

23 THE COURT: Redirect?

24 SOLICITOR PATTERSON: Very briefly,
25 Your Honor.

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THE COURT: Yes, ma'am.

REDIRECT EXAMINATION

BY SOLICITOR PATTERSON:

Q. Ms. Rich, just to be clear, you have been practicing and treating children since 2011?

A. Yes.

Q. And to be clear, when Mr. Quinn was asking you about the different location, is it your understanding that all of that was at Toi's house?

A. That's my understanding.

Q. Thank you.

SOLICITOR PATTERSON: Nothing further from the State, Judge.

THE COURT: Mr. Quinn, any recross?

MR. QUINN: No, sir. Thank you.

THE COURT: Thank you. I appreciate your being here. You can step down.

(WITNESS STEPS DOWN)

THE COURT: Okay. Anything further from the State?

SOLICITOR PATTERSON: Your Honor,

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1 at this time, the State rests.

2 THE COURT: Okay. Does the
3 Defense intend to introduce any evidence?

4 MR. QUINN: No, Your Honor.

5 THE COURT: All right. Ladies and
6 gentlemen, we have reached the point in the
7 case where I must necessarily hear some
8 Motions from the attorney. And also we must
9 get ready for closing arguments and the
10 charge on the law. Therefore, it's going to
11 take us a little bit of time to make that
12 happen. So I'm going to give you all a long
13 lunch break, okay?

14 I'm going to ask you to be back at
15 1:00. And at 1:00, we'll begin our closing
16 arguments and then we'll go to the closing
17 charge on the law.

18 So, please, during your lunch hour
19 don't discuss the case and we'll come back at
20 1:00 and begin promptly. Thank you very much
21 and I appreciate it.

22 (JURY OUT @ 11:10 A.M.)

23 THE COURT: Okay. Motions?

24 MR. QUINN: Your Honor, I renew my
25 motion for directed -- I'm sorry. I renew my

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1 motion for a mistrial -- I'm sorry -- based
2 on the witness vouching of the credibility of
3 **Minor**

4 Additionally, I would move for a
5 directed verdict based on the general
6 insufficiency of the State's evidence.

7 THE COURT: Okay. All right.
8 Anything from the State?

9 SOLICITOR PATTERSON: Your Honor,
10 if you'd like to hear from the State on the
11 mistrial motion, I'm happy to go through
12 that. You've heard arguments on both sides.

13 The State's position on the directed
14 verdict motion would be that there is
15 certainly sufficient evidence in the record
16 when considered in the light most favorable
17 to the State to take this to the jury.

18 THE COURT: Okay. All right.
19 With regard to the mistrial, I think I've
20 already addressed.

21 Again, if you want a curative
22 instruction, you may present that to me.
23 And, you know, what I'm thinking is if you
24 wanted to have a curative instruction that an
25 expert witness cannot vouch for the veracity

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1 State for closing argument.

2 SOLICITOR PATTERSON: Thank you,
3 Your Honor. May it please the Court?

4 THE COURT: Yes, ma'am.

5 CLOSING STATEMENT

6 BY SOLICITOR PATTERSON:

7 Ladies and gentlemen, I told you at
8 the beginning of this case that some children
9 have reason to fear. Not the fear of the
10 dark or monsters under the bed, but of real
11 people doing terrible things behind closed
12 doors. **Minor** is one of those
13 children.

14 The Defendant in this case, Ontario
15 Makins, who she loved and trusted as a
16 brother, preyed on her and used his access to
17 her as an opportunity to chronically abuse
18 her.

19 We also talked about at the
20 beginning of the case that this is a secret
21 crime. That, like I said, it's done behind
22 closed doors; that there are going to be
23 people around, people like **Minor** mother
24 who love and protect her and don't have any
25 idea of what's going on. It's done in

1 secret.

2 And until **Minor** was able to under-
3 stand, articulate and tell what was going on,
4 no one knew. Does that mean that it didn't
5 happen? Absolutely not. She just needed the
6 words and the knowledge to be able to express
7 what was going on behind those closed doors.

8 As the Judge mentioned, in a few
9 minutes after we finish closing arguments, he
10 is going to give you the charge on the law.
11 If anything I or Mr. Quinn say disagrees with
12 the Judge, the Judge always wins that battle.
13 He is in charge of the law.

14 But you, ladies and gentlemen, are
15 the finders of fact. And that is why your
16 role in this proceeding is so important. It
17 is you who will decide in this case what is
18 true and what happened in this case to

19 **Minor**.

20 I want to focus on a few things that
21 the Judge is going to talk about with regard
22 to the law, then we're going to talk a little
23 bit about the evidence. The Judge is going
24 to explain to you in a few minutes that the
25 State bears the burden of proof in this case.

1 You've heard that throughout the case. The
2 State bears the burden of proving the
3 defendant guilty beyond a reasonable doubt.
4 That is not something that anyone in this
5 courtroom, myself included, wants you to take
6 lightly. That is foundational to our
7 criminal justice system.

8 But what I want you to keep in mind
9 is that "reasonable doubt", and "beyond a
10 reasonable doubt", is not an unattainable
11 standard like the Defense wants you to
12 believe. It is that you are firmly convinced
13 that the Defendant is guilty.

14 The Judge is going to tell you that
15 evidence, that testimony -- and the testimony
16 that you've heard from this stand is evidence
17 just like any other evidence that you would
18 get in a criminal case. So what you're going
19 to do is you're going to take the evidence
20 that you've heard and also the evidence that
21 you've seen in this case, the drawing that
22 **Minor** made, the forensic interview. You
23 are going to take that back to your jury
24 room. You are going to discuss it. You are
25 going to weigh it. Talk about the witnesses,

1 what they said. You should discuss in a way
2 -- and go back and forth, this is a big
3 decision and this is something that everyone
4 in this courtroom wants you to take seriously
5 and that you should discuss and deliberate
6 on. But that discussion and deliberation and
7 debate back and forth is not reasonable
8 doubt. That's your job. That's what you're
9 supposed to do.

10 But if, at the end of that
11 discussion, if after talking about all of the
12 witnesses:

13 Mary Jill Kroske, the second grade
14 teacher who **Minor** first told about the
15 abuse;

16 Investigator Picone;

17 **Minor** mom;

18 **Minor** herself.

19 If, after weighing all of that
20 evidence, if after looking at the evidence
21 you are firmly convinced that the Defendant
22 committed these crimes, then you must find
23 the Defendant guilty.

24 The second thing I want to talk
25 about that the Judge will address in his

1 legal instructions to you is witness
2 credibility. You decide how much credibility
3 to give to different witnesses. One thing I
4 want you to think about as you're thinking
5 about these different witnesses is why
6 they're telling you what they're telling you
7 and how they acted on the stand.

8 I want to talk for a minute about
9 how **Minor**, our victim in this case, was on
10 the stand. It was clear she did not want to
11 be here. It was clear she did not want to
12 talk about the abuse we're here to talk about
13 today. The same was true in her forensic
14 interview. She did not want to talk about
15 it.

16 She did not want to be here. That
17 ten-year-old little girl, who just turned ten
18 on Monday, had to walk into this courtroom,
19 get up on that witness stand and talk about
20 things that adults never talk about in public
21 or talk about with strangers. Talk about
22 things that embarrass her and clearly cause
23 her to put up barriers. Not only did she
24 have to do that in this courtroom, she had to
25 do that to police. She had to do that to

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1 forensic interviewers, she had to do that to
2 therapists. She has had had to talk about
3 this, something she wants to avoid
4 desperately, over and over. And so I would
5 ask you what does she have to gain by making
6 this up, as the Defense is going to want you
7 to believe that she has just made this up.

8 Not only has she been forced to talk
9 about things that we don't talk about in
10 public in this forum, she also talked to you
11 about the loss that she has experienced as a
12 result of this disclosure. She talked to you
13 about how much she misses her nephews, the
14 defendant. How they were her playmates. Her
15 sister, Isis, is nine years older than she
16 is. And while she loves her sister
17 obviously, her nephews were her peers, her
18 same age. They played Xbox together. They
19 played constantly together during the summer.
20 She's lost that. She's lost her sister.

21 You heard **Minor** mother, Ms.
22 Johnson get up on the stand and talk about
23 how she's lost her daughter, how she no
24 longer sees her grandsons.

25 The effect of the disclosure on this

1 family has not been positive. The only
2 positive that has come out of this, is that
3 the abuse has stopped because that Defendant
4 no longer has access to **Minor**. Otherwise,
5 it has caused trauma, and loss. It has
6 caused **Minor** embarrassment and difficulty.
7 So I ask that you keep that in mind.

8 Why would she lie about this? She
9 has absolutely no reason to do so. The only
10 reason she has to say that this happened is
11 because it actually happened.

12 The last thing I want to talk about
13 that the Judge is going to talk to you about
14 are the charges that this Defendant is
15 facing. I talked to you a little bit about
16 this in opening, but just to briefly remind
17 you, the Defendant in this case has been
18 charged with three different things.

19 The first thing is criminal sexual
20 conduct with a minor, first degree. That is
21 a sexual battery on a child under the age of
22 eleven, talked about how a sexual battery is
23 a penetration into the victim's body in some
24 way. You heard that **Minor** was and, in
25 fact, is still under the age of eleven when

1 this abuse occurred. And you heard Minor
2 yesterday on the stand say over and over that
3 the Defendant would make her suck his penis.
4 That, ladies and gentlemen, constitutes a
5 sexual battery.

6 The second thing this Defendant has
7 been charged with is lewd act. To be guilty
8 of a lewd act, a defendant has to commit a
9 lewd act on a child under sixteen. Again, as
10 we all know, Minor is under the age of
11 sixteen years old. A lewd act is touching,
12 rubbing or fondling of a child that is done
13 in a way that's meant to arouse the defendant
14 or the child.

15 The third thing he has been charged
16 with is criminal sexual conduct with a minor,
17 third degree, which, as we discussed, means
18 the same thing as a lewd act. But the
19 legislature changed the name such that
20 touching that happened before the law changed
21 in June of 2012 is a lewd act. Touching that
22 occurred after the year 2012 constitutes
23 criminal sexual conduct with a minor, third
24 degree.

25 You heard in this case from Minor

1 on the stand and in her forensic interview,
2 that the Defendant was touching her
3 inappropriately. You heard in the video how
4 she talked he touched her vagina. You also
5 heard different witnesses talk about that.
6 Then you heard **Minor** up on the stand
7 talking about how the Defendant would touch
8 her bottom and how he would make her touch
9 his penis. You saw from **Minor**'s own hand
10 what was going on. Both in terms of the
11 criminal sexual conduct with a minor first
12 degree, the oral sex, the fact that he was
13 making her suck his penis. The fact that "he
14 touched me in the pussy." The fact that he
15 was having her touch his penis. You also
16 heard from different witnesses, including
17 **Minor** and the tape, that the abuse started
18 when she was five years old, which is before
19 the law changed, hence is the lewd act. And
20 continued through the time that she was eight
21 years old.

22 Ladies and gentlemen, now that we've
23 talked a little bit about the law, I want to
24 talk to you about the evidence that you've
25 heard over the last couple of days. I want

1 to talk to you about why that evidence should
2 firmly convince you of the Defendant's guilt.

3 As I mentioned, testimony is
4 evidence. So I want to talk first about the
5 testimony that you heard.

6 You heard from Mary Jill Kroske,
7 **Minor** second grade teacher. She told you
8 how there was one day **Minor** hung back from
9 a recess and all the other kids ran out, and
10 told her that she was being touched like that
11 lady from the Julie Valentine Center had
12 talked about. That happened just nine days
13 after the Julie Valentine Center came in and
14 gave **Minor** the words to express what was
15 going on with her. You heard from Jenna
16 Toney, who was the Julie Valentine Center
17 educator. She came in and actually did the
18 presentation that she does for these second
19 graders. She talked about the purpose of the
20 presentation, to keep children safe.

21 One other effect of her presentation
22 in this case was that she gave **Minor** the
23 knowledge that this was wrong and the words
24 to use to tell about it. You heard **Minor**
25 say she didn't know it was wrong before that

1 lady from the JVC came. She didn't know that
2 the Defendant making her suck his penis was
3 wrong. She didn't know that that's something
4 she was supposed to tell about. Once she
5 did, after she had the time to process, nine
6 days later, she comes forward and she uses
7 the words that Jenna Toney gave her and was
8 able to say 'Tari is a child molester. You
9 heard on that video. And you heard a ten-
10 year-old say -- it was an eight-year-old on
11 the video and a ten-year-old on the stand say
12 he is a child molester. No child should have
13 to get up and say that, but she was able to
14 do so.

15 Another important thing that I want
16 you to keep in mind was Jenna Toney's
17 presentation are the words that she didn't
18 use. She told you she did not use the words
19 vagina or penis. She doesn't talk about oral
20 sex or other kinds of touching. She simply
21 tells kids what good touch and bad touch is,
22 without those details. Those details, the
23 words that **Minor** later used to describe
24 things that were going on, penis and dick,
25 those did not come from Jenna Toney. Those

1 came from what the Defendant was doing to
2 this eight-year-old child.

3 After Ms. Toney, you had an
4 opportunity to hear from Investigator Picone.
5 He's the investigator from the sheriff's
6 department who was called out to the school
7 once [Minor] made her disclosure. He talked
8 to you about how [Minor] also disclosed
9 sexual abuse to him. On cross-examination he
10 was asked if he said that when Ms. Tapp
11 pointed to her vagina, that [Minor] said that
12 she had been touched there.

13 He also talked to you about how the
14 Defendant came in and made a voluntary
15 statement to him. The Defendant, not
16 surprisingly, denied that this was going on,
17 but very shortly admitted that he had been
18 alone with this child and had the opportunity
19 to do what he was being accused of doing.

20 Investigator Picone also gave you
21 some information about why we don't have a
22 medical exam in this case. He said that
23 often in these cases with delayed disclosure
24 -- which Kristin Rich also talked to you
25 about, how in these cases children often

1 don't tell immediately after something has
2 happened -- that we don't request a medical
3 exam. I want you to use your common sense
4 too when you're thinking about that. What
5 we're talking about in this case is oral sex
6 and outside touching. Using your common
7 sense, are those things that typically cause
8 injury? No. So, knowing that this abuse had
9 gone on for a substantial period of time,
10 that significant time had passed since at
11 least it started, and we don't know how long
12 it had been since the last event, and knowing
13 from your common sense that these types of
14 allegations would not cause injury, why would
15 we put a child through an intrusive exam.

16 We heard from **Minor** mom in this
17 case, Ms. Johnson. You heard the emotion in
18 her voice as she talked about her child.

19 You heard **Minor** disclosure that
20 was also made to her, how **Minor** has
21 disclosed sexual abuse to her. You heard
22 Investigator Picone testify on cross-
23 examination that at first she couldn't
24 believe that this was going on, but once she
25 saw her child, she knew.

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1 You heard from [Minor] mom how
2 this Defendant had the opportunity to abuse
3 this child, how often [Minor] was over at Toi
4 and 'Tari's house. How often Toi would be at
5 work and so the Defendant would be alone with
6 these children, as he acknowledged to
7 Investigator Picone. I don't mean he'd been
8 alone with the children, including his own
9 children, but on at least one occasion he'd
10 been alone with this victim.

11 She talked to you about what a close
12 family they had and how difficult this has
13 been, as it has torn them apart. And very
14 importantly, mom told you about the symptoms
15 that [Minor] has experienced prior to and
16 since the disclosure while this abuse was
17 going on. She talked to you about [Minor]
18 had been wetting the bed, how she hasn't been
19 sleeping, how she avoided -- not only avoided
20 wanting to go over to 'Tari and Toi's house,
21 but in a sense avoiding talking about what's
22 gone on. She talked to you about how
23 sometimes she would find [Minor] with her
24 hands in her panties and how [Minor] was
25 acting out in school, how this trauma was

1 manifesting itself inside this young child.

2 And once she was able to know the signs to

3 look for, she was able to see it.

4 Most importantly, ladies and
5 gentlemen, the evidence in the case is the
6 eyewitness to what happened. I want to talk
7 to you about **Minor**. Part of what the Judge
8 is going to tell you about is -- and instruct
9 you on will be children as witnesses and how
10 that can be different, how you weigh that
11 witness' credibility. But what I would ask,
12 and ask you to keep in mind, using your
13 common sense, knowing other children who you
14 may know in your life, think about how
15 children speak, how they remember things, how
16 they are able to articulate things and how
17 different that can be from adults. But they
18 come in and they tell us what is going on in
19 the way that they are able.

20 First, I want to talk about eight-
21 year-old **Minor** and the forensic inter-
22 viewer. Again, she was clearly uncomfortable
23 while she was talking about this. She was
24 clearly avoidant, but she was able to say in
25 response to Christine Carlberg's open-ended

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1 questions that 'Tari, who she called her
2 brother, had touched her private parts. She
3 talked about how he made her touch his
4 private part, which she identified as his
5 penis. She talked about how she was scared.

6 And you may have noticed at the end
7 of the video, she'd drawn a picture of a
8 devil. When she was by herself in that room,
9 no one else is watching, she draws a picture
10 of a devil and talks about it being 'Tari.

11 Not only does she talk about that,
12 but like I told you with Jenna Toney, she's
13 able to use the word that she has learned and
14 call her brother, the man she considers her
15 brother, a child molester.

16 Now, we have a ten-year-old, just
17 barely a ten-year-old, she just turned ten,
18 **Minor** on the stand. She was the same way.
19 She was clearly uncomfortable. She clearly
20 avoided talking about this as much as she
21 could. But she said over and over to you
22 from the stand, "he made me suck his penis."
23 She told you about how he showed her
24 websites, about how to suck penises.

25 Not only do you have that, ladies

1 and gentlemen, you have what **Minor** drew.
2 And I would like for you when you go back to
3 your jury room, to look at this drawing
4 closely. To look at this drawing and how
5 there is, in fact, a penis on here, drawn
6 with a stick figure, with a small child
7 beside them. Ask yourself how an eight --
8 she was eight at the time she disclosed. She
9 just turned ten. How would she know this if
10 this didn't happen?

11 She also told you on the stand that
12 this abuse happened more times than she could
13 count. She was able to tell you in the
14 forensic interview, which was two years ago,
15 much closer to the time when this actually
16 happened, that she was about five when it
17 started and eight when it ended.

18 She've said consistently that this
19 happened by the Defendant, that it happened
20 at Toi and 'Tari's house. He would touch her
21 and make her touch and perform oral sex on
22 him.

23 She also told you that she didn't
24 know it was wrong until the Julie Valentine
25 Center came in and told her. Then nine days

1 later, she made that disclosure.

2 Ladies and gentlemen, I want to talk
3 a little bit about something that Minor
4 said on the stand, which I think is important
5 and I'm sure you're going to hear from
6 Defense counsel about, which is the fact that
7 she admitted that she made up the fact that
8 'Tari threatened to kill her and her family.
9 She got up on that stand and she owned that.
10 She didn't make any qualms about it. She
11 didn't hesitate. She acknowledged that she
12 -- that that was not true and that she had
13 made it up. And when asked why, she
14 explained to you why that happened; that she
15 was scared and that she needed a reason for
16 why she didn't tell. I want you to think
17 about that for second. This child who has
18 had no idea that this is wrong all of a
19 sudden is faced with the knowledge once the
20 Julie Valentine Center comes in, that "this
21 is wrong, this shouldn't be happening to
22 you."

23 Kristin Rich, as we'll talk about in
24 a few minutes, talks about the guilt and the
25 shame that sexual abuse victims often feel,

1 that they themselves have done something
2 wrong. And she needed a reason in her eight-
3 year-old mind to explain why she hadn't told.
4 She was then brave enough to admit that that
5 wasn't true, both to other people and then on
6 the stand when she came here.

7 But she was very clear when I asked
8 her,

9 "Is it true he made you suck his
10 penis?"

11 Yes.

12 Is it true that he touched you?

13 Yes.

14 Is it true he made you touch him?

15 Yes."

16 Ladies and gentlemen, the last
17 witness you heard from Kristin Rich, who the
18 Judge qualified as an expert. She told you
19 that she has been treating children and
20 trauma victims since 2011. She's treated
21 over five hundred children, including between
22 a hundred and twenty and a hundred and fifty
23 for sexual abuse. Kristin talked to you
24 about trauma, what trauma means and the
25 symptoms that children who have experienced

1 trauma often experience: bedwetting,
2 nightmares, avoidance, trouble sleeping,
3 guilt, shame and acting out.

4 Ladies and gentlemen, those are the
5 exact same symptoms that **Minor** mother
6 described to you that her child has
7 experienced.

8 Kristin also talked to you about
9 delayed disclosure, why children -- and it's
10 sometimes hard to understand. If this is
11 going on, why don't they tell? She explained
12 that delayed disclosure is extremely common
13 in sexual abuse cases. It is particularly
14 common with a young victim like we have here.
15 And particularly common when the perpetrator
16 is a close family member, exactly like we
17 have here. The child wants to protect that
18 family member. They are afraid of what is
19 going to happen to their family if they tell,
20 even afraid of what might happen to that
21 person if they tell. Often, they love that
22 person and there are conflicting feelings
23 about telling. Just as **Minor** had
24 potentially feared, this has had a great
25 impact on her family.

1 Another reason for **Minor** delayed
2 disclosure, is as she told you, because she
3 was so young, eight years old when this was
4 going on, that she didn't know it was wrong
5 until somebody told her.

6 Kristin also talked to you about
7 piecemeal disclosure. She said that
8 disclosure is not an event. It's a process.
9 Particularly, as we've talked about when you
10 have a child who is trying to process what
11 has happened to them, we may see what we call
12 piecemeal disclosure. And Ms. Rich explained
13 to you why that may happen. Children often
14 talk about the memory that's at the forefront
15 of their mind. So if the oral sex is what is
16 at the top of her head at that time, that may
17 be what that child is talking about in
18 disclosing. Children will often tell a
19 little bit, see if they're safe, see if they
20 are believed before they are comfortable
21 telling anything else. They also often feel
22 shame and guilt.

23 And ladies and gentlemen, I want to
24 give you a brief example where, even as a
25 adults -- let's say you have gone on vacation

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1 to the Caribbean. And you come back and a
2 week after you're back your neighbor asked
3 you what you did, what your favorite part
4 was? And you say 'we went snorkeling.' Two
5 weeks pass, you're talking to a coworker and
6 they ask you about your vacation. You say,
7 'I ate at this amazing restaurant.' Five
8 weeks after that, you're talking to your
9 mother and you say to her 'my favorite thing
10 was lying on the beach.' Now, you have told
11 three different stories about your vacation.
12 Does that mean you're lying about any of it?
13 No. What you are telling may depend on the
14 context in which you're talking to another
15 person. The same is true here.

16 The Defense wants you to believe,
17 and is going to talk about, that her story
18 has changed. Her story is not changing. It
19 is evolving because as Kristin said, this is
20 a process. As she has felt more comfortable,
21 she has been able to tell more and more about
22 what happened to her.

23 Ladies and gentlemen, I'm going to
24 wrap up and going to sit down. We've talked
25 several times how child abuse is a secret

1 crime. This case shows that well. No one
2 knew what was going -- other people were at
3 work, children were in other rooms playing
4 Xbox -- until Minor was able to put it into
5 words.

6 Minor was an eight-year-old
7 little girl in the second grade when she
8 told. She was a nine-year-old little girl
9 when she drew this picture. She was brave
10 enough to get up on that stand and tell you
11 what happened to her. She's the eyewitness
12 in this case. The other witness in this case
13 can talk to you about how she has disclosed
14 to them, how that corroborates it. You've
15 heard the symptoms that she had but she is
16 the child who experienced this. She got up
17 on the stand. She told you that he touched
18 her. Made him touch her, made her touch him
19 and made her suck his penis.

20 I ask that you go back to your jury
21 room and you think about the witnesses, that
22 you look at the evidence and you consider the
23 evidence, consider what has happened to this
24 eight-year-old child, review the forensic
25 video, look at the pictures, talk about what

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1 you've heard. Then I would ask that you
2 return a verdict that speaks the truth that
3 finds the Defendant guilty of criminal sexual
4 conduct with a minor first degree, third
5 degree and lewd act. Make the Defendant
6 accountable for what he has done to this
7 child. Thank you.

8 THE COURT: Yes, sir, Mr. Quinn.

9 MR. QUINN: May it please the
10 Court.

11 CLOSING STATEMENT

12 BY MR. QUINN:

13 Mr. Foreman, ladies and gentlemen of
14 the jury, the state attempts to fill the
15 holes in their case and to explain those
16 things which are not explained to you by
17 saying "use your common sense." 'Just use
18 your common sense. Don't look for the
19 evidence now because we didn't give you any
20 evidence about that.' Otherwise I'd say,
21 look at the evidence that speaks to that.
22 No, she says "use your common sense."

23 Well, let's use our common sense.
24 They say now after 'Tari Makins gets arrested
25 because he has supposedly threatened to kill

1 her and her family, a story which gets told
2 for almost a year and a half until **Minor**
3 admits to the prosecutors that it is not
4 true. 'I made that part up.' So the State's
5 got to have it one way or the other. Either
6 there was a threat, because that would
7 justify somebody keeping a secret,
8 particularly a child. If I said I was going
9 to hurt you or hurt your family, you might
10 keep that secret. And now they're saying
11 that didn't happen. Well, then why did
12 **Minor** tell you? In three years -- and this
13 isn't supposed to be a secret. Why wouldn't
14 she have said to her sisters or to her mama
15 or to anybody else that while you were
16 outside, 'Tari and I did this. We played
17 this game, if that's how she was going to
18 phrase it. We did this physical thing, if
19 that's how she was going to phrase it. He
20 took his clothes off or took my clothes off.
21 Because if it's not a secret, if she's not
22 being told to hide it or threatened to keep
23 it secret, is your common sense that a five,
24 six, seven, eight-year-old, is going to keep
25 something like that to themselves for three

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1 years and not mention it to other people in
2 and around the house? Is that the common
3 sense the State wants you to adopt? They
4 want you to believe that for three years this
5 was ongoing, that this child just -- she just
6 didn't tell anybody because she didn't know
7 it was wrong. Well, that's not what kids
8 say. They just tell you about their day.
9 They tell you what they did. Their whole
10 world revolves around them. But that's
11 supposed to be your common sense just to fill
12 those blanks in?

13 And we're going to talk about that
14 "this case is evolving." That's a phrase
15 we're going to keep coming back to. Because
16 evolving means when you look at the evidence,
17 look at the proof, look at the witnesses,
18 that this story has consistently changed,
19 that where we're at today is not where we
20 started when this fellow gets arrested. And
21 if it's evolving, I have no idea where it'll
22 be like two months from now. Because two
23 months ago, the story was still he had
24 threatened to kill her and threatened to kill
25 the family.

1 The JVC -- I will try to stay a
2 little bit on structure. JVC comes in --
3 that stands for Julie Valentine Center. In
4 early March 2015, the JVC goes to the school
5 and does this presentation. And I talked in
6 opening statement, just as an aside, about
7 you might see some fluff in this case.
8 Because the case is really **Minor**; there is
9 no other evidence. And so they put up this
10 woman who showed you a presentation and tells
11 us how they scare these kids about 'don't go
12 near anybody in the entire world.' 'If the
13 postman comes to the front door, go hide and
14 call your mama.' It seems like my kids
15 didn't get this presentation, to be honest
16 with you; but that's the presentation.

17 Did that woman ever meet **Minor**?
18 No, she doesn't remember and doesn't remember
19 teaching that class, but that was one of
20 their witnesses. 'Don't you teach them to go
21 ahead and make disclosure, to tell someone?'
22 'Yes, there's no reason to wait.'

23 But two weeks go by. I believe it
24 was March 10th and March 11th of 2015. It is
25 reported to Ms. Kroske, the teacher and then

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1 the police, on March 23rd. Not quite two
2 weeks go by. The report is, as I'm sure you
3 remember, and as Officer Picone testified,
4 that he went with another officer, Officer
5 Tapp of the sheriff's office, a female
6 officer, who hasn't testified but we heard
7 what happened with Officer Tapp. That
8 Officer Tapp pointed to various parts of her
9 body and said, 'is there where you were
10 touched?' And that **Minor** said, when
11 Officer Tapp pointed to her vaginal area
12 that, yes, she was touched there, over and
13 under her clothing.

14 **Minor** also stated 'Tari told her
15 he would kill her if she told anybody. So
16 the first allegation is this allegation about
17 touching of the vaginal area was over and
18 under her clothing.

19 The police then begin an investiga-
20 tion. The officer talks with 'Tari, who
21 comes down voluntarily and meets with the
22 officer. That apparently gets him no credit
23 from the State, that he voluntarily comes.
24 No lawyer, no nothing. He goes down and says
25 'I understand you want to talk to me.' He

1 even tells them 'yeah, I was alone with
2 **Minor** sometimes. I mean, she's over at the
3 house all the time. They're kids. You know,
4 sometimes the kids are in the house,
5 sometimes they're outside the house. Yeah, I
6 was alone with her one time.' One time.
7 Anybody pin down a date? Anybody pin down
8 multiple times? No.

9 Okay. Now, let's get serious.
10 Where's the investigation? Where is Caesar?
11 Why wasn't he put up to testify? Now, the
12 officer says he spoke with him and he didn't
13 say he saw anything. But why weren't they
14 offered as witnesses? Why wasn't Messiah
15 offered as a witness? Because keep in mind
16 that **Minor** story now -- we're going to
17 jump back and forth today -- she testified
18 was that one specific instance she could tell
19 us about occurred on a bed with a blanket
20 thrown over her and 'Tari, not a little
21 fellow, while Caesar and Messiah were in the
22 room playing a game. I think she said Xbox,
23 but at least in the room playing a game. And
24 that 'Tari had her perform sex on him with
25 the boys in the room. Did anybody see that?

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1 Apparently not because the officers spoke
2 with both of them and said they never saw
3 anything like this.

4 Now, how likely is that? If you've
5 got three kids, one kid is suddenly under a
6 blanket with an adult and the other two kids
7 are just ignoring it? Really? A nine-year-
8 old, six-year-old, seven-year-old whatever
9 they were, they're just ignoring that the
10 adult and this child are wrestling around and
11 having sex on the bed with them, but they
12 don't see that.

13 Where's Toi, the adult sister? Why
14 didn't anybody call Toi and say, 'What did
15 you see? What did you suspect? Did the girl
16 act differently around you? Did **Minor** act
17 like she was unhappy? Did she act scared?
18 Did she want you to be with her the whole
19 time? Did you have any trouble with her
20 wetting the bed or showing any of these
21 symptoms that supposedly we have?' She
22 wasn't called.

23 Where's Isis her sister who
24 apparently, according to the mother, is nine
25 or ten years older. So now we're not talking

1 about a child. We're talking about a young
2 adult, an eighteen, nineteen-year-old or
3 sixteen, I guess, maybe when it started.
4 Where is that witness? Why didn't Isis, who
5 everybody agrees, including Minor went
6 over there with her. I think Minor says
7 half the time. Mama made it sound like it
8 was a whole lot more often than that. Why
9 doesn't she testify? Why doesn't she tell
10 you if she saw anything? Again, the officer
11 said yeah, we talked to them. There was
12 nothing to add to the investigation. In
13 other words, they didn't see anything.

14 So with all the people that are
15 around, even if you think my questions about
16 asking other people in the apartment
17 building, because you may or may not be aware
18 of what these apartments are like, but most
19 apartments are fairly close together.
20 They're fairly large and there's other kids
21 around and other people out and about.
22 Nobody's seen anything. No witnesses come
23 forward to testify that they saw anything,
24 suspected anything, believed anything, not
25 even her mama. Nobody comes forward to say

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1 anything. There are no witnesses. The case
2 revolves around [Minor] and what [Minor]
3 said. Well, the State wants you to ignore
4 what she said because her first statement is
5 that she was touched on the vaginal area and
6 that 'Tari threatened to kill her.

7 The next statement is at the Julie
8 Valentine Center. That's about a month
9 later, April 21st of 2015. And you've had the
10 opportunity to see the video. I have the
11 opportunity to have a transcript. I cheated.
12 But it's clear from the questioning that I
13 had with Ms. Carlberg, and from the tape that
14 [Minor] does not allege any oral sex, none.
15 There is no allegation of oral sex ongoing in
16 this case. She asked her numerous times,
17 'Were you touched in any other way? Were
18 there any other kind of touches? Was his
19 mouth used in any way? Was your mouth used
20 in any way?' No, no, no, no, no, no. None
21 of those things.

22 Touching is supposed to be of the
23 vaginal area. That's it. 'Have you seen
24 anything like this on the TV or the movies?
25 No.'

1 So the officer -- because that came
2 out yesterday -- 'did you look for this video
3 that **Minor** now says she watched showing how
4 to perform oral sex?' And I don't know if it
5 was a phone or a tablet or a computer, 'so
6 did you look on all of those that he had
7 available to him?' 'Well, no, I didn't
8 because it's the first time I'd heard it.'
9 The first time he heard it was the first time
10 we heard it in court. So the officer didn't
11 even know to go look for those things. So he
12 could not have investigated that because the
13 story is, as we are told, "evolving." The
14 story is changing.

15 And yet you are supposed to decide
16 that factually, without any question, beyond
17 reasonable doubt, a hundred percent, that
18 he's guilty.

19 So the Julie Valentine Center gives
20 no support to the story that is now being
21 told in court by **Minor**

22 The next statement is to Ms. Rich.
23 That's on July 6th of 2016. So now we jump a
24 year. And you have noticed, I'm certain,
25 that lots of things have changed in that

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1 year. First of all, the allegations changed.
2 The allegation now becomes after 'Tari has
3 been arrested, put in jail, gotten released,
4 been indicted, been before the grand jury,
5 accused of touching inappropriately, now the
6 allegation is oral sex.

7 Now we've got this sketch.

8 Now the words that she didn't know
9 at the beginning, that **Minor** was not aware
10 of. She didn't know how to name the parts,
11 right? She called it a "private" and "rear
12 end", "raisins for nipples", suddenly she's
13 using words my mother would wash your mouth
14 out with soap for using as a ten-year-old.
15 But she suddenly knows those words. She
16 knows how to describe those acts, which have
17 never come up before, with Christine
18 Carlberg, the forensic interviewer; with the
19 police officer, who they were told in this
20 training is a safe person, somebody to go to,
21 somebody if you were afraid you should go to
22 and tell them what happened. She's had every
23 opportunity to do that and has not said any
24 of this. But now in July, all of a sudden,
25 we are changing to an oral sex charge.

1 That's now what the allegation is. Even the
2 Solicitor says that. She says it several
3 times in her closing that [Minor] talked all
4 about oral sex, all about oral sex. There is
5 no statement given by [Minor] to the
6 authorities indicating anything like that
7 happened.

8 [Minor] then, three month later in
9 October, admits that a story she's been
10 telling for a year and a half, 'that's a
11 lie.' Not a little lie. We're not talking
12 about an exaggeration. We're not talking
13 about events that happened twice, that might
14 have happened three times or even four times.
15 We're talking about the only piece that
16 remains from her original allegation of
17 touching and "that he threatened to kill us",
18 the piece that remains a year and a half
19 later, because now we change to oral sex, is
20 that he, 'Tari Makins said, he was going to
21 "kill me and kill my family and that's why I
22 kept it quiet." And she says that wasn't
23 true. 'I made it up.'

24 The Solicitor says why would kids
25 make things up? Mr. Quinn's going to get up

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1 and say this and say that. I have no idea.
2 Why did she tell that story? So. Does that
3 mean it's not a lie? Of course, it's a lie.
4 She admits it's a lie.

5 [Minor], don't you agree that you
6 lied about that?

7 'Yes, I lied about that.'

8 The Solicitor gets up, interesting
9 way of doing it, gets up and says 'Let me
10 tell you, ladies and gentlemen, because we
11 know she lied, you should trust everything
12 she said even more. Because she got up and
13 said that part, that part's a lie. But, hey,
14 you can trust me about everything else.'

15 The Judge is going to tell you when
16 you figure credibility, you are holding in
17 your hands individually and as a twelve-
18 member jury, 'Tari Makins' future. We hear
19 all this talk about 'oh, it's torn up the
20 family. It's done this.' He's the one going
21 to be going to jail. He's the one ---

22 MS. HODGE: Your Honor, objection.
23 There should be nothing regarding sentence
24 nor punishment.

25 THE COURT: I sustain. We'll

1 strike that. You can proceed, Mr. Quinn.

2 CLOSING STATEMENT CONTINUED

3 BY MR. QUINN:

4 He's the one looking at being
5 branded a child molester. He's the one
6 facing the difficulties here in Court.

7 **Minor** and -- well, the prosecutor
8 wants you to take the lie -- and I don't know
9 any other way to say it because it's not an
10 exaggeration. It's not a half-truth. She
11 admits it's a lie -- and use that to bolster
12 her credibility.

13 You twelve have somebody's future,
14 somebody's -- the result of this matter in
15 your hands. I'm going to say it that way.
16 And you are being told -- 'Okay, here's what
17 we're giving you. Okay. We're going to
18 change that part. That part's not going to
19 be true anymore and this part's a lie. But
20 you should find that what you still remain in
21 your hands is the truth. And because I tell
22 you I'm a liar, you should give me greater
23 credibility.'

24 In your day-to-day life, and the
25 Judge is going to charge you about

1 credibility, would you do that? In making
2 the most serious decisions of your lives as
3 reasonable people, would you -- if somebody
4 came to you and said, 'Look, I'm going to lie
5 to you. I'm going to add to that lie for a
6 year and a half. Then I'm going to change my
7 lie so, therefore, you ought to believe it.'

8 Would you go, 'Hey, no problem.
9 Anything you want, I'll believe it. Anything
10 important to me, absolutely I'll believe it.'
11 Or would you say, 'I'm sorry you can't do
12 that. You can't lie to me and then say hey,
13 you ought to trust me even more.'

14 And it would be different perhaps
15 if there was any support for this story. If
16 Toi or Isis or Caesar or Messiah had gotten
17 on the stand and said, 'Yeah, look, I saw
18 these things. I suspected this and I suspect
19 that.'

20 Instead, what do we get? We get
21 Kristin Rich, who until six months ago, had
22 her "learner's permit." She was able to
23 practice under somebody else's supervision.
24 So for the last six months, she's had her own
25 driver's license. The last six months she's

1 been able to practice by herself without
2 somebody looking over her shoulder. And
3 she's been doing it now for three years or
4 four years. And so you should trust her
5 completely. Did she ever say, 'Tari Makins
6 has this personality disorder, which makes it
7 more likely he did it.'

8 Did she ever say 'these symptoms
9 that children perhaps suffer actually, in
10 fact, were suffered by this girl?' Now,
11 let's talk about that. Her mom gets up and
12 says, 'you know, now that you mention it...' --
13 and I'm sorry, I've going to have to put a
14 cough drop in my mouth.

15 'Now that you mention it, I did
16 notice these things. I did notice that she
17 was wetting the bed more. She was having
18 some trouble in school.'

19 Not for three years. The trauma
20 supposedly occurs when she's five. Nobody
21 testified that at five years old she had any
22 of these difficulties. And in fact the
23 symptoms that Kristin Rich talks about, some
24 of them, the difficulty with sleeping and
25 stuff, did arise until after the report.

1 There's no allegation about that. And
2 there's nothing to tie this case to those
3 symptoms. In other words, nobody has said
4 **Minor** suffered this symptom or had
5 this symptom because of this. Nobody did.
6 Kristin Rich didn't even talk about 'well,
7 yeah, it might change my opinion because
8 she's changed her story. It might change my
9 opinion because the manner in which it was
10 told to me.'

11 And do you remember she had gotten
12 her leg broken in a car accident? I don't
13 even know if that's the trauma that she was
14 seeing her for. That didn't come out, as to
15 why Kristin Rich was seeing her.

16 Christine Carlberg says, you know,
17 'I interviewed. You could see Christine was
18 trying to give her all the room she could.
19 You know, it was a long tape. 'Take your
20 time, can you tell me, blah, blah, blah.'
21 Has never gone back and talked to her again.
22 even though the allegation has changed, not
23 another word.

24 The case really turns, I believe,
25 and I would ask y'all to consider completely

1 on Minor .

2 (JUROR COUGHING)

3 THE COURT: Need some water?

4 JUROR: No, I'm fine.

5 THE COURT: There is some right in
6 front of you if you'd like some.

7 MR. QUINN: There is no
8 evidentiary support for this story by the
9 witnesses that we have talked about or this
10 video that existed, or whether anybody even
11 knew about it.

12 Did you hear when 'Tari came in and
13 gave a statement that DSS was there, did a
14 safety plan, that his kids are home with him?
15 We didn't hear from anybody from DSS as to
16 why the boys were still home with him.

17 The witnesses we didn't see -- this
18 interview that supposed was going to be taped
19 but wasn't. Apparently, it took an hour and
20 there's like a paragraph. The officer agreed
21 that he came in, admitted that the kids were
22 in the home alone with him at times, but he
23 said he didn't do anything. Admitted Minor
24 is probably alone with him sometimes, but
25 denied he did it. The Solicitor just as

1 well, 'that's not a big surprise, of course
2 he's going to deny it.' Well, yeah, if you
3 didn't do it, you might deny it. And if you
4 actually did something, maybe you'd try to
5 explain it or you'd get a lawyer. Or you'd
6 have enough sense to go 'no, I was never
7 alone with her, not once, not ever' and tell
8 that story, but he hasn't. Comes in
9 voluntarily. Stays as long as the officer
10 wants. He thinks it's being video recorded.

11 We don't hear from Detective
12 Robertson who's also there, but I'd assume
13 his testimony would have been the same.

14 And the Solicitor wants you to say
15 well, 'I guess he's guilty because of that,
16 because he came in and talked to the police.'

17 **Minor** story has changed from the
18 beginning of this case. **Minor** admits on
19 the witness stand that if we had tried this
20 case three months ago, she would have said
21 that she had been threatened to be killed.
22 The Solicitor wants you to say, 'Hey, it's
23 okay. It's all right. The case is evolving.
24 Her testimony is evolving.'

25 Well, the truth doesn't evolve.

1 The truth is consistent. If you know
2 anything about the truth it is that what is
3 true today will be the same truth tomorrow
4 and the same truth the day after that. There
5 are not Ten Commandments on Monday, twelve on
6 Tuesday, eleven on Wednesday. They are the
7 same the same number. The truth doesn't
8 change.

9 If the allegation was what she told
10 somebody on the streets, 'well, no.' She met
11 with the teacher. She met with the police
12 officer. She met with the expert at the
13 Julie Valentine Center. She met with this
14 therapist, Ms. Rich and the story is not the
15 same. And it is not a little bit of
16 difference where I call it red and you call
17 it some other color, okay? It's completely
18 different. And when she comes forward and
19 says -- very crucial -- that she lied. She
20 lied. She made up the story. How can you
21 say beyond any reasonable doubt she [sic]
22 must be guilty?

23 And that leads to the law. The
24 Judge is going to tell you the law. I hope
25 he's going to tell you exactly as I do. I'm

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1 certainly not trying to misstate it. I
2 believe he's going to tell you half of --
3 well, twice what the Solicitor did. The
4 Solicitor told you about to find him guilty
5 that you have to be firmly convinced that
6 he's guilty. Well, that's half of what the
7 standard is. The rest of the standard, as
8 the Judge is going to tell you is, if you
9 think there's a real possibility that Mr.
10 Makins is innocent -- he'll say not guilty
11 rather than innocent. Sorry. Presumption of
12 innocence. That Mr. Makins is not guilty,
13 then you must give him the benefit of that
14 doubt and find him not guilty. He doesn't
15 have to prove he's innocent because very
16 often, like in a case like this, it might be
17 impossible.

18 So the question is can the State
19 convince you beyond any reasonable doubt that
20 he is guilty. Reasonable doubt generally is
21 considered to be a hundred percent. In civil
22 court, we talk about the preponderance of
23 evidence. It's zero proof to fifty percent
24 -- fifty-one percent is preponderance of
25 evidence. In a civil case, that' all you've

1 got to make. In a criminal case, it's a
2 hundred percent. There is no question.
3 There is no reason to hesitate to act. There
4 is no reason to go in back and go, 'wait a
5 second. Wait a second. We need to think
6 about this real, real hard because that is
7 the reasonable doubt.' Not can you overcome
8 it, not can you talk it through and figure it
9 out without the evidence, because the
10 evidence doesn't exist.

11 So the Judge is going to tell you
12 you look to see if there is a real
13 possibility that he is not guilty. And if
14 so, then you find him not guilty. That goes
15 back to the presumption of innocence that the
16 Judge told you about to start with. And then
17 he may tell you about it again starting with
18 in his jury charge. But that's your starting
19 point is that Mr. Makins even now is innocent
20 as he sits here. There is no hint that he is
21 guilty as far as the law is concerned. And
22 that has to be your starting point. Your
23 starting point has to be can the State
24 convince me by evidence, by proof, by
25 something that I would rely on in the most

1 serious matters of my own life, beyond a
2 reasonable doubt. And only then can someone
3 be found guilty. In this case, I don't
4 believe that the evidence will allow you to
5 do that.

6 And I believe, and I think that if
7 you look at the evidence, a reasonable doubt
8 can arise from the evidence, that is from
9 what you hear or see, and from a lack of
10 evidence; that is, what's missing. Because
11 you could say well, you know, in a case like
12 this there ought to be this or there ought to
13 be that. If this is supposed to be ongoing
14 for three years, how come these other kids
15 didn't see it even once? Or an adult suspect
16 it or her older sister come in on them or
17 suspect it. How come somebody didn't say
18 their relationship, 'Tari's and hers is
19 different, there's something wrong about it.
20 Nobody does that for three years, that you've
21 heard. There's no testimony about that. And
22 so reasonable doubt can come from that.
23 Reasonable doubt can arise from the lack of
24 evidence. Just like it can from -- okay, we
25 saw that person testify but we don't believe

1 that they're credible. We would not rely on
2 them if it was my family. If that was
3 another reasonable person over there, another
4 person that I cared about, would I rely on
5 what I've heard said? No question.

6 Question, guilty. Because that's what you're
7 being ask to do. You should not do that in
8 this case.

9 There are problems with the law
10 that I'm only going to mention for a second.
11 I mentioned to Christine Carlberg, 'didn't
12 you keep asking the question about did his
13 hand go inside -- and isn't that a terrible
14 question -- into you rather than on your
15 vagina.' Yes, I asked her that several times
16 because that makes it whether it's criminal
17 sexual conduct first or not. If there is no
18 intrusion, it is not criminal sexual conduct
19 in the first degree in South Carolina.

20 Lewd and lascivious act, there are
21 -- definitions are there. The Judge is going
22 to give you that the question becomes can the
23 State make all of the elements of the
24 offenses. And the Judge is going to give you
25 that. And if you want to listen carefully

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Closing Argument by Mr. Quinn for Defense

1 and note that, I think you'll find that the
2 evidence doesn't satisfy all of the elements
3 of the case. And that means that you've got
4 to get past the difficulty, you've got to get
5 past your only witness admitted that she
6 misled people for a year and a half, people
7 she had no reason to mislead, people she is
8 told she should trust, a crucial part of the
9 case. And it means that you ignore that the
10 case has changed. That the allegation
11 originally was vaginal touching over and
12 under clothing. And now we're up to an oral
13 sex case, that came up in July apparently.
14 And the change that came up in October about
15 the truthfulness. I'd ask that you give this
16 due consideration.

17 We don't get to talk to you again.
18 I'm sure I've forgotten something. You're
19 not bound by what the lawyers argue to you.
20 That's what this is, is argument. I want you
21 to look at the case from our particular
22 perspective. I'd love to tell you what to
23 do, but I don't think I should do that. But
24 I want you to at least consider the case from
25 a perspective of the person who is sitting

1 over there accused. I want you to consider
2 the case from a perspective that's about a
3 juror taking their duty seriously, who is
4 trying to find is this person guilty beyond
5 a reasonable doubt or is there a real
6 possibility he's innocent. So I'm asking you
7 to look at it from that perspective.

8 Start with presumption of innocence,
9 finish with Not Guilty. That will be the
10 correct verdict in this case.

11 This is a court of law. This is
12 not a court of you go out and do what's right
13 because this is an emotional matter. There
14 are always emotional matters when there are
15 kids and parents involved. It doesn't mean
16 you bring a child in and the person is
17 automatically guilty because it's a child
18 testifying. Don't fall into that trap. Your
19 verdict should be Not Guilty.

20 SOLICITOR PATTERSON: Your Honor,
21 may we approach for just a moment?

22 THE COURT: Yeah. I was going to
23 ask you to come up for two seconds.

24 (OFF RECORD BENCH CONFERENCE)

25 THE COURT: Now, when you took

1 your oath you swore to accept the law as I
2 give it to you. So if you've come into this
3 courtroom with any prior opinions or previous
4 positions about what the law is or what the
5 law should be, I charge you at this point to
6 disregard that. You must accept the law as I
7 give it to you under your oath.

8 Now, as I've told you any number of
9 times, your role is to be judges of the
10 facts. And as the judges of the facts,
11 you'll analyze the evidence that has been
12 presented and you will determine whether the
13 State has met its burden of proof.

14 Now, ladies and gentlemen, when we
15 first started I told you that the Defendant,
16 Mr. Makins, is presumed innocent until the
17 State proves each and every element of each
18 offense beyond a reasonable doubt. Now,
19 until such time as the twelve deliberating of
20 you determine that the State has met its
21 burden, Mr. Makins retains that presumption
22 of innocence. And just imagine that he's
23 wearing a cloak, just like I am, and he
24 retains it until twelve jurors take it off of
25 him by finding that the State has met its

1 burden of proof.

2 Now, ladies and gentlemen, there are
3 three separate indictments in this case, as
4 you know:

5 Criminal sexual conduct with a minor
6 in the first degree;

7 Lewd act upon a minor; and

8 Criminal sexual conduct with a minor
9 in the third degree.

10 Now, those are three separate and
11 distinct charges and you must consider each
12 and every one of those charges separately and
13 distinctly. You will analyze the evidence
14 and the law specific to each charge. And I'm
15 going to give you three separate verdict
16 forms so that you will know demonstrably that
17 you should consider them all separately and
18 distinctly. And you will determine on each
19 charge whether the State has met its burden
20 of proving each and every element of the
21 offense beyond a reasonable doubt.

22 So just by way of example, ladies
23 and gentlemen, if you find that the State has
24 met its burden of proof with respect to one
25 of the charges, it does not mean that you

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1 have to likewise find in favor of the State
2 and find the Defendant guilty on the other
3 two. If you find that the State has not met
4 its burden, it doesn't mean that you have to
5 find not guilty for the other two as well.
6 It is entirely up to you. You will consider
7 each one distinct from one another and
8 consider them each separately and
9 independently.

10 Now, ladies and gentlemen, I'll also
11 tell you that in this case I'll point out
12 something to you that you already know. And
13 that is that the Defendant elected not to
14 testify in this case. Now, it is his right
15 not to testify as guaranteed under our
16 Constitution. Therefore, you cannot hold it
17 against him that he elected to exercise a
18 constitutional right. Therefore, when you go
19 into your jury room, you can't consider that
20 as a matter of fact because it is an
21 important constitutional right that we all
22 enjoy. You can't even discuss it as part of
23 your deliberations in your jury room.

24 Ladies and gentlemen, we've been
25 bandying about the term "reasonable doubt."

1 So I think it begs a definition. You know
2 and you may have heard of other types of
3 trials that come before the court, either in
4 your personal experience or on TV. And there
5 are different standards and burdens of proof.
6 In a civil case, ordinarily you're going to
7 have a burden of proof called a preponderance
8 of the evidence, which is a greater weight of
9 the evidence, greater than fifty percent.
10 Sometimes in a civil trial when we requests
11 for punitive damages or certain causes of
12 action, you'll have a standard of clear and
13 convincing evidence, which is a greater
14 standard of proof. But in all criminal
15 trials, the standard of proof is beyond a
16 reasonable doubt.

17 Proof beyond a reasonable doubt is a
18 doubt that would cause a reasonable person to
19 hesitate to act. Stated otherwise, proof
20 beyond a reasonable doubt is -- proof beyond
21 a reasonable doubt leaves you firmly
22 convinced of the Defendant's guilt.

23 Now, ladies and gentlemen, there are
24 very few things in the world that you can
25 know with absolute certainty. And the law

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1 does not require that the State prove its
2 case with absolutely certainty.

3 After your review of the evidence if
4 you are firmly convinced of the Defendant's
5 guilt, then you would find him guilty.

6 However, after your review of the
7 evidence if you feel that there is a real
8 possibility that the Defendant is not guilty,
9 then you must afford him the benefit of that
10 doubt and under your oath find him not guilty
11 of the offense.

12 Now, ladies and gentlemen, you'll
13 determine whether the State has met its
14 burden of proof by reviewing the evidence.
15 And in doing that, in part, what you're going
16 to do is weigh the credibility of the
17 witnesses who took the stand. Now, you'll
18 determine in your own discretion whether the
19 witness was believable or not.

20 Now, from your own common sense, you
21 know whether someone is believable or not.
22 You know by the way someone expresses
23 themselves, by what they say, how they say
24 it, their body language, facial expressions,
25 whether or not they are believable or not.

1 You may also consider whether that
2 witness had something to gain or something to
3 lose as a consequence of his or her
4 testimony.

5 Ladies and gentlemen, you can take a
6 part of someone's testimony and find that it
7 was believable and discount the rest. Or you
8 may take all of it or you make take none of
9 it. That is entirely in your discretion what
10 to believe.

11 Also understand that no witness,
12 even an expert witness can vouch for the
13 credibility of another witness' testimony.
14 Now, ladies and gentlemen with witnesses'
15 testimony and other evidence, you'll
16 determine what weight and value any piece of
17 evidence has. You may determine that it's
18 very valuable or not valuable. And you
19 assign its weight and you assign its value.
20 From that, you determine what the facts are.

21 Now, ladies and gentlemen, I will
22 restate for you very, very briefly. You saw
23 testimony from an expert witness. I just
24 remind you that an expert witness's testimony
25 is considered in the same fashion as any

1 other piece of evidence that you receive in a
2 case, meaning you decide it was believable
3 and you decide what weight and what value an
4 expert witness's testimony may have.

5 Also, ladies and gentlemen, during
6 this trial you heard the testimony of a
7 child. Now, a child can testify in a case.
8 In deciding believability you can consider
9 the age of that child. You can consider the
10 child's ability to observe and remember
11 facts. You can consider the child's ability
12 to understand and answer questions. Because
13 children may not fully understand what's
14 happening, it's up to you to decide whether
15 the child understood the seriousness of
16 appearing as a witness at a criminal trial,
17 whether the child understood the questions,
18 whether the child has a good memory and
19 whether the child understands the difference
20 between lying and the truth. In addition,
21 young children may be influenced by the way
22 the questions are asked. It's up to you to
23 decide whether the child understood those
24 questions asked.

25 Now, ladies and gentlemen, in this

1 trial and in any trial, ordinarily evidence
2 is going to take one of two forms. It's
3 either going to be direct evidence or
4 circumstantial evidence.

5 Now, direct evidence is evidence
6 which immediately establishes a fact to be
7 proven.

8 Circumstantial evidence is proof of
9 collateral facts or a chain of facts that,
10 which taken together, prove the main fact to
11 be proven.

12 Now, the law doesn't prefer direct
13 evidence over circumstantial evidence or
14 circumstantial evidence over direct evidence.
15 You decide what has weight and what has
16 value, regardless of whether it's direct or
17 circumstantial.

18 Now I'm going to give you an
19 example of direct and circumstantial evidence
20 to help you to conceptualize it a little bit
21 better. I know it's always helpful for me as
22 opposed to just a standard, dry definition.
23 So let's imagine in January you are in your
24 house or your apartment and you walk past
25 your front window or front door going to bed

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1 one evening and you look out on your front
2 lawn in front of your house or apartment and
3 you see there's no precipitation on the
4 ground. You go to bed, you wake up. The
5 next morning you walk past that very same
6 window or door and you look out and there is
7 a blanket of snow in the yard or in the
8 parking lot. And in that snow you see
9 footprints which lead to your door and lead
10 away. Now, under that set of circumstances
11 you've got direct evidence that it snowed
12 last night because that snow is right there.
13 You can touch it. You can feel it. You can
14 pick it up. It's there. It's immediately
15 established by its presence. But you've got
16 circumstantial evidence that somebody, either
17 early that morning or that night walked to
18 your door and walked away. You don't see
19 that person. You can't touch them. You
20 can't feel them. You can't have a
21 conversation with them. But you know as a
22 consequence of the timing of that snowfall
23 and the existence of the footprints in the
24 snow, that someone must have come to your
25 door and walked away. That's circumstantial

1 evidence.

2 Now, ladies and gentlemen, again,
3 the law doesn't prefer direct or
4 circumstantial evidence. You decide what has
5 weight. However, understand that to the
6 extent that the State relies upon
7 circumstantial evidence, all of those
8 circumstances, when taken together, must
9 point conclusively to the guilt of the
10 confused and not create a mere suspicion.

11 Ladies and gentlemen, at this point
12 I'm going to go over with you the charges
13 that have been brought before the Court. And
14 I'm going to read it for you because it's
15 important that I get precise definitions
16 precisely right. I don't like to read
17 because it suggests to you that perhaps I
18 don't understand or know the law. But I
19 think in a case like this, and most cases,
20 it's important, again, that I get these
21 precise definitions precisely right. So if
22 you'll please humor me, I'm going to read
23 them for you, okay?

24 The first case that we have is first
25 degree criminal sexual conduct with a minor.

1 The State must prove beyond a reasonable
2 doubt that the Defendant engaged in a sexual
3 battery with the victim. A sexual battery is
4 sexual intercourse, cunnilingus, fellatio,
5 anal intercourse or any intrusion, however
6 slight, of any part of a person's body or of
7 any object into the genital or anal opening
8 of another person's body. The State must
9 prove beyond a reasonable doubt that the
10 victim was less than eleven years old at the
11 time of the sexual battery. Consent,
12 willingness, indifference or ignorance on the
13 part of a minor, if any, as to what was
14 taking place does not, in any way, affect the
15 charge of criminal sexual conduct with a
16 minor because an unmarried woman under the
17 age of fourteen cannot legally consent to
18 sexual intercourse.

19 Ladies and gentlemen, the next
20 charge that you have to consider is lewd act
21 on a minor. A minor is a person under the
22 age of eighteen. The State must first prove
23 beyond a reasonable doubt that the Defendant
24 was over the age of fourteen. Next, the
25 State must prove that the Defendant willfully

1 and lewdly committed or attempted a lewd or
2 lascivious act on or with the body parts of a
3 child under the age of sixteen years, with
4 the intent to arouse, appeal to or gratify
5 the lust, passions or sexual desires of the
6 Defendant or the child.

7 "Willfully" means voluntarily and
8 intentionally with the specific intent to do
9 something the law forbids.

10 "Lewd" means obscene, lustful,
11 indecent or lecherous.

12 "Lascivious" means tending to incite
13 lust, lewd, indecent, obscene or tending to
14 deprave the morals in respect to sexual
15 relations.

16 Ladies and gentlemen with regard to
17 the allegation of lewd conduct, the State
18 alleges that this happened between 1 January
19 2012 and 17 June and 2012. On the verdict
20 forms, I have those dates for you so it'll be
21 easily identified.

22 Ladies and gentlemen the third
23 charge for your consideration is criminal
24 sexual conduct with a minor in the third
25 degree. And a person is guilty of criminal

1 sexual conduct with a minor in the third
2 degree if the actor is over fourteen years of
3 age and the actor willfully and lewdly
4 commits or attempts to commit a lewd or
5 lascivious act upon or with the body or its
6 parts of a child under sixteen years of age
7 with the intent of arousing, appealing to or
8 gratifying the lust, passions or sexual
9 desires of the actor or the child.

10 Ladies and gentlemen, I have for you
11 three verdict forms, as I had already
12 suggested to you. Now, these verdict forms
13 are very simple and they have the caption and
14 then they'll have the charge to which the
15 verdict form applies.

16 With regard to the criminal sexual
17 conduct with a minor in the third degree, it
18 has the date that I've written in, and I hope
19 you can read that, of 18 June 2012 through 20
20 March 2012. And with respect to lewd act it
21 has the relevant dates of 1 June 2012 through
22 17 June 2012. Now, ladies and gentlemen, you
23 will read on this verdict form it says,
24 (reading): "We, the jury, by unanimous
25 agreement find the Defendant..." -- all right,

1 before we go any further, understand that
2 your verdict must be unanimous. You must all
3 agree on the verdict. It can't be a
4 combination of eleven to one or ten to two.
5 You must all agree on the verdict, it must be
6 unanimous. Also understand that your verdict
7 must be based on the law and on the evidence
8 as it has been presented to you in this case.
9 It can't be based on anything outside of this
10 courtroom. It can't be based on passion or
11 prejudice or bias or caprice or sympathy. It
12 has to be based on the law and the evidence
13 as it was presented at trial.

14 Now, ladies and gentlemen, all of
15 the verdict forms are alike from here. That
16 is, you're going to have two choices, either
17 Not Guilty or Guilty. Now, look, I prepared
18 these, so don't think that I am trying to
19 send you a signal by putting them in any
20 particular order. If there are only two
21 choices one's going to come first and one's
22 going to come second. So don't think that
23 I'm trying to tell you anything. I am
24 certainly not. So what you will do is you
25 will look at each case and determine has the

1 State met its burden of proof with respect to
2 this charge and have they proven all of the
3 elements of the offense beyond a reasonable
4 doubt. If you determine that that is the
5 case, then you would check accordingly. If
6 not, you would check accordingly.

7 And, Mr. Foreman, after the jury has
8 reached a unanimous verdict you would simply
9 sign as foreperson of the jury.

10 After you have made a unanimous
11 decision in each of the cases, then you would
12 let the bailiff know. And then he'll let me
13 know and we'll come out to receive the
14 verdict.

15 Now, I'm going to send you back to
16 your verdict room, but I don't want you to
17 start considering the case yet because I'm
18 going to give the attorneys the opportunity
19 to correct anything that I may have
20 misstated. This is the opportunity for them
21 to tell me that I've either missed something
22 and I left it out and it needs to be included
23 or that I have made a misstatement of the law
24 and it needs to be corrected.

25 And ladies and gentlemen, I want to

1 tell you something before you go as well,
2 that the attorneys have asked me to tell you
3 something and I failed to tell you. And that
4 is the sentence in any criminal case is not
5 relevant to your determination. The sentence
6 in the case is up to the Court. Therefore,
7 you're not to consider the possible
8 consequences of a guilty or not guilty
9 verdict. You are simply deciding whether the
10 State has met its burden of proof.

11 All right. Having said that, ladies
12 and gentlemen, I ask you to return to your
13 jury room. I will send you these verdict
14 forms. And when you receive these verdict
15 forms the bailiff, then you can begin your
16 deliberations.

17 (JURY OUT @ 2:20 P.M.)

18 THE COURT: All right. Exceptions
19 to charge?

20 MR. QUINN: No exceptions nor
21 additions.

22 SOLICITOR PATTERSON: Nothing from
23 the State, Your Honor.

24 THE COURT: Okay. All right.
25 Thank y'all very much. Y'all can do an

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1 inventory of the exhibits. What I'm going to
2 do is I'm going to send these verdict forms
3 back to the jury and I'm going to excuse the
4 two alternates from chambers. I want to
5 thank y'all for trying an excellent case.
6 You were each very professional and did an
7 excellent job. Calculated any all motions or
8 objections to affect a substantive end and
9 you were certainly well prepared and I
10 appreciate it.

11 And all the parties and everyone in
12 the courtroom, I appreciate each of you
13 having been civil and professional. It
14 certainly makes it easier. I don't know what
15 will happen in this case. I'm sorry that
16 we've all arrived here at this point because
17 I know it's hard on everybody. But I wish
18 you all good luck, okay? We'll be in recess.

19 (COUNSEL APPROVAL OF EXHIBITS)

20 (ALTERNATES EXCUSED FROM CHAMBERS)

21 (JURY IN DELIBERATION @ 2:30 P.M.)

22 (COURT IN RECESS)

23 (NOTIFIED OF JURY QUESTION @ 5:15)

24 (DEFENDANT PRESENT)

25 THE COURT: I had the opportunity

1 to discuss with all counsel a note that I
2 received from the foreman. It says, "We have
3 not come up with a verdict. Are we allowed
4 to leave for the night and restart our
5 discussion tomorrow?"

6 We had the bailiff inquire further
7 of the jury as to where they stood and how
8 much longer they may anticipate that they
9 need to continue deliberating. They
10 indicated that probably as much as four
11 hours. So with the consent and leave all
12 counsel, we have elected to bring them in and
13 let them go for the night.

14 I do intend to give them an
15 admonition against discussing the case and to
16 make it very, very clear to them that they
17 must all return tomorrow morning for further
18 deliberations. So I will make this note,
19 Court's Exhibit Number 1.

20 COURT REPORTER: Court's Exhibit
21 Number 1.

22 (SO MARKED AS COURT'S EXHIBIT 1)

23 THE COURT: Mr. Frazier, if you'd
24 bring the jury?

25 (JURY IN @ 5:20 P.M.)

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1 THE COURT: All right. Ladies and
2 gentlemen, I got your note. And I understand
3 that you want to take a break for the night.
4 Now, I'm going to honor your request. I've
5 had a discussion with the attorneys and we've
6 decided that we're comfortable with that.

7 But I do want you to know that I,
8 generally speaking, am very reluctant to let
9 a jury leave while a jury is conducting
10 deliberations. I've been at the courthouse
11 as late as midnight and beyond with juries
12 who were out deliberating. But I recognize
13 that you're conscientious and we'd have more
14 time tomorrow. But the reason why I'm always
15 reluctant, and most judges are reluctant, to
16 let juries go home is because once you begin
17 your deliberations, it's rife with peril when
18 you leave the courthouse. So I need to
19 stress upon you the importance of not
20 discussing the case with anyone. You'll go
21 home and I'm sure that, again, someone may
22 invite you to discuss it. And you may even
23 want to discuss it to try to get something
24 off your chest. Don't do it, okay? Don't
25 discuss the case with anyone. Don't conduct

1 any self-help. No, you know, flow charts in
2 the basement on the wall or algorithms as you
3 think it out. When you go home, you have to
4 change gears and do something entirely
5 different. Don't think about it. Don't talk
6 about it. When you get back, you can resume
7 your deliberations.

8 Also, let me stress upon you the
9 importance of everyone coming back. Again,
10 that's a reason why we're reluctant to do it
11 because I've got to have twelve jurors. If
12 eleven of you shows up and one of you has
13 gotten sick or for whatever reason elects not
14 to show up, then I have to declare a mistrial
15 and have to start all over. So that is --
16 that's problematic as you can imagine because
17 the parties have invested a lot of time and
18 effort into the case. And the resources of
19 the State and of the community have been
20 brought to bear to bring this to trial. So
21 we need to make sure that we don't trip up at
22 the eleventh hour. So, you've heard me.
23 Don't discuss the case. And by all means, be
24 back, okay? 9:00 tomorrow morning.

25 When I get a report that y'all are

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1 all here, I'll either bring you back in and
2 tell you good morning and give you further
3 instruction, or I'll just give the bailiff
4 instructions to tell you to resume your
5 deliberations, okay? Y'all have a great
6 evening and I'll see you tomorrow morning.

7 (JURY OUT @ 5:23 P.M.)

8 THE COURT: All right. Counsel,
9 before we adjourn I need to put one thing on
10 the record that's entirely administrative. I
11 just forgot to put it on before, before we
12 argued and charged. I know we were all
13 concerned with what we were doing. But I did
14 want to put on the record that by consent the
15 curative charge of no witness, including an
16 expert witness is allowed to vouch for the
17 credibility of another witness' testimony.
18 And that was the curative charge that we had
19 discussed pursuant to an incident to the
20 motion for mistrial before and the concern
21 over expert witnesses vouching for
22 credibility. I just wanted to make sure that
23 that was on the record. I think that was a
24 discussion that we had in chambers and it's
25 important that we get in the clear, okay?

1 Anything else we need to put on the record
2 this evening?

3 SOLICITOR PATTERSON: Nothing from
4 the State, Judge.

5 MR. QUINN: Only that while I
6 agree to the curative instruction and, in
7 fact, asked the Court to give it, I do not
8 think it resolves the issue of whether a
9 mistrial should have been granted.

10 THE COURT: I understand.

11 MR. QUINN: Thank you, Judge.

12 THE COURT: Okay. Good enough.
13 I'll see y'all tomorrow. If y'all need me
14 between now and then, e-mail me or call me.

15 MR. QUINN: Thank you, Judge.

16 (COURT IN RECESS)

17 (TRANSCRIPT CONTINUED NEXT PAGE)

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State of South Carolina v. Ontario Makins
Case No. 16-GS-23-04363 et. al.
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Court's Charge on the Law

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DECEMBER 8, 2016

9:00 A.M.

(DEFENDANT PRESENT)

(JURY DELIBERATING @ 9:00 A.M.)

(NOTIFIED OF JURY QUESTIONS 9:05 A.M.)

THE COURT: We're back on the record in the case of State versus Makins. I've had the opportunity to discuss in chambers four notes that I received from the jury in this case. And what I'm going to do is I'm going to have the court reporter staple all four together and mark them as Court's Exhibit Number 2 collectively.

COURT REPORTER: Yes, sir.

(SO MARKED COURT'S EXHIBIT NUMBER 2)

THE COURT: Okay. And I'll go through each in turn with the jury. But I'll bring them out and obviously by -- through discussion with counsel, we've elected to bring them out and discuss these issue -- the issues with them, give them a DVD player for the purpose of viewing the DVD that was admitted into evidence, that was the forensic interview. And then otherwise, I intend to recharge them with regard to criminal sexual

1 conduct with a minor in the first degree and
2 criminal sexual conduct with a minor in the
3 third degree, as it addresses a specific
4 question that they posed.

5 All right. And with that, if you'd
6 bring them in, please, sir?

7 Oh, and would you ask them to bring
8 in, please, their verdict forms. I want to
9 see them to make sure that I indicated on
10 those correctly, the time frames. Okay?

11 BAILLIFF: Yes, sir.

12 (COURT AT EASE)

13 BAILLIFF: Sir, (tenders verdict
14 form to the bench).

15 THE COURT: Thank you.

16 BAILLIFF: Yes, sir.

17 (JURY IN @ 9:25 A.M.)

18 THE COURT: Good morning, ladies
19 and gentlemen. I hope y'all are doing well.
20 I've gotten your notes and I brought you back
21 in to address them.

22 On the first one, "We have a DVD as
23 evidence. Are we allowed to watch it again?
24 And if so, can we get a DVD player?"

25 Yes, we're going to give you a

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1 computer and you can plug it in and watch the
2 DVD. Please don't use the computer to access
3 the internet and do any research or anything
4 of that sort. Just use it for its intended
5 purpose and I trust that you will.

6 Next question, "Is there any
7 timeline of the sequence of events that we
8 can review?"

9 I can't do that because that is
10 evidence that was presented at trial. The
11 only way that I could possibly do that is
12 give you a recitation of a timeline or have
13 the witnesses get back up and testify once
14 again. We're not allowed to do that. The
15 law and the procedure doesn't allow for it.
16 One of the reasons why there are twelve
17 jurors in a jury is because collectively
18 among you, you have the capacity and the
19 ability to recount the evidence that was
20 presented in trial. We can't go back and
21 review or -- excuse me. We can't go back and
22 reintroduce evidence. And I, because I've
23 told you, I'm not allowed to have an opinion
24 on the evidence or the facts of the case,
25 which means I can't give you a timeline of

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1 events because I'm not allowed to under the
2 law because that would be commenting on the
3 evidence and I'm not in a position to do it.
4 So what you'll have to do is rely upon your
5 collective recollection of the testimony, the
6 evidence that was admitted during trial.

7 Second one, "For lewd act upon a
8 child, can we get a clarification on where
9 June 1st, 2012 came from. We understand the
10 June 17th."

11 Okay. Clarification: I screwed that
12 up. I meant to put 1 January, 2012 to 17
13 June 2012. And I put June -- it was just a
14 scrivener's error and I apologize for that.
15 You understand that there is a time
16 difference and it butts up is because the
17 Legislature changed the law. So it's
18 incumbent upon y'all to look at the first
19 timeframe and determine whether the State met
20 its burden of proof, specifically with regard
21 to that timeframe and the charge for lewd act
22 and for criminal sexual conduct with a minor
23 in the third, okay? So I've changed that and
24 I initialed it. So for the lewd act it's 1
25 January 2012 to 17 June 2012. And I

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1 apologize for that. I recognize that I may
2 have confused you with that.

3 Okay. With regard to the fourth
4 question: "Now that we have had time to
5 discuss the evidence, can we get a brief
6 recap on the difference between the first
7 degree and the third degree?"

8 I'm just going to read to you the
9 definitions that I read to you before, okay?
10 (Reading): "With regard to criminal sexual
11 conduct with a minor in the first degree, the
12 State must prove beyond a reasonable doubt
13 that the defendant engaged in a sexual
14 battery with the victim.

15 A "sexual battery" is sexual
16 intercourse, cunnilingus, fellatio, anal
17 intercourse or any intrusion, however slight,
18 of any part of a person's body or of any
19 object into the genital or anal openings of
20 another person's body.

21 The State must prove beyond a
22 reasonable doubt that the victim was less
23 than eleven years old at the time of the
24 sexual battery.

25 With regard to criminal sexual

1 conduct with a minor in the third degree, a
2 person is guilty of criminal sexual conduct
3 with a minor in the third degree if the actor
4 is over fourteen years of age and the actor
5 willfully and lewdly commits or attempts to
6 commit a lewd or lascivious act upon or with
7 the body or its parts of a child under
8 sixteen years of age, with the intent of
9 arousing, appealing to or gratifying lust,
10 passions or sexual desires of the actor or
11 the child.

12 Okay? That's the distinction
13 between the two. So ladies and gentlemen,
14 I'm going to ask you to return to your jury
15 room. I'm going to pass these verdict forms
16 back to you. And we'll send a computer that
17 you can use -- we'll send it back with the
18 bailiffs and y'all can tee it up and watch
19 the video. Thank you very much. I'd
20 appreciate it. Y'all can return to your jury
21 room.

22 (JURY OUT @ 9:35 A.M.)

23 THE COURT: Okay. All right.
24 We'll be in recess until we hear from the
25 jury.

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1 SOLICITOR PATTERSON: Thank you.

2 (COURT IN RECESS)

3 (DEFENDANT PRESENT)

4 (JURY NOTIFICATION @ 2:55 P.M.)

5 THE COURT: All right. Ladies and
6 gentlemen, I've been advised that the jury
7 has received a unanimous verdict. Is the
8 State prepared to receive the verdicts?

9 SOLICITOR PATTERSON: We are, Your
10 Honor.

11 THE COURT: Is the Defendant
12 prepared to receive the verdict?

13 MR. QUINN: Yes, sir. Do you
14 prefer to stand when the verdict is read?

15 THE COURT: I don't have a
16 preference. Whatever you're comfortable
17 with.

18 MR. QUINN: Okay. Thank you.

19 THE COURT: Okay. If you'll bring
20 them in, please, sir.

21 (JURY IN @ 3:00 P.M.)

22 THE COURT: All right. Mr.
23 Bonarrigo, has the jury reached a unanimous
24 verdict, sir?

25 FOREMAN: Yes, sir, we have --

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Jury Trial of December 5-8, 2016

Verdicts & Sentence

1 (tenders verdict forms).

2 BAILIFF: (Tenders verdict forms
3 to the judge)

4 THE COURT: (Upon review), the
5 Clerk will publish the verdicts.

6 CLERK: Your Honor, in the case of
7 2016-GS-23-04363, State of South Carolina
8 versus Ontario Stefon Patrick Makins,
9 (reading): "We, the jury, by unanimous
10 agreement, find the Defendant not guilty."

11 In the case of 2016-GS-23-7512A,
12 (reading): "We, the jury, by unanimous
13 agreement, find the Defendant not guilty."

14 In the case of 2016-GS-23-4363,
15 (reading): "We, the jury, by unanimous
16 agreement, find the Defendant guilty."

17 They're signed by Mr. Bonarrigo, our
18 Foreperson.

19 Ladies and gentlemen, if you agree
20 these are the verdicts you reached in your
21 deliberation room, would you please raise
22 your right hand?

23 (ALL JURORS' HANDS WERE RAISED)

24 CLERK: Thank you.

25 THE COURT: Counsel, anything

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Verdicts & Sentence

1 have stated since the beginning, I'm
2 innocent. I have two kids with Toi. And
3 like she (Ms. Johnson) say. it's already done
4 tore the family apart. Ever since I was
5 brought up about fourteen years old, I spent
6 every holiday over Ms. Johnson's house. And
7 that was my family. And ever since this done
8 happen, I feel like I already been treated
9 like a criminal. Like, I was denied jobs,
10 places to stay. And I'm just asking please
11 don't take me away from my kids.

12 MR. QUINN: And the other thing
13 the Court is aware of is DSS was involved in
14 this case from the beginning. The children
15 were returned to he and Toi, but DSS
16 continues to be involved in monitoring the
17 case.

18 DEFENDANT MAKINS: Can I say I'm
19 sorry to Ms. Johnson all this happened. I'm
20 sorry that it's -- that we even made it this
21 far but I'm just saying please don't take me
22 away from my kids.

23 THE COURT: Okay. Mr. Makins, I
24 don't feel the need and I think would be
25 gratuitous for me to pontificate in any way,

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1 shape or form. And so I'm simply going to
2 hand down the sentence.

3 The sentence based on the verdict
4 that's been handed down by the jury. The
5 sentence of the Court is you be committed to
6 the Department of Corrections for a period of
7 ten (10) years, credit for any time you may
8 have served. Good luck to you, sir.

9 MR. QUINN: Thank you, Your Honor.

10 SOLICITOR PATTERSON: Thank you,
11 Judge.

12 (TRANSCRIPT CONCLUDED)

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Toy's house in living room
 in the afternoon, two summers
 ago.
 Before - playing with my ~~friends~~ ^{new friends}
 and they wanted to play
 outside, but I didn't cause
 it was hot and I didn't
 want to walk ~~and~~ crutches

Hear - He said, "Suck my dick."
 I said, "mmm"
 See - ~~printed~~ picture

Touch - ~~plastic~~ picture

Think - Maybe he'll give me
 a dollar.
 He gave me \$20.

Feet - scared
 Suck!

373 WITNESSES

D Picone (60)

Greenville County Sheriffs Office

4/22/2015

ARREST WARRANT NUMBER
2015A2330203335

ACTION OF GRAND JURY

TRUE BILL
Thomas J. Piche
FOREMAN GRAND JURY
Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury
Date:

AMENDED INDICTMENT
DOCKET NO. 2016-GS-23-004363
KWP

The State of South Carolina
County of Greenville

COURT OF GENERAL SESSIONS

August TERM 2016

~~THE STATE~~ GUILTY
vs.

ONTARIO STEFON PATRICK MAKINS

Amended Indictment for
3661

ENTERED
ACCT. *df*

CRIMINAL SEXUAL CONDUCT WITH A MINOR
3RD DEGREE

VIOLATION § 16-03-0655(C)

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STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

AMENDED INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT WITH A MINOR 3RD DEGREE

At a Court of General Sessions, convened on

AUG 23 2016

the Grand Jurors of Greenville

County present upon their oath:

That ONTARIO STEFON PATRICK MAKINS did in Greenville County, between the 18th day of June, 2012, and the 20th day of March, 2015, being over the age of fourteen years, willfully and lewdly commit or attempt a lewd and lascivious act upon or with the body, or its parts, of B. W., a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or such child. This is in violation of §16-03-0655(C) of the South Carolina Code of Laws (1976) as amended.

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



SOLICITOR

BAR # 8245-101073

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with 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."

Respectfully Submitted,



Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589

ATTORNEY FOR APPELLANT

This 21st day of February, 2018.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ONTARIO STEFON PATRICK MAKINS,

APPELLANT

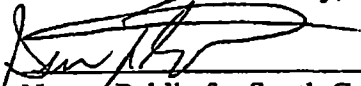
CERTIFICATE OF SERVICE

I certify that a copy of the Record on Appeal in the above-referenced case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 21st day of February, 2018.



Scott Leverett
Administrative Specialist

SUBSCRIBED AND SWORN TO before me
this 21st day of February, 2018.



(L.S.)
Notary Public for South Carolina
My Commission Expires: 10/30/2022.

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2016-002495

THE STATE,

Respondent,

vs.

ONTARIO STEFON PATRICK MAKINS,

Appellant.

SUPPLEMENTAL RECORD ON APPEAL

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ATTORNEYS FOR RESPONDENT

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1 of the minor child, I'd consider that. I'd
2 consider it. And you may not want it. You
3 may not want to put a fine point on the issue
4 at all and just let it ride. You can
5 consider that and tell me if that suits you.

6 With regard to the motion for
7 directed verdict, obviously, the standard is
8 review the evidence in the light most
9 favorable to the non-moving party to
10 determine, not the weight and sufficiency of
11 the evidence, but the existence of any
12 evidence upon which a jury could determine
13 that the State had met its burden of proof.
14 And under that standard, I respectfully deny
15 the motion for directed verdict, okay?

16 Anything else we need to put on the
17 record?

18 MR. QUINN: Does Your Honor want
19 to inquire of my client about his right to
20 testify and his waiver?

21 THE COURT: Sure. I'll do that.
22 Mr. Makins, if you please would raise your
23 right hand?

24 (WHEREUPON DEFENDANT DULY SWORN)

25 THE COURT: Mr. Makins, in a

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2016-002495

THE STATE,

Respondent,

vs.

ONTARIO STEFON PATRICK MAKINS,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Supplemental Record on Appeal 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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Attorney General

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ATTORNEYS FOR RESPONDENT

March 13, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ONTARIO STEFON PATRICK MAKINS,

APPELLANT

APPELLATE CASE NO. 2016-002495

FINAL BRIEF OF APPELLANT

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II.

The trial court violated Appellant's due process rights under Sixth and Fourteenth Amendments to present a complete defense and to confront adverse witnesses through meaningful cross-examination by refusing to allow Appellant to cross-examine Minor regarding three prior false allegations of sexual abuse that Minor made against that Appellant's two sons, both between the ages three and seven, and against Minor's niece on the grounds that Appellant had to prove that the allegations were "absolutely false."17

III.

The trial court abused its discretion by allowing a witness to testify as both an expert witness in child sexual abuse trauma and as a fact witness regarding Minor's allegations of sexual abuse as the expert's testimony improperly bolstered Minor's credibility in a sexual abuse case against Appellant where Minor's credibility was the critical determination in the case.....21

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STATEMENT OF ISSUE ON APPEAL

I.

The trial court violated Appellant's due process rights under Sixth and Fourteenth Amendments to present a complete defense and to confront adverse witnesses through meaningful cross-examination by refusing to allow Appellant to cross-examine Minor regarding three prior false allegations of sexual abuse that Minor made against that Appellant's two sons, both between the ages three and seven, and against Minor's niece.

II.

The trial court violated Appellant's due process rights under Sixth and Fourteenth Amendments to present a complete defense and to confront adverse witnesses through meaningful cross-examination by refusing to allow Appellant to cross-examine Minor regarding three prior false allegations of sexual abuse that Minor made against that Appellant's two sons, both between the ages three and seven, and against Minor's niece on the grounds that Appellant had to prove that the allegations were "absolutely false."

III.

The trial court abused its discretion by allowing a witness to testify as both an expert witness in child sexual abuse trauma and as a fact witness regarding Minor's allegations of sexual abuse as the expert's testimony improperly bolstered Minor's credibility in a sexual abuse case against Appellant where Minor's credibility was the critical determination in the case.

STATEMENT OF THE CASE

On August 23, 2016, the Greenville County Grand Jury indicted Appellant for criminal sexual conduct with a minor, first degree; criminal sexual conduct with a minor, third degree, and one count of committing a lewd act upon a minor. R. 373 – 374. R. 8,1.3 – 9,1.18.

On December 5-8, 2016, Appellant proceeded to trial before the Honorable Robin Stilwell and a jury. R. 1. Tom Quinn represented Appellant, and Assistant Solicitors Kate Patterson and Chris Hodge represented the State.

The jury found Appellant guilty of one count of criminal sexual conduct with a minor, third degree. R. 368, ll. 2-23. The trial court sentenced Appellant to ten years imprisonment. R. 369,1.23 – 437,1.8.

ARGUMENT

I.

The trial court violated Appellant's due process rights under Sixth and Fourteenth Amendments to present a complete defense and to confront adverse witnesses through meaningful cross-examination by refusing to allow Appellant to cross-examine Minor regarding three prior false allegations of sexual abuse that Minor made against that Appellant's two sons, both between the ages three and seven, and against Minor's niece.

Relevant Facts

On March 10, 2015, Jenna Toney from the Julie Valentine Center began a two day long training session with Ms. Mary Jill Kroske's second grade class at Mitchell Road Elementary School in Greenville County. R. 116, l. 16 – 168, l. 25. Minor was a student in Kroske's class and present for Toney's sessions.

Toney's program was designed to inculcate in children an awareness of child molestation and to alert them to the ever present threat posed to them by strangers. *Id.* Among other advice, Toney instructed the second graders with examples of how they should react when strangers talked to them:

So the first situation is a stranger danger situation. It's about being at a gas station. We say that mom asked us to wait in the car real quick while she goes and gets her gas. But shortly after mom goes into the store, a car pulls up next to mom's car and there's someone in this car that we don't know. So I ask them what that means. That means that person's a stranger. And then -- so then that stranger rolls down his window or their window and says, 'hey, it's a lovely evening out.' And whenever he does this, it gives us a funny feeling in our tummies. We call it the butterflies or the willies. It's the nervous, uh-oh feeling we get sometimes. And I ask them if they know what I'm talking about and they say they do.

And then we say -- I say, you know, we get this feeling because mom, dad and grandma has told us not to, what? "Don't talk to

strangers." So we turn away from him because we're not going to and he sees that. So he gets out of his car and he starts to walk towards the store. But then he changes his mind and he starts to walk back towards mom's car. So what can we do to stay safe in the situation? So we go through -- they give me a bunch of ideas on what they can do to stay safe in this situation. But ultimately what I tell them is they lock the doors, they roll up the windows, and they honk the horn. Now, we honk the horn to draw attention to ourselves, let mom or dad know that we're in trouble and we need help, even though they're in the gas station. And it'll let other adults know in the parking lot that we need help.

R. 120, l. 18 – 172, l. 4. Toney also advised children not to answer the door if they were home alone when the mail man delivered a package and to call their parents or the police if the mail man knocked on the door. R. 122, l. 16 – 173, l. 11.

After covering a wide range of "stranger danger" scenarios on the first day of her presentation, Toney spent the second day lecturing the children about child molesters. Importantly for Appellant's trial, she defined child molesters as "people who try to touch kids on the private parts of their body. Or they'll try and get that kid to touch them on their private parts and they tell them to keep the touching a secret." R. 177, ll. 16-24.

Much of the child molester presentation was dedicated to telling children that child molesters could "look like a normal person" and "could be someone a kid knows and trust, even somebody that loves and cares about." R. 129, l. 5 – 185, l. 11. Toney informed the children that child molesters are tricky people who will use "rewards," "tricks," and "bribes" to keep children quiet. R. 126, l. 8 – 184, l. 15.

Toney ended the presentation by urging children to report child molesters even if the adult they initially tell does not believe their allegations and that "it's never too late to tell someone about a secret unsafe touch. It doesn't matter if it happened a week ago, a month ago or even years ago. It's never too late to tell someone." R. 138, ll. 9-20.

Minor's Initial Disclosure of Sexual Abuse

On March 20, 2015, less than two weeks after Torrey's session, Minor told Kroske that she had been molested. R. 109, ll. 4-11. Without asking questions, Kroske went to the school's guidance counselor and called the police. R. 109, l. 20 – 161, l. 9.

Greenville County Investigator David Picone interviewed Minor at her school. R. 201, l. 17 – 205, l. 22. At trial, Picone recalled that Minor did not initially want to talk about her allegations. *Id.* Picone and the victim's advocate eventually got Minor to disclose the abuse by having the victim's advocate point to Minor's breast, vagina, and butt while asking Minor if she was touched there. *Id.*

Minor indicated that she was touched in the vagina from age five until age eight during frequent visits to Appellant's apartment. *Id.* Appellant lived with his girlfriend, Toi Tisdale. Tisdale is Minor's older sister. Having successfully extracted a disclosure of sexual abuse, the police referred Minor to the Julie Valentine Center for a forensic interview. *Id.*

Appellant voluntarily met with law enforcement. R. 210, ll. 5 – 211, ll. 17. He adamantly denied sexually abusing Minor. He freely conceded that Minor regularly spent time at his and Tisdale's apartment as they frequently babysat Minor and she was good friends with his two sons. *Id.*

Appellant further stated that he had understandably been alone with Minor at various times during the three year period when the state alleged the abuse occurred. *Id.* Unlike the forensic interview, Appellant's denials were not recorded as Picone purportedly inadvertently failed to turn on the recording system. R. 210, l. 5 – 211, l. 21.

Disclosure of Sexual Abuse during Forensic Interview

The forensic interview occurred on March 23, 2015 and was given by Christine Carlburg. During the "non-leading" forensic interview Carlburg asked Minor on four different occasions whether Appellant penetrated her. R. 235, l. 15 – 237, l. 11.

Each time Minor denied that the sexual abuse ever escalated beyond Appellant supposedly touching her "private parts" on several occasions. *Id.* Minor expressly denied any other kind of sexual abuse. *Id.*

Minor claimed that she did not disclose the abuse when it occurred because Appellant "was scary and evil" and threatened to kill her and her family. R. 237, ll. 15-22. She also stated that the abuse always occurred at Appellant's house when no one else was present, including Appellant's sons. *Id.* Picone arrested Appellant after the forensic interview. R. 212, ll. 18-23.

Minor's Later Disclosures during Therapy

Minor's allegations against Appellant expanded once Minor began attending therapy sessions with Kristen Rich of the South Carolina Department of Mental Health. During one therapy session on July 6, 2016, over a year after Minor's disclosure, Rich asked Minor to recall the worst incident of sexual abuse she experienced. R. 275, l. 8 – 279, l. 20.

In response Minor drew Rich a photograph showing Appellant forcing her to perform oral sex on him. *Id.* Minor claimed this incident occurred sometime in the summer of 2014 and that the sexual abuse started when she was five and ended when she was eight. R. 278, ll. 12- 23.

This was the first time that Minor alleged Appellant had done more than touch her genitals. Minor repeated to Rich that she was afraid because Appellant threatened to kill her and her family if she told anyone about the abuse. R. 281, ll. 8-9.

During another therapy session Minor accused C.M. and M.M., Appellant's two sons and her nephews, of forcing her to have anal sex with them. R. 77, l. 11 – 78, l. 23. M.M. and C.M.

are both younger than Minor. At the time of Appellant's trial, Minor was ten years old, C.M. was six, and M.M. was nine. Nevertheless, Minor was adamant that the two young boys sodomized her when testifying at trial. *Id.*

Minor also accused another nephew, M.S. of sexually abusing her. In language that mirrored the terms used by Toney in her presentation, Minor accused M.S. of "touching her private parts." R. 70, l. 11 – 74, l. 25. M.S. is the daughter of one of Minor's older sisters. *Id.* M.S. lived in North Carolina and rarely saw Minor. *Id.*

Like her allegations against M.M., C.M., and Appellant, Minor was unable to provide any dates or time frame for M.S.'s alleged abuse. *Id.* Minor claimed that she told her mother and her therapist about M.S.'s abuse, but was unsure if she told the police. *Id.* Minor was adamant that M.S. sexually abused her.

Pre-Trial Boiter Hearing

Appellant moved pre-trial to be allowed to cross-examine Minor on the allegations she made against C.M. and M.M. pursuant to *State v. Boiter*. After Minor testified about the allegations, counsel proffered without objection from the State that C.M. and M.M. were available to testify and would deny Minor's allegations against them.

Defense counsel argued that the *Boiter* framework, particularly the requirement that Appellant "prove" that the allegations at issue were false, presented an impossible standard for the defense:

It appears that the burden is on the defense to first prove that the allegation made by the reported victim was false.

Then you go to other considerations about timeliness, the factual similarity to determine relevance.

As the Court has heard, [Minor] has testified these allegations did occur. Whether I believe that or no, it becomes an impossibility, even though I have the children here available to

testify that with denial of these allegations, I think it becomes a factual impossibility to prove the allegations false when there are no witnesses, there is no physical evidence, there are no reports that police -- there was no investigation. At best what I'm going to have is a swearing contest.

R. 84, l. 22 – 86, l. 20.

Defense counsel expressed frustration that the *Boiter* opinion did not specify the burden of proof that the defense had to carry, but simply required that the defense "prove" the allegations were false. *Id.* Defense counsel maintained that proving with complete certainty, as *Boiter* appeared to require, that the allegations against the six year old C.M. and nine year M.M. were false was impossible. *Id.*

Prior to finding Minor's allegations against C.M. and M.M. inadmissible, the trial court embraced some of defense counsel's frustrations:

Okay. All right. I do find that based on the evidence that's been submitted on the record, I cannot determine under any standard of proof, whether it's preponderance of the evidence, clear and convincing or beyond a reasonable doubt, that the accusations made by the victim, prior accusations were false.

I recognize the Defense's position that is, that under the relevant standard articulated by the Supreme Court that it's a futile endeavor to try to prove the falsity of prior accusations. I don't know if that's precisely true. However, I would say that it is an unwieldy burden. And for the record I'm not so sure that it's a fair burden to impose upon a defendant either. I don't know if that issue has been waived by the Defense.

However, I will tell you from the trial court perspective, I would love to have additional guidance from the Supreme Court about the burden of proof required for proving the falsity of the accusation.

And I think that it should more particularly be that the -- the proof should be that the accusation was in question, not that it was absolutely false. Because I think that visits ultimately an unfairness upon a defendant in not being able to explore prior allegations of sexual abuse that may be questionable. That is,

that had not been adjudicated but weren't proven specifically false in any tribunal or in any in-camera proceeding.

Okay. For that reason, I find that any cross-examination of prior allegations of sexual abuse or inadmissible...

R. 87, l. 11 – 88, l. 23.

Minor's Trial Testimony

Minor was ten years old at the time of Appellant's trial. Minor was unsure when Appellant began sexually abusing her and initially claimed that she did not remember being sexually abused and refused to testify about it. R. 174, ll. 2-23

With prompting from the solicitor, Minor went on to claim that Appellant first forced her to perform oral sex on him after she, M.M. and C.M. got in trouble for having a "water fight" in the bathroom of Appellant's apartment. R. 175, l. 7 – 226, l. 6. Minor could not remember what, if anything, Appellant said to her at time.

Minor further alleged that, on at least three occasions, Appellant forced her to perform oral sex on him while C.M., M.M. or others were in the room. R. 176, ll. 7-22; r. 182, ll. 1-11. Minor stated that Appellant would occasionally give her a dollar after she performed oral sex on him and once made her watch a video on how to perform oral sex. R. 180, ll. 5-20.

On cross-examination, Minor admitted that she never told police or the forensic interviewer about Appellant making her watch the video. R. 190, l. 11 – 192, l. 2. Minor also admitted that Appellant never threatened her. She conceded that she had lied to police, the forensic interviewer, and her therapist in an effort to explain why she had waited to report Appellant. *Id.*

Minor further conceded that her story of sexual abuse had "grown" in the year and a half since she first accused Appellant from Appellant touching her to Appellant forcing her to perform oral sex. R. 194, l. 3 – 195, l. 12.

Other Evidence

As noted *supra*, there was no physical evidence corroborating Minor's allegations. Moreover, despite Minor claiming that Appellant on at least one occasion forced her to perform oral sex while the same room as other people, no witnesses came forward at trial to say that they observed any suspicious acts by Appellant or saw any sexual abuse.

The only other evidence that suggested Minor had experience something traumatic was testimony from Minor's mother that Minor began touching herself and wetting her bed after she disclosed the sexual abuse. R. 152, l. 13 – 155, l. 9. Minor's mother also claimed that prior to the abuse, Minor frequently complained to her about having to go to the apartment that Appellant and Tisdale's residence. *Id.*

Discussion

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038 (1973); *see also California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, (1984) (finding the Due Process Clause of the Fourteenth Amendment affords criminal defendants a meaningful opportunity to present a complete defense); *State v. Hutton*, 358 S.C. 622, 631, 595 S.E.2d 876, 881 (Ct.App.2004) (recognizing fundamental fairness requires criminal defendants be granted a meaningful opportunity to present a complete defense).

The cross-examination of adverse witnesses has been accurately described as the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970) (*internal quotations omitted*). The right to confront adverse witnesses through

meaningful cross-examination is foremost amongst the rights that secure the accused "a fair opportunity to defend against the State's accusations." *State v. Gillian*, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004).

The right to cross-examine a prosecuting witness is of constitutional dimensions because it is essential to a fair trial. *State v. Sierra*, 337 S.C. 368, 523 S.E.2d 187 (Ct. App. 1999). Denial of an accused's right to effective cross-examination is a "constitutional error of the first magnitude." *Davis v. Alaska*, 415 U.S. 308, 218, 94 S.Ct. 1105, 1111, 39 L.E.2d 347 (1974).

The Confrontation Clause does not prevent a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. Trial judges retain the power impose reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness's safety, or interrogation that is repetitive or only marginally relevant. *Martin v. Dunlap*, 266 S.C. 230, 222 S.E.2d 8 (1976).

However, before a defendant can be prohibited from attempting to demonstrate bias on the part of a witness, the record must clearly show that the cross-examination is improper. *State v. Smith*, 315 S.C. 547, 446 S.E.2d 411 (1994). Generally, where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *In re Vora*, 354 S.C. 590, 582 S.E.2d 413 (2003).

The credibility of any witness is undoubtedly a relevant subject for cross-examination. *State v. Jenkins*, 322 S.C. 360, 360, 474 S.E.2d 812, 814-815 (Ct. App. 1996) (reversing conviction where trial court erroneously prevented defendant from cross-examining detective about circumstances of controlled buy made by confidential informant).

Rule 611(b), SCRE, expressly provides that "a witness may be cross-examined on any matter relevant to any issue in the case, including credibility." Under Rule 608(b), SCRE, witnesses may be cross-examined regarding:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Rule 608(b), SCRE. The credibility of the prosecuting witness is a critical subject for cross-examination. *Jenkins*, 322 S.C. at 360, 474 S.E.2d at 814-815.

An anomalous restriction on the otherwise wide-ranging right to cross-examine the prosecuting witnesses on issues relating to credibility is when the defendant wishes to confront the prosecuting witness about a prior false accusation of sexual abuse. *State v. Boiter*, 302 S.C. 381, 383-384, 396 S.E.2d 364, 365 (1990) (holding defendant failed to prove that prior accusations of sexual abuse made by prosecuting witness were false where neither the police nor social services investigated the prior allegation.).

For this one subject, a defendant must first prove that the allegations were false in a pre-trial hearing before being allowed to confront the prosecuting witness regarding alleged prior false accusation of sexual abuse. *Id.* Only if the defendant can prove that the prior allegations were false does the trial court then determine whether the probative value of the allegations are substantially outweighed by the risk of prejudice. *Id.*

To do this, the trial court evaluates how remote in time the prior allegation is to the offense at trial and the extent of any factual similarities between the two allegations. *Id.* In effect, *Boiter* lays out a nearly impossible standard for the introduction of prior false accusations of sexual abuse during cross-examination.

Requiring the defendant to prove that the prosecuting witness' prior allegation was factually false before allowing the defendant to cross-examine on the prior allegation is constitutionally unsound. *Boiter* places an unreasonable restriction on the right to cross-examine the prosecuting witness so as to test their credibility. 302 S.C. at 305, 396 S.E.2d at 365.

Other jurisdictions, including jurisdictions the *Boiter* court relied on two and a half decades ago, have recognized that cross-examining the prosecuting witness on prior false accusations of sexual abuse is necessary for a fair determination of the case when the prosecuting witness's credibility is central to the State's case against the defendant. These states simply require that there is some evidence that the prosecuting witness made prior accusations that were false, unless the probative value of the evidence which the defendant seeks to elicit on the cross-examination (including the probability that false accusations were in fact made) is substantially outweighed by the risk of prejudice, confusion, embarrassment or delay. *State v. LeClair*, 83 Or. App. 121, 730 P.2d 609, 615 (1986); *Smith v. State*, 377 S.E.2d 158 (Ga. 1989); *State v. Baron*, 292 S.E.2d 741, 743 (N.C. Ct. App. 1982).

These jurisdiction rightly treat cross-examination on a witness's prior allegations of sexual abuse no differently than other kinds of impeachment and credibility evidence offered to attack a witness under those jurisdictions equivalent of Rule 608(b), SCRE. *Commonwealth v. Bohannon*, 378 N.E.2d 987 (Mass. 1978); *State v. Wyrick*, 62 S.W.3d 751 (Tenn. Crim. App. 2001); *Beck v. State*, 824 P.2d 385 (Ok. Ct. Crim. App. 1991); *Clinebell v. Com*, 368 S.E.2d 263 (Va. 1988); *State v. Long*, 140 S.W.3d 27 (Mo. 2004); *State v. Miller*, 921 A.2d 942 (N.H. 2007).

Further, the *Boiter* standard is antithetical to the stated goal of the Rules of Evidence that relevant evidence be admissible. Evidence bearing directly on the credibility of witnesses, especially prosecuting witnesses, is relevant and admissible. See Rule 608(b), SCRE.

In all other instances, a cross-examiner seeking to attack the credibility of a witness by asking about the witness's specific past conduct under Rule 608(b), SCRE must simply have a good faith basis for the question. *State v. Gunn*, 313 S.C. 124, 136, 437 S.E.2d 75, 82 (1993); see also *See State v. McGuire*, 272 S.C. 547, 253 S.E.2d 103 (1979) (a witness may be impeached by past conduct which fairly tends to affect her credibility if the questioner has a good faith basis for asking the question).

Only in instances where the defendant is seeking to attack a witness's credibility based on that witness having made a prior false accusation of sexual abuse, is the defendant required to prove the accusation was factually false. *Boiter*, 302 S.C. at 383-384, 396 S.E.2d at 365. This is an impossible burden of proof for a defendant to satisfy and an unreasonable restriction on a defendant's right to confront adverse witnesses.

Appellant's case aptly illustrates the impossibility of satisfying *Boiter's* requirement of proving falsity. When asked to describe what C.M., M.M., and M.S. did, Minor refused. When initially pressed, Minor claimed she did not remember. R. 70, l. 15 - 83, l. 7. Finally, with additional prompting, Minor alleged that Appellant's six and nine year old sons sodomized her or "played with her butt" when the boys were around ages four and seven respectively. Minor also accused M.S. of "touching her private parts."

Minor, who is older than both boys, never reported any of this abuse to the police. She never mentioned it to the forensic interviewer. *Id.* She first disclosed these purported incidents of abuse to her therapist during a counseling session almost two years after she accused Appellant of sexually assaulting her. There were no witnesses. There was no physical evidence or corroborating reports of any injuries from the assault.

Defense counsel proffered without objection that all three children denied Minor's allegations. R. 85, ll. 6-23. Common sense and a basic understanding of human develop strongly support defense counsel's contention that Minor's allegations against Appellant's sons and M.S. were false.

Nevertheless, Minor was adamant that the three sexually assaulted her. R. 73, ll. 12- 17; R. 77, ll. 20-22. Defense counsel correctly noted that he was faced with a "swearing match" and could not prove that the allegations were factually false. R. 85, ll. 6-23. Thus, under *Boiter* the allegations were inadmissible. *Id.*

Minor's credibility was critical to a fair determination of Appellant's case. The central issue at trial was whether or not the alleged acts of sexual abuse occurred. Like M.S., C.M., and M.M., Appellant denied the abuse occurred. R. 210, ll. 10-14. Minor was the only witness able to testify on this issue. Evaluations of witness credibility are the exclusive remit of the jury. *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016) (instructing jury that testimony of the victim need not be corroborated in prosecutions for criminal sexual conduct, was an impermissible charge on the facts and unconstitutional.).

Appellant sought by his questions to bring to the jury's attention that Minor had made multiple allegations of sexual abuse against family members. These other allegations of abuse were substantially similar to Minor's allegations against Appellant and these other allegations of abuse were very likely false. The fundamental requirement for admitting extrinsic evidence of a prior false allegation should be a showing of legal relevance. *See* Rule 403, SCRE

Evidence of other false accusations accusing other family members of committing the same crimes that Appellant was standing trial for would have seriously damaged Minor's credibility. Moreover, the possibility that this evidence might have had a significant impact on

the issue of credibility is enhanced by the fact that Minor's testimony was inconsistent and confused.

Had defense attorney been allowed to cross-examine Minor on these other prior false accusations of sexual abuse, Minor's credibility would have been further undermined. This evidence might have had a significant impact on the issue of whether or not the abuse occurred and consequently on the outcome of trial.

Therefore, the exclusion of the Appellant proposed cross-examination questions regarding Minor's likely false allegations of sexual abuse by M.S., C.M., and M.M. violated Appellant's due process right to effectively confront his accuser and to present his defense fully.

Accordingly, this Court should now take the opportunity to rule that under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, a defendant has a right cross-examine a witness, including the prosecuting witness, on a prior false allegation of sexual abuse for the purposes of attacking that witness's credibility under Rule 608(b) and Rule 611(b) of the South Carolina Rules of Evidence when defendant has a good faith factual basis for asking the question and the credibility of the challenged witness is a critical issue in the case.

II.

The trial court violated Appellant's due process rights under Sixth and Fourteenth Amendments to present a complete defense and to confront adverse witnesses through meaningful cross-examination by refusing to allow Appellant to cross-examine Minor regarding three prior false allegations of sexual abuse that Minor made against that Appellant's two sons, both between the ages three and seven, and against Minor's niece on the grounds that Appellant had to prove that the allegations were "absolutely false."

In the event this court upholds *Boiter's* requirement that a defendant "prove" a prior allegation of sexual abuse was false before allowing cross-examination on the prior allegation, this Court should take the opportunity to clarify the burden of proof that a defendant must satisfy in order to prove that the prior allegation of sexual abuse was false.

The record of the *Boiter* hearing makes clear that neither defense counsel nor the trial court could discern the burden of proof that the defense must overcome before a witness can be cross-examined on a prior false allegation of sexual abuse. R. 84, 1. 22 – 88, 1. 23. The defense maintained that a straightforward reading of *Boiter* required that the defense prove the prior allegations were factually impossible. *Id.*

The trial court demurred as to the impossibility of proving factual falsity, but recognized the due process dilemma caused by *Boiter*:

I recognize the Defense's position that is, that under the relevant standard articulated by the Supreme Court that it's a futile endeavor to try to prove the falsity of prior accusations. I don't know if that's precisely true. However, I would say that it is an unwieldy burden. **And for the record, I'm not so sure that it's a fair burden to impose upon a defendant either.** I don't know if that issue has been waived by the Defense.

However, I will tell you from the trial court perspective, I would love to have additional guidance from the Supreme

Court about the burden of proof required for proving the falsity of the accusation.

And I think that it should more particularly be that the -- the proof should be that the accusation was in question, not that it was absolutely false. Because I think that visits ultimately an unfairness upon a defendant in not being able to explore prior allegations of sexual abuse that may be questionable. That is, that had not been adjudicated but weren't proven specifically false in any tribunal or in any in-camera proceeding.

Id. (emphasis added). The trial court was absolutely correct in its assessment of *Boiter's* constitutional and evidentiary problems.

If this Court still wishes to impose on the defendant a burden of proving, to some degree, that the prior allegation is false; the only constitutionally sound burden of proof would be to require that the defendant to prove by a preponderance of the evidence that there is a reasonable probability the prior allegation of sexual abuse was false. *See State v. Guenther*, 854 A.2d 308, 324 (N.J. 2004) (holding that to impeach prosecuting witness who allegedly made a prior false criminal accusation, trial courts must first conduct determine by a preponderance of the evidence whether defendant has proven that a prior accusation charging criminal conduct was false).

Adopting the preponderance of the evidence standard would be consistent with our other foundational requirements for **admitting or excluding extrinsic evidence** of some fact sought to be proven. *Cf. Morgan v. State*, 54 P.3d 332 (Ak. Ct. App. 2002) (holding that extrinsic evidence of prior false claim of sexual assault must be proven by a preponderance of the evidence); *see also State v. Long*, 140 S.W.3d 27 (Mo. 2004). It would concededly keep in place *Boiter's* disparate treatment of cross-examination questions attacking the credibility of a witness based on prior false allegations of sexual abuse versus cross-examination on other specific instances of prior conduct. Rule 608(b), SCRE; *see also Gunn*, 313 S.C. at 136, 437 S.E.2d at 82.

For instance, the State must prove by a preponderance of the evidence that a defendant's statement to law enforcement was voluntarily made before the statement can be entered into evidence. Further, the State must show by a preponderance of the evidence that false statements in a search warrant were not made intentionally or with reckless disregard for the truth. *State v. Miller*, 375 S.C. 370, 379, 652 S.E.2d 444, 449 (Ct. App. 2007) citing *Jackson v. Denno*, 378 U.S. 368, 376, 84 S.Ct. 1774 (1964); see also *State v. Wilson*, 345 S.C. 1, 4, 545 S.E.2d 827, 829 (2001) (at trial state bears the burden of showing by a preponderance of the evidence that a motion to suppress should not be denied).

Requiring the defense prove that there is a reasonable probability, the prior allegation is false addresses the concern for fairness displayed by the trial court in Appellant's case:

I think that it should more particularly be that the -- the proof should be that the accusation was in question, not that it was absolutely false. Because I think that visits ultimately an unfairness upon a defendant in not being able to explore prior allegations of sexual abuse that may be questionable

R. 88, ll. 9-19. Reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome." *Ramirez v. State*, 419 S.C. 14, 795 S.E.2d 841 (2017). In the context of an alleged prior false allegation of sexual abuse, reasonable probability would be a probability sufficient to undermine confidence in the validity of the witness's claim of prior sexual abuse.

It is fundamentally unfair, and offensive to due process, to require the defense prove that the prior accusation was "absolutely false." R. 87, l. 11 – 88, l. 19; *Boiter*, 302 S.C. at 383, 396 S.E.2d at 365. Neither the State nor a criminal defendant nor any civil litigant are required to prove the "absolute" existence of a disputed fact.

As a common reasonable doubt jury instruction states, regarding the highest burden of proof in our judicial system, "[t]here are very few things in this world that we know with absolute certainty. And in criminal cases, the law does not require proof that overcomes every possible doubt. The law doesn't require that." *State v. Darby*, 324 S.C. 114, 115, 477 S.E.2d 710, 711 (1996).

Accordingly, in the event that this Court concludes that a defendant must make a preliminary showing, beyond those required by Rules 401, 403, and 608(b), SCRE, that a witness's prior allegation of sexual abuse was factually false, this Court should take the opportunity to clarify that the defense has the burden of proving by a preponderance of the evidence that there is a reasonable probability that the accusation of sexual abuse is false.

III.

The trial court abused its discretion by allowing a witness to testify as both an expert witness in child sexual abuse trauma and as a fact witness regarding Minor's allegations of sexual abuse as the expert's testimony improperly bolstered Minor's credibility in a sexual abuse case against Appellant where Minor's credibility was the critical determination in the case.

Relevant Facts

At trial, the State sought to have therapist Kristin Rich testify as both an expert in the treatment of child trauma and child sexual abuse dynamics and as the therapist that diagnosed Minor with post-traumatic stress syndrome. R. 249, ll. 1-14. Further, the State sought to have Rich testify that Minor, a year and half after her first allegation of sexual abuse by Appellant, disclosed to her during a counseling session that Appellant had forced her to repeatedly perform oral sex on him when she was between the ages of six and eight. R. 91, l. 7-92, l. 25.

Defense counsel objected to having Rich testify as both an expert witness and a fact witness. Counsel argued that Rich's testimony would improperly bolster Minor's testimony. R. 47, l. 11 - 49, l. 7. The trial court acknowledged defense counsel's concern was valid:

This is my concern about this witness and why I'm somewhat circumspect. We have a long line of cases which discuss expert witnesses buttressing the credibility of minor witnesses. And although I think that most of what she talked about in a vacuum is okay, my concern is that she begins to talk about the specific treatment and discussions with this child and without saying 'that makes her believable', she is suggesting that that makes her believable.

And I want to make sure that what we're not doing is an end run around forensic interviewers being qualified as expert witnesses and thereby buttressing the credibility of witnesses.

R. 48, ll. 8-23. The State assured the trial court that it would limit Rich's testimony and not ask her if she determined the source of Minor's PTSD. R. 45, l. 23 - 46, l. 22.

Rich was qualified as an expert in child the treatment of child trauma and child sexual abuse dynamics, testified before the jury as to the common symptoms children exhibit when they have experienced trauma. R. 251, l. 4 – 253, l. 20. Rich stated that child who have experienced trauma frequently act out and misbehave. *Id.*

Rich also explained that children who have experienced trauma because of sexual abuse will frequently avoid talking about the abuse or avoid trying to visit where the abuse occurred. She posited that child sexual abuse "is strongly correlated with ... bedwetting, pulling out hair, wanting to avoid particular situations, being frightened in certain situations. Sometimes children who have been abused by a particular type of perpetrator, they want to avoid that. .. some children want to avoid men." R. 252, ll. 17-25.

Rich then held forth how children typically do not immediately disclose the abuse and how it was perfectly normal for children's stories surrounding the abuse to change over time. "Disclosure is really not an event, it's a process." R. 254, l. 2 – 255, l. 18. Every single factor that Rich enumerated regarding characteristics and behaviors of children who have suffered trauma because of sexual abuse, matched Minor's behavior.

The State then moved on to asking Rich about her treatment of Minor. Rich testified that she only works with children who have experienced some kind of trauma and that she had "provided therapy to the victim in this case." R. 257, ll. 6-9. Defense counsel immediately moved for a mistrial arguing that the State had just vouched for Minor's credibility in direct violation of the court's pre-trial ruling:

Defense counsel stated that Rich had stated she worked with children who had sustained trauma and that she was treating Minor for trauma. "[O]nce-Ms. Rich says 'I only work with people who have been traumatized, who have suffered ... ' -- I believe that her description was "a very bad event, one that they can feel that they can be hurt or killed, that was shocking and would leave them

horrified", she is saying that, "Every child I work with or every person I work with has suffered some trauma. That's why I provide counseling to them, is they are my clientele.

By definition then, she is saying [Minor] suffered a trauma. In this case, the trauma was from sexual abuse.

R. 260, ll. 3-16. Counsel further averred that it was obvious the State was attempting to vouch for Minor's credibility by "saying in essence 'if she didn't suffer trauma, I wouldn't be working with her.'" R. 260, ll. 18-25. Furthermore, once the State had Rich testify to Minor's disclosure, Rich would expressly stating that she had found Minor's disclosure credible.

The trial court declined to grant a mistrial, but noted the clear parallel between Rich's testimony and the – now impermissible – testimony of purported forensic interviewers, "I'm not certain how we distinguish the therapist from a forensic interviewer. I know how we do it semantically. I'm not certain how we do it substantively." R. 267, ll. 9-16.

Ultimately, the court ruled that Rich's testimony was not objectionable because Rich had not testified beyond what a "blind expert" would have testified too. R. 269, ll. 19-22. Curiously, the trial court also held that if Rich "testifies about the disclosure, then obviously she represents to the jury that she has a relationship, a professional relationship with this child. But if, she doesn't talk about the diagnosis and all of those other things, then I don't think you get to the point of vouching." R. 269, l. 23 – 270, l. 4.

After the jury returned, Rich testified that Minor disclosed the sexual abuse to her during a counseling treatment session. R. 275, l. 8 – 279, l. 20. Rich recalled that the disclosure, "wasn't until the second session that she would say it because part of the therapy is to be able to say the things that you're scared of." R. 279, ll. 7-13.

Discussion

The *only* purpose of Rich's testimony was to improperly bolster Minor's testimony. The South Carolina Court of Appeals has recently held that it is improper for a witness to bolster the testimony of other witnesses. *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012); see also *Smith v. State*, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010) (finding a "forensic interviewer's...opinion testimony improperly bolstered the Victim's credibility").

In *McKerley*, the trial court allowed a witness to testify as an expert in "forensic interviewing and child abuse assessment." 397 S.C. at 463, 725 S.E.2d at 141. The expert had interviewed the alleged victim twice and concluded that both interviews were compelling for sexual abuse. She also determined that the victim's statements were consistent with other information she had on the case. *Id.* at 466, 725 S.E.2d at 142. Our Court of Appeals determined that there was no other way to interpret the language used in the expert's testimony other than to mean she believed the victim was being truthful. It further held, "In light of [the expert's] extensive inadmissible testimony bolstering the credibility of the victim ... we cannot say the erroneous admission of [the expert's] testimony did not contribute to the jury's decision," therefore finding harmful error. *Id.* at 467, 725 S.E.2d at 143.

Our Supreme Court has also held that it is improper "for an expert to comment on the veracity of a child's accusations of sexual abuse." *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011); see *State v. Dawkins*, 297 S.C. 386, 393-94, 377 S.E.2d 298, 302 (1989) (finding therapist indicating he believed victim's allegations were genuine was improper); see also *State v. Dempsey*, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct. App. 2000) (finding

therapist's testimony children were being truthful in ninety-five percent of instances in which sexual abuse was alleged was improper vouching for child).

In *Jennings*, the forensic interviewer, who was qualified as an expert, interviewed the three alleged victims of sexual abuse and issued a separate report for each child that was admitted into evidence. She concluded in her reports that each child provided a compelling disclosure of abuse by the defendant and that the children provided details that were consistent with the background information received from their mother, the police report, and the other children. 394 S.C. at 476-481, 716 S.E.2d at 92-95.

Our Supreme Court held that conclusions in the reports improperly vouched for the children's veracity and, thus, the trial court abused its discretion by admitting the reports into evidence. It further held the error was *not* harmless because there was no physical evidence presented at trial and, therefore, the children's credibility was the sole issue in the case. *Id.* at 94-95, 716 S.E.2d at 480.

It is clear from the record that the state in this case attempted to circumvent recent case law sharply limiting the use of forensic interviewers by presenting a Minor's therapist, who was presumably familiar Minor' expected testimony and specific allegations. The State used Rich's direct knowledge of the specifics of the case to *indirectly comment on Minors' credibility* and provide greater weight to their testimony.

Rich's testimony was very likely interpreted by the jury to express that they should believe Minor because Minor's behavior was typical, expected, and complied with the behavior of the majority of other victims of sexual abuse. Moreover, that jurors should believe Minor because she disclosed sexual abuse to an expert in "the treatment of child trauma and child sexual abuse dynamics." The expert, Rich, found Minor's disclosure credible enough to inform law enforcement

For example, Rich testified that the vast majority are children are delayed in disclosing abuse just like Minor in this case. Her testimony strongly implied that because she witness Minor act in the same manner as other victims of sexual abuse Minor must be telling the truth.

Therefore, admitting her as an expert and allowing her to testify as both an expert witness and a fact witness was error as "[t]he assessment of witness credibility is within the exclusive province of the jury." *State v. McKerley*, 397 S.C. at 464, 725 S.E.2d at 141 (citing *State v. Wright*, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)).

Not only was Rich's testimony used to bolster Minor's testimony, it was also highly prejudicial to Appellant and cumulative. Under Rule 403, SCRE, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ... or needless presentation of cumulative evidence."

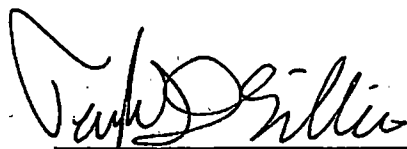
Why Minor delayed disclosing was an issue of dispute. Initially, Minor claimed Appellant threatened her life and her family. Minor later admitted that this was a lie and that she did not disclose earlier because she did not realize Appellant was a child molester.

Rich testified that either reason was consistent with the actions of a child who was traumatized by sexual abuse. R. 251, l. 6 – 257, l. 8. Rich's testimony regarding both the typical process of delayed disclosure and her first hand observations of Minor's disclosure process was used solely by the State to reinforce and reiterate the reasoning for Minor's actions and behavior. *See Jolly v. State*, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994) ("Improper corroboration testimony that is *merely cumulative to the victim's testimony*, however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.") (emphasis in original).

Rich's testimony was also prejudicial to Appellant because there was no physical evidence presented in the case and the sole issue was the credibility of Minor. Because the Minor's credibility was the most critical determination in this case and Rich's testimony was used solely to bolster Minor's credibility, Appellant was clearly prejudiced and should be granted a new trial. *See Jennings*, 394 S.C. at 480, 716 S.E.2d at 94-95 ("Because the children's credibility was the most critical determination of this case, we find the admissibility of the [forensic interviewer's] written reports was not harmless.").

CONCLUSION

By reason of the foregoing arguments, Appellant's convictions should be reversed and this case remanded to the Greenville County Court of General Sessions for a new trial.



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Appellate Defender

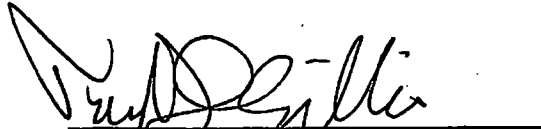
ATTORNEY FOR APPELLANT

This 13th day of March, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 13, 2018



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,


V.

ONTARIO STEFON PATRICK MAKINS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of March, 2018.



Taylor D. Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 13th day of March, 2018.

Courtney Powers (L.S)

Notary Public for South Carolina

My Commission Expires: May 2, 2027.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Robin B. Stillwell, Circuit Court Judge

THE STATE,

Respondent,

vs.

ONTARIO STEFON PATRICK MAKINS,

Appellant.

Appellate Case No. 2016-002495

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STATEMENT OF ISSUES ON APPEAL

I.

The trial court did not err in declining to allow evidence Victim disclosed being abused by other children pursuant to State v. Boiter, 302 S.C. 381, 396 S.E.2d 364 (1990), because Appellant abandoned his motion to admit the evidence and failed to offer any proof the allegations were false. (Appellant's issues I & II).

II.

The trial court did not err in denying Appellant's motion for mistrial. The State's expert witness did not impermissibly bolster Victim's testimony by providing testimony on the behaviors of sexually abused children and the symptoms of trauma. The issue is not preserved for review since Appellant did not contemporaneously object to the sufficiency of the "curative" instruction (Appellant's issue III).

STATEMENT OF THE CASE

Appellant Makins was indicted for criminal sexual conduct with a minor in the first degree, criminal sexual conduct with a minor in the third degree, and lewd act on a minor. Following trial on December 5-8, 2016, a jury found Makins guilty of criminal sexual conduct with a minor in the third degree. During sentencing, Makins apologized to Victim's mother. R. p. 369. The Honorable Robin B. Stilwell sentenced Makins to ten years imprisonment.

STATEMENT OF FACTS

Appellant Makins molested his girlfriend's younger sister from the time she was five to eight years old. Victim disclosed the abuse to her second grade teacher, Mary Jill Kroske, roughly a week after a representative from the Julie Valentine Center spoke with the class about inappropriate touching. R. p. 108. On March 20, 2015, the children left for recess, but Victim lagged behind and said, "Ms. Kroske, do you remember those ladies that came to us?" and Kroske answered, "yes." Victim replied, "well that happened to me." R. p. 109, lines 4-11. Victim disclosed she was sexually abused to Kroske. R. p. 109. Kroske went to the guidance counselor to report the abuse. R. pp. 109-10.

Victim's Mother testified Victim was ten years old at the time of trial. Mother has four daughters, including Victim, aged twenty-nine to ten years old. At the time of trial, daughter Toi was nearly twenty years old. Makins is Toi's boyfriend, and they have two children together – M.M. (age 9) and C.M. (age 6). R. pp. 143-45; p. 147. Mother testified she was close to Makins before the disclosure: Toi and Makins were together since they were in middle school, and Mother loved Makins and considered him a son. Makins spent a lot of time with the family. R. pp. 147. Sometimes Makins babysat Victim. R. p. 150.

The school called Mother and advised her Victim told her teacher her "brother" sexually abused her. Mother did not believe it at first, because "brother" meant Makins and she did not believe Makins would do that. However, when she went to school and spoke to Victim, she implored Victim, "Tell the truth," and Victim replied "I am." R. p. 153.

Mother testified at the time Victim acted out a lot. She would check on Victim in her room at night and see Victim with her hands in her panties. Victim wet the bed a lot. She became adamant

at times about not wanting to go to Toi's apartment. R. pp. 153-54.¹ After the disclosure, Mother took Victim to the Julie Valentine Center for a forensic interview and took her to counseling. She testified Victim had trouble focusing, behaving in school, and sleeping at night. R. pp. 154-55. Mother and Victim no longer interacted with Makins and did not have regular contact with Toi or the grandsons. R. pp. 156-58.

Victim testified she went to Toi's house often. Sometimes Makins watched Victim when Toi was at work. R. pp. 172-73. She testified one time, she was playing with her nephews and they threw cups of water at each other in the bathroom. Makins called them into the living room, one at a time, to punish them. He called Victim and told her to suck his penis. R. p. 175. She testified she was made to perform oral sex on other occasions, more times than she could remember. R. pp. 175-76. Makins also touched her "butt" and made Victim touch his penis. R. pp. 177-79. This sometimes happened while the nephews were outside but also happened when the nephews were playing video games. Sometimes the nephews were in the same room. R. pp. 181-82. Victim found she wanted to leave Toi's as soon as she arrived and would call her mother to go home. R. p. 183.

She testified she told her teacher, Ms. Kroske, about the abuse. R. p. 184. She admitted she previously lied when she said Makins threatened not to tell, but explained she lied because she was previously scared to tell about the abuse. R. pp. 192-93; pp. 195-96. She testified she misses Toi and her nephews, but she told because "[Makins] is a child molester." R. pp. 184-85. She explained a child molester is a person who touches children on their private parts. R. p. 187. She testified she

¹ Makins erroneously claims Mother testified Victim became adamant about not going to Toi's house before the abuse occurred. Br. of App. p. 13. Mother testified Victim's protestations occurred when Victim was between five and eight years old, during the time period Makins abused her. R. p. 154.

drew a picture of herself and Makins during therapy. R. p. 186.

Investigator David Piccone interviewed Victim, then referred her to the Julie Valentine Center. He also interviewed Makins, who denied committing any sexual abuse, but admitted he sometimes was alone with Victim when he babysat her. R. pp. 203-04; pp. 209-10.

Christine Carlberg from the Julie Valentine Center conducted a forensic interview during which Victim described being sexually abused by Makins. The video recording of the interview was admitted as State's Exhibit Number Two. R. pp. 228-32.

During the interview, the Victim was clearly reluctant to talk about the abuse. She was visibly angry and sometimes grunted responses to the interviewer's questions. When asked a general question if anything happened, she replied "no" and later said she did not want to talk about it. State's Exhibit No 2 (8:30-9:30). Victim complained she wanted to go home. She slumped over on her chair – her body language would continue to be telling throughout the interview. She told the interviewer she told her mother and teacher, but she did not want to tell the interviewer what she told them. (9:30-10:30). Victim later said she was worried about Terry and was scared to tell. (11:00-11:30). She then indicated by shaking her head in agreement that she was abused, and she told the interviewer it occurred more than one time. (12:00-13:00). She held up five fingers to answer the question of what age the abuse began and indicated by showing eight fingers that the abuse lasted until she was eight years old. (circa 13:00). The abuse occurred at Toi's house. Victim asked the interviewer if Terry got arrested. She angrily exclaimed, "You already know, don't you" as an answer to either her question or the interviewer's question about what happened. Victim pushed her chair to the edge of the room as the interviewer continued the inquiry on the difficult topic. (13:00-14:30). She slumped out of the chair onto the floor as she faced more questions. (16:00). She told

the interviewer Terry is mean, Terry is scary, and he is a child molester. (17:00-17:15). She described a child molester as someone who touches a child in the private parts of their body. (17:30-17:45). Victim indicated, by pointing, that Terry did that to her. She said it occurred more than one time. (circa 18:00). Victim angrily said it felt scary. (18:45-19:00). Terri told her not to tell anyone. (21:00). She told the interviewer he also made her touch his rear. (25:00-25:30). Victim told the interviewer the abuse occurred every time she was at Toi's house. She told the interviewer he made her touch him with his pants pulled down, and threatened to kill her or her family if she told. (30:00-31:30). The interviewer suggested she draw while the interviewer briefly left the room. She drew a picture and said "Devil." (34:00-36:00). She later identified the person she drew as Terry. (39:00-39:15). At the end of the interview, Victim appears relieved and unburdened.

Kristen Rich, a licensed counselor, treated Victim. R. p. 245. She is certified in trauma focused cognitive behavioral therapy. She defined trauma as an event of a shocking nature that "tragically shifts your life." R. p. 243, lines 11-20. She testified she saw children suffering trauma from a number of events, including car accidents, physical or sexual abuse, witnessing a traumatic or violent death, robberies, and house fires. R. pp. 243-44.

She noted often children are suffering symptoms and they do not know why. She notes that first, she provides information about trauma so patients may understand what is happening to them. She utilizes tools so they can understand their emotions. The "most important part of trauma [treatment] is to talk about what happened." R. p. 244, lines 8-23. Rich testified she has treated about 500 children, of which about 125 to 150 suffered trauma from sexual abuse. R. pp. 248-49.

Rich testified some of the symptoms a child might exhibit after suffering trauma are avoidance, hypervigilance, sleep problems, and somatic symptoms. R. pp. 251-52. They may suffer

from intrusive thoughts or feel shame. Symptoms often overlap. R. pp. 252-53.

She further testified about delayed disclosure. Rich noted most children will delay disclosure because of their youth. If the perpetrator is a family member, delayed disclosure is more likely. Rich explained that disclosure is not an event, but more of a process. This process is known as piecemeal disclosure. R. pp. 254-55.

Rich testified she treated Victim. Victim disclosed she was abused during a therapy session. R. p. 275. Victim drew a picture in therapy which was admitted as State's Exhibit Number Four. R. P. 372.

ARGUMENT

I.

The trial court did not err in declining to allow evidence Victim disclosed being abused by other children pursuant to State v. Boiter, 302 S.C. 381, 396 S.E.2d 364 (1990), because Appellant abandoned his motion to admit the evidence and failed to offer any proof the allegations were false. (Appellant's issues I & II).

Makins complains his due process rights were violated because he was not allowed to put into evidence that Victim made a "false" accusation that other children sexually assaulted her, relying on State v. Boiter, 302 S.C. 381, 396 S.E.2d 364 (1990). However, Makins' counsel aborted the in camera hearing and conceded he would be unable to establish the predicate requirement for admissibility. Makins' counsel offered no proof the allegations were actually false. Accordingly, the issue is not preserved for review, and the trial court did not err in declining to admit the evidence after counsel conceded the issue.

In Boiter, the Supreme Court found evidence of prior false accusations by the victim may be probative on the issue of credibility, but noted other jurisdictions require a threshold determination the prior accusation was false. Id. at 383, 396 S.E.2d at 365. The Supreme Court held in "deciding the admissibility of evidence of a victim's prior accusation, the trial judge should first determine whether such accusation was false." Id. If finding the accusation was false, the trial court should consider the remoteness in time and consider the factual similarity between the prior and present allegations to determine relevancy. Id.

Boiter's victim, his seventeen-year old stepdaughter, testified in camera she told her mother and a social worker she was fondled by her biological father at age eight. No investigation or further inquiry was conducted as a result of her complaint. Applying the facts in Boiter to the Supreme

Court's announced standard, the Supreme Court held, "Based upon the record in this case, the previous accusation was not investigated. **The defense presented no evidence to establish its falsity.**" Id. at 384, 396 S.E.2d at 365 (emphasis added).

In the instant case, Makins requested a hearing pursuant to Boiter. Victim then testified in camera she was touched inappropriately by M.S., Victim's oldest sister's daughter. She testified she told her mother. She did not tell her therapist, Kristen Rich, about the incident – only her mother told Rich. Victim was not sure, but thought she remembered telling officers. R. pp. 71-75. Defense counsel asked Victim whether she accused M.M. and C.M. of touching her inappropriately. She did not want to talk about it, but she confirmed they sexually abused her, although due to defense counsel's unartful questions, the exact nature of the abuse was not definitively established. The record does not support Makins' claim Victim "was adamant that the two young boys sodomized her when testifying at trial." Br. of App. p. 10. The abuse occurred at Toi's home. Victim told her mother, and said she "maybe" told Rich. R. pp. 75-78.²

After Victim testified, Makins' counsel announced he was not calling any more witnesses.

Counsel explained:

It appears that the burden is on the defense to first prove that the allegation made by the reported victim was false. . . .

As the Court has heard, [Victim] has testified these allegations did occur. Whether I believe that or no, it becomes an impossibility, even though I have the children here available to testify that – with denial of these allegations, I think it becomes a factual impossibility to prove the allegations false when there are no witnesses, there is no physical evidence, there are no reports that police – there was no investigation. At best what I'm going to have is a swearing contest.

² No evidence was presented Victim disclosed abuse by M.S. to Rich. Further, no evidence was presented Victim disclosed to Rich that "C.M. and M.M. forced Victim to have anal sex with them." Br. of App. p. 10. Makins' citation in his brief does not support this claim.

. . . [E]ven if the standard is preponderance of evidence, I don't know [how] I get past fifty percent to fifty-one percent. Rather than putting three minor children witnesses up, when I do not believe that I can establish to the Court even to a preponderance of the evidence that the allegations are false – because it would be a straight forward swearing contest. One will say yes, they did it. And they'll say, "no, I didn't." That's all the testimony we will have.

I have discussed it with my client, of course, that if we stop at this point the allegations, the other allegations made will not come out before the jury. They will not be aware of these allegations, whether they are true or false, that no testimony about that would be admissible. So my client understands that and that is all the testimony that I would have.

R. p. 85, line 6 – p. 86, line 20.

The trial court asked if the prosecutor wished to respond, and the prosecutor replied, "I don't believe it's necessary so long as [defense counsel] has conceded that these allegations would be absolutely inappropriate at trial." R. p. 86, line 24 – p. 87, line 2. The prosecutor noted the Boiter standard was not met because the allegations were not proven false. Further, the prosecutor explained the State's view that the allegations were not factually similar to the instant crime and so the other allegations would not be admissible at trial. R. pp. 86-87.

The trial court agreed defense counsel's presentation was insufficient to establish admissibility under Boiter. The trial court remonstrated the burden suggested in Boiter was "an unwieldy burden" and questioned whether it was fair. The trial court suggested Supreme Court review of the question would be useful. However, the trial court held the evidence was inadmissible. R. pp. 87-88.

Makins' counsel did not argue Boiter applied an unconstitutional standard or Boiter required more than a preponderance of evidence to admit evidence of false accusations. State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998) (holding failure to raise constitutional issue at trial precluded its

consideration on appeal). Makins' counsel only admitted his offer of proof would fail even under the preponderance standard, and he abandoned the motion.

The issue is not preserved for review because counsel conceded he could not present sufficient evidence to meet the Boiter standard and abandoned the motion. "[I]t is the responsibility of trial counsel to preserve issues for appellate review." Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750, 759 (1997). Mere observations by the trial court do not enlarge the grounds upon which the motion is made. Mize v. Blue Ridge Ry. Co., 219 S.C. 119, 64 S.E.2d 253 (1951). An issue conceded in trial court is not preserved for review. State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000) (appellant barred from arguing a palm print was circumstantial evidence when he conceded at trial that it was direct evidence); State v. Brannon, 347 S.C. 85, 89, 552 S.E.2d 773, 775 (Ct. App. 2001) (finding search issue as to co-appellant Mayberry not preserved since Mayberry conceded at trial he had no standing to contest admission of evidence); Ex parte McMillan, 319 S.C. 331, 334, 461 S.E.2d 43, 45 (1995) (holding a party cannot acquiesce to an issue at trial, but then complain on appeal); see Ligon v. Norris, 371 S.C. 625, 634, 640 S.E.2d 467, 472 (Ct. App. 2006) ("An objection withdrawn at trial constitutes an express waiver of the issue and does not preserve the issue for appellate review."). "A litigant cannot concede an issue at trial and then raise it on appeal." CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 81, 716 S.E.2d 877, 885 (2011).

Further, counsel failed to make a sufficient record of the evidence that would be presented for this Court to review. Failure to make an offer of proof precludes consideration of an issue on appeal. State v. Cabbagestalk, 281 S.C. 35, 36, 314 S.E.2d 10, 11 (1984). The appellant bears the burden of presenting an adequate record that is sufficiently complete so the appellate court is able to review the lower court's actions. State v. Knighton, 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999).

The reviewing court may not consider alleged error in excluding testimony unless the record fairly shows what the rejected testimony would have been. State v. Roper, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979). Counsel's claim the two children would deny abusing Victim does not constitute evidence that they would deny abusing Victim. Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) ("Arguments of counsel are . . . not evidence."); Shinn v. Kreul, 311 S.C. 94, 102, 427 S.E.2d 695, 700 (Ct. App. 1993) ("A court cannot consider facts appearing only in argument of counsel.").

Moreover, Makins' claim the prosecution did not object to defense counsel's "proffer" is simply misleading because the "proffer" was merely part of his counsel's explanation for abandoning the Boiter motion, and the prosecutor noted Makins failed to offer any evidence the allegations were false.

Makins cites several cases purportedly in support of his argument. In State v. LeClair, 730 P.2d 609, 615 (Or. Ct. App. 1987), the Oregon Court of Appeals found in order for alleged prior false accusations to be admitted, there must be evidence the victim recanted the accusations, the defendant demonstrates the accusations were false, or evidence demonstrates the accusations were false. Further, the defendant may be excluded from attempting to elicit such testimony if the probative value, including the probability that false accusations were made, is outweighed by the risk of prejudice. Id. The Oregon court concluded two incidents, a 1981 incident and a 1984 incident, were properly excluded. The victim denied making a 1981 accusation. The victim maintained the 1984 incident did occur, while the alleged perpetrator denied the incident occurred. The Oregon court concluded the trial court properly applied the balancing test to preclude the defense from inquiring about either incident. Id. at 615-16. In the instant case, evidence of abuse by the three

children was not admissible because Makins failed to demonstrate the accusations were false.

Makins relies on two other cases which lack applicability to the instant case. In State v. Baron, 292 S.E.2d 741, 744 (N.C. Ct. App. 1982), the North Carolina Court of Appeals did not determine the standard of admissibility for alleged false accusations, but instead determined false accusations did not fall under the state's rape shield statute. Likewise, in Smith v. State, 377 S.E.2d 158, 159-60 (Ga. 1989), the Georgia Supreme Court found the trial court erred by finding alleged false accusations by the victim inadmissible under the rape shield statute and concluded the rape-shield law does not prohibit such testimony. The Georgia Supreme Court set out the rule that the trial court must make a threshold determination that a reasonable probability of falsity exists to protect the prosecutrix from unfounded allegations that she made similar allegations in the past. Id. at 138. Ultimately Makins' reliance on these cases is misplaced, because unlike those cases, the trial court in the instant case did not base its ruling on the rape shield statute, but instead on Boiter.

Makins also cites State v. Long, 140 S.W.3d 27 (Mo. 2004). However, the Missouri Supreme Court held exactly what Makins complains about: the Missouri Court found that a defendant seeking to admit evidence that a prosecuting witness made a previous false allegation **must show** by a preponderance of evidence that the accusation previously made was actually false. Id. at 32.

In State v. Miller, 921 A.2d 942, 946-47 (N.H. 2007), the New Hampshire Supreme Court made a distinction between a threshold showing allowing cross-examination of a victim about an alleged false accusation, and a higher **clear and convincing** standard to allow extrinsic evidence of a prior false accusation. Since Makins abandoned his motion, it is difficult first to know whether Makins was merely seeking to cross-examine Victim or offer extrinsic evidence. However, there is

no indication from the record Makins would have met the lower threshold requirement since she confirmed the abuse actually occurred. Further, Makins was not prejudiced since cross-examination would not have aided Makins. Finally, Miller actually requires a higher standard for admitting extrinsic evidence of a purported false allegation, which the State would suggest is excellent policy because of the danger of unfair prejudice from unfounded claims of a false allegation.

Likewise, in Commonwealth v. Bohannon, 378 N.E.2d 987 (Mass. 1978), the Massachusetts Supreme Court addressed only the question of whether cross-examination about prior false accusations was permissible, without addressing the admissibility of extrinsic evidence. Unlike the present case, an offer of proof was made – the defendant established the complainant made false accusations through hospital records. Id. at 93, 95. Indeed, since Bohannon, the Appeals Court of Massachusetts subsequently held a defendant is not always permitted to cross-examine a victim about alleged false accusations, noting Bohannon merely stands for “the proposition that the general rule barring evidence of prior false accusations is ‘not inflexible.’” Commonwealth v. Trenholm, 442 N.E.2d 745, 746 (Mass. App. Ct. 1982). In Commonwealth v. Haynes, 696 N.E.2d 555, 559-60 (Mass. App. Ct. 1998), the Appeals Court noted a requirement of “special circumstances” to allow a victim to be cross-examined about an alleged false accusation and upheld the trial court determination that the testimony was inadmissible because there was no factual basis from independent third party records. Accordingly, Massachusetts does not have the permissive rule Makins advocates in his brief.

In the instant case, the trial court did not err in declining to admit the proposed evidence in the absence of a showing of proof. “The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a

showing of an abuse of discretion.” State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003).

The only evidence in the record was the allegations were true. Further, by aborting the hearing, defense counsel prevented the trial court from conducting a balancing test to determine admissibility.

Accordingly, the issue should not be reviewed and the trial court did not abuse its discretion.

II.

The trial court did not err in denying Appellant's motion for mistrial. The State's expert witness did not impermissibly bolster Victim's testimony by providing testimony on the behaviors of sexually abused children and the symptoms of trauma. The issue is not preserved for review since Appellant did not contemporaneously object to the sufficiency of the "curative" instruction (Appellant's issue III).

Makins alleges Victim's counselor, Kristen Rich, bolstered Victim's testimony. Rich provided the jury general background information on trauma and the behaviors of sexually abused children. Additionally, Rich testified she treated Victim and Victim disclosed sexual abuse. However, Rich did not testify about any symptoms of trauma Victim might have suffered or provide a diagnosis. She did not comment on Victim's credibility. Makins blindly ignores this Court's precedent from State v. Barrett, 416 S.C. 124, 785 S.E.2d 387 (Ct. App. 2016).

At trial, Makins made a motion for mistrial, alleging Rich's testimony bolstered Victim's testimony. The trial court declined to grant a mistrial, finding the prosecution did not elicit any improper testimony. Makins renewed the motion after the State rested its case. The trial court offered a curative instruction. Tr. pp. 288-89; p. 376. During the trial court's instructions to the jury, the trial court advised the jury, "[U]nderstand that no witness, even an expert witness, can vouch for the credibility of another witness' testimony." R. p. 344, lines 11-13. Following instructions, not only did Makins not make any exceptions to the instructions to the jury, Makins did not challenge or object to the sufficiency of the "curative" instruction. R. p. 354, lines 18-23. Only after the jury began deliberating did Makins object to the sufficiency of the curative instruction. R. p. 360, lines 5-9.

"Our law is clear that a party must make a contemporaneous objection that is ruled upon by

the trial judge to preserve an issue for appellate review.” State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011). “A **contemporaneous** objection to the sufficiency of a curative charge must be made to preserve the issue for appellate review.” State v. Greene, 330 S.C. 551, 557, 499 S.E.2d 817, 820 (Ct. App. 1997) (emphasis added). Because counsel failed to object to the sufficiency of the curative instruction, the issue is not preserved for review. Makins neglects to discuss the limiting instruction in his brief and did not designate the jury instruction or Makins’ belated objection to the sufficiency of the instruction.

Further, Rich’s testimony was proper expert testimony and did not improperly bolster Victim’s testimony. In South Carolina, “[t]he admission or exclusion of expert testimony is a matter within the sound discretion of the trial court.” Burroughs v. Worsham, 352 S.C. 382, 390, 574 S.E.2d 215, 219 (Ct. App. 2002). “A trial court’s decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion.” State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009). A trial court abuses its power of discretion when it commits an error of law or when there has been a factual conclusion without any evidentiary support, State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006).

Expert testimony concerning trauma resulting from sexual abuse is admissible. “[B]oth expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect.” State v. Schumpert, 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993) *overruled on other grounds by* State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). “Expert testimony on rape trauma may be more crucial in situations where children are victims. The inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior.”

State v. White, 361 S.C. 407, 414-15, 605 S.E.2d 540, 544 (2004) (finding testimony is admissible in prosecutions where the victim of sexual abuse is an adult).

Rich explained the term trauma as follows:

[T]rauma is a very bad event where somebody feels like they might be hurt or killed or something very bad might happen to them. And generally, it's shocking in nature where somebody feels helpless or terrorized or horrified, and if that occurs to them. So something out of the ordinary that's bad. It's worse than falling down and skinning your knee. It's something that tragically shifts your life.

R. p. 243, lines 11-20. Rich gave the following examples of events which could result in trauma: car accidents, witnessing domestic violence, physical abuse, sexual abuse, witnessing the death of a loved one that's traumatic or violent, robberies, kidnappings, or house fires. R. p. 243, line 23 – p. 244, line 5. Rich noted it was important during therapy for the patient to talk about the traumatic events the patient experienced. R. p. 244.

Rich was then qualified as an expert in treatment of child trauma and child abuse dynamics.

R. pp. 249-50. Rich further explained a child experiencing trauma often will show some avoidance by not wanting to be around the setting of the trauma or “a person that reminds them of the trauma.”

R. p. 251, lines 6-11. Traumatized children may also become hypervigilant out of fear the traumatic event will happen again. R. p. 251, lines 12-15. They may have difficulty sleeping and suffer nightmares. R. p. 251, lines 16-20. The children may act out at school or home, and suffer emotional difficulties. R. p. 251, lines 21-25. The trauma may manifest itself in somatic symptoms, intrusive thoughts, or mood disturbances. R. p. 252, lines 1-13.

The prosecutor asked Rich about whether any symptoms the child may experience are particular to sexual abuse trauma. Rich explained:

So sexual abuse trauma is strongly correlated with that. It's sometimes, you know, bedwetting, pulling out hair, wanting to avoid particular situations, being frightened or being in certain situations.

Sometimes children who have been abused by a particular type of perpetrator, they want to avoid that. So avoid – some children want to avoid men. Some children want to avoid certain situations.

R. p. 252, line 17 – p. 253, line 1. Note in the instant case, no testimony was elicited that Victim pulled her hair out, suffered nightmares, suffered intrusive thoughts, was frightened, or avoided men generally. Therefore, Makins' claim that Rich testified only to the symptoms Victim suffered is incorrect.

Rich explained trauma associated with sexual abuse tends to be more situational. The secretive and seductive nature of child sexual abuse creates a traumatic situation different than, for example, a car accident. Because the abuse occurring in the context of a personal relationship violates that relationship, the child will feel shame, fear, insecurity, or guilt, and display these feelings as symptoms of the trauma resulting from the abuse. R. p. 253, lines 5-20.

Rich explained about delayed disclosure. Delayed disclosure often occurs because the abuser threatens the child or the child's family. The child may also fear the child will be in trouble if the child discloses the abuse or may fear the abuser will be in trouble. The child is more likely to delay disclosure when the abuser is a family member. The child will often delay disclosure until they feel safe. R. p. 254.

Disclosure tends to be piecemeal: Rich described disclosure as a process rather than an event. The child may disclose a fraction of the abuse to test the non-offending parent or may disclose only what is bothering them the most at the moment. The child will often disclose more as they become more comfortable or feel safer, further disclosure may be dependent on whether the child is believed.

R. p. 255. The child may want to push aside recollections of the abuse or may “close up because they don’t want to hurt the adults in their life.” R. p. 256, lines 8-17.

Rich explained sometimes children experience difficulty discussing the abuse they experienced, so counselors may let the child draw what happened to them. R. p. 256, line 21 – p. 257, line 6. When the prosecution began to ask about the therapy Rich provided to Victim, defense counsel interposed the first objection to the testimony, pretrial or before the jury. Once the jury was out, defense counsel moved for a mistrial. R. pp. 257-59. Strangely, defense counsel claimed the reason he waited to interpose the objection was because he wanted to be sure the witness treated the child. R. p. 259, lines 5-11. In fact, during the in limine motion, the prosecutor informed counsel and the trial court that Rich would testify about “some details of her treatment of this victim.” R. p. 46, lines 15-22.

Defense counsel’s objection was not timely: defense counsel belatedly complained that Rich testified of the five hundred patients she treated, about 120 to 150 were treated for trauma related to sexual abuse. R. p. 259, lines 18-23. Defense counsel claimed Rich’s testimony conveyed she believes the child because she is saying to the jury she would not have treated the child if the child was not suffering trauma. R. pp. 260-61. The prosecution noted at that point in Rich’s testimony, the testimony was the equivalent of “blind expert” testimony and Rich did not testify she believed the victim. The prosecutor made clear she was not eliciting testimony from Rich as to what symptoms Victim suffered. R. p. 261. Defense counsel’s reply was to complain that Rich’s expert testimony was supported by fact witness testimony from other witnesses like Victim’s mother, who would testify to Victim’s demeanor and symptoms. R. pp. 262-63. However, defense counsel did not explain how that is different from cases where a blind expert testifies generally about symptoms

of child abuse that corroborates another witness's fact testimony.

The trial court denied the mistrial motion. R. p. 270. The trial court then returned from a brief recess and announced it would limit the State's inquiry into Rich's specific treatment and diagnosis. R. pp. 271-72. Defense counsel made no objection at that time to the trial court's ruling or the sufficiency of its limitation on Rich's testimony. R. p. 273-74. See State v Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) (where appellant objects, but fails to request further relief or object to the court's failure to give a curative instruction, no issue is preserved for review).

After the jury returned to the courtroom, Rich testified she provided treatment to Victim, and Victim disclosed sexual abuse during a therapy session. R. p. 275. Victim also drew a picture, admitted as an exhibit. Rich laid foundation for the exhibit and testified to Victim's explanation of the drawing. Defense counsel did not object to the exhibit or any of the testimony surrounding it. R. pp. 275-79. She testified Victim disclosed the abuse occurred between the time she was five years old and seven or eight years old, and the abuse always occurred at Toi's house. R. p. 280. At no point did Rich testify Victim suffered from any symptoms of trauma, nor did Rich offer any testimony implying she believed Victim's disclosures. Further, contrary to Makins' assertions in his brief, Rich did not testify that she diagnosed Victim with post-traumatic stress syndrome.

Makins also falsely claims, "Rich testified that she **only** works with children who have experienced some kind of trauma and that she had 'provided therapy to the victim in this case.' R. p. 257, ll. 6-9." Appellant's Br. p. 25 (emphasis added). The passage found at lines six through nine on page 307 is actually the prosecutor's question posed to Rich, "I want to move a little more specifically. Have you provided therapy to the victim in this case, [Victim's name]?" The answer was yes, followed by defense counsel's objection. R. p. 257, lines 6-9. Further, Rich testified she

provides individual and family therapy, and occasionally group therapy, in her current position. When asked if she specialized in any particular type of therapy, she replied she has “different types” before noting she was certified to administer trauma focused cognitive behavioral therapy. R. p. 242, line 24- p. 243, line 8. Rich never testified she treats **only** traumatized children although her credentials as an expert in trauma were impressive. Also, she certainly did not testify she only treats children if they suffered trauma, as defense counsel suggested to the trial court. Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) (“Arguments of counsel are . . . not evidence.”). Pretrial, asked if she focused “on any particular type of issues with children.” Rich replied, “Really, it’s based on what they present and what they have. Many, many of the children that I work with had a history of trauma and I do – I am qualified to provide trauma [therapy] for them.” R. p. 25, line 20 – p. 26, line 1. Many is not all, and Makins’ brief is incorrect on this point.

Makins relies on cases in which a forensic interviewer testified about a victim’s credibility or veracity. For instance, in State v. McKerley, 397 S.C. 461, 466, 725 S.E.2d 139, 142 (Ct. App. 2012), the forensic interviewer offered the conclusion that victim’s interviews were compelling for sexual abuse. In State v. Jennings, 394 S.C. 473, 476-81, 716 S.E.2d 91, 92-95 (2011), the forensic interviewer’s report from interviews with three victims was admitted into evidence, each report concluded there was a compelling disclosure of abuse.

The prosecution cited State v. Brown, 411 S.C. 332, 768 S.E.2d 246, 252-53 (Ct. App. 2015). In Brown, an expert witness who did not interview the victim provided testimony on the behaviors of sexually abused children. This Court distinguished McKerley and Jennings, plus similar cases the appellant relied upon, noting that unlike those cases the expert: (1) did not testify as a forensic interviewer, (2) never interviewed the victims, (3) did not prepare a report of the interview, (4) did

not express any opinion regarding the credibility of the allegations, and (5) did not express an opinion regarding the child victims. Id. at 344-45, 768 S.E.2d at 252-53. The same holds true in this case: although Rich did provide counseling for Victim, she did not conduct a forensic interview, and certainly none of the other four circumstances exist in the instant case. Ultimately, the Brown court found the expert's testimony, which merely provided broad testimony about the behaviors of sexually abused children, did not bolster the victims' testimony even though the expert's testimony did corroborate some of the reasons for the victims' delayed disclosure. Id. at 345, 768 S.E.2d at 253.

Makins also argues Rich should not have provided expert testimony because she was aware of Victim's disclosure history and Victim made a disclosure directly to her. Makins neglects to cite State v. Barrett, 416 S.C. 124, 785 S.E.2d 387 (Ct. App. 2016), in which this Court rejected arguments that the trial court should not have allowed the person who conducted a forensic interview of the victim to be qualified as an expert in child abuse characteristics and provide testimony on the behaviors of sexually abused children. This Court found it was not an error to admit the interviewer as an expert, the testimony she offered regarding general behavioral characteristics was admissible, and she did not improperly vouch for the victim's credibility. Id. at 130, 785 S.E.2d at 389.

In the instant case, Rich testified about trauma and delayed disclosure. She testified she provided counseling to Victim, and Victim disclosed abuse. But Rich did not offer an opinion on Victim's veracity or even what symptoms, if any, Rich might have observed while treating Victim. In the instant case, because Rich offered admissible testimony about general behavior characteristics of abused children and did not vouch for the victim's credibility, the trial court did not err in **further** limiting her testimony.

The improper admission of evidence is reversible error only when the admission causes prejudice. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). “Unfair prejudice means an undue tendency to suggest a decision on an improper basis.” State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). “Unfair prejudice does not mean the damage to a defendant’s case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.” State v. Dennis, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013) (internal quotation marks omitted). “All evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided.” State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (internal quotation marks omitted).

In the instant case, Makins mistakes the legitimate probative value of behavioral expert testimony for prejudice. The evidence presented did not create a danger of unfair prejudice. Further, in light of the evidence at trial, any error was harmless beyond a reasonable doubt. Mitchell, 286 S.C. at 573, 336 S.E.2d at 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial).

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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March 20, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Robin B. Stillwell, Circuit Court Judge

THE STATE,

Respondent,

vs.

ONTARIO STEFON PATRICK MAKINS,

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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March 20, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
The Honorable Robin B. Stillwell, Circuit Court Judge

Appellate Case No: 2016-002495

THE STATE,

Respondent,

v.


ONTARIO STEFON PATRICK MAKINS,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Final Brief of Respondent on Appellant by delivering two copies of the same to Taylor D. Gilliam, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

I further certify that all parties required by Rule to be served have been served.
This 20th day of March, 2018.


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

The State, Respondent,

v.

Ontario Stefon Patrick Makins, Appellant.

Appellate Case No. 2016-002495

Appeal From Greenville County
Robin B. Stilwell, Circuit Court Judge

Opinion No. 5683

Heard November 7, 2018 – Filed September 4, 2019

REVERSED AND REMANDED

Appellate Defender Taylor Davis Gilliam, of Columbia,
for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Deputy Attorney General David A. Spencer, both of
Columbia; and Solicitor William Walter Wilkins, III, of
Greenville; for Respondent.

MCDONALD, J.: Ontario Stefon Patrick Makins appeals his conviction for third degree criminal sexual conduct (CSC) with a minor, arguing the circuit court erred in (1) refusing to allow Makins to cross-examine the victim (Victim) about her prior allegations of sexual abuse and (2) allowing a therapist to essentially vouch for Victim's credibility by testifying both as a fact witness regarding Victim's allegations of abuse and an expert witness on child sexual abuse trauma. We reverse and remand for a new trial.

Facts and Procedural History

In March 2015, training specialists from the Julie Valentine Center¹ visited Mitchell Road Elementary School in Greenville to discuss safety and "inappropriate touching" with students. Approximately two weeks later, on March 20, 2015, Victim reported to her teacher, Mary Kroske (Teacher), that she had been sexually abused. Teacher reported Victim's disclosure to the school's guidance counselor.

Investigator David Picone of the Greenville County Sheriff's Department (GCSD), responded to the school to investigate Victim's report. Picone spoke with Victim's mother, Teacher, and Victim about Victim's disclosure. Victim reported to Investigator Picone that she was abused by her sister's boyfriend, Makins, at the home where the couple lived with their children; Victim stated the abuse began when she was five years old. Investigator Picone testified he did not question Victim, who was eight at the time, about the details of the alleged abuse. Instead, he followed GCSD's procedure for referring children under the age of twelve to the Julie Valentine Center for a forensic interview.

On March 23, 2015, Investigator Picone interviewed Makins and informed him of Victim's allegations of sexual abuse, which Makins denied. While at the GCSD, Makins also met with the South Carolina Department of Social Services (DSS) to discuss DSS's safety plan.

On April 21, 2015, Christine Carlberg of the Julie Valentine Center conducted a forensic interview with Victim.² After viewing the forensic interview, Investigator Picone determined probable cause existed to arrest Makins. On August 23, 2016, the grand jury indicted Makins for CSC with a minor, first degree; lewd act upon a minor; and CSC with a minor, third degree.

At Makins's trial, Victim testified that on more than one occasion, Makins asked her to perform oral sex, touched her inappropriately, and showed her a sexually-oriented website on his cell phone.³ Victim admitted she lied to the police when

¹ The Julie Valentine Center is a sexual assault and child abuse recovery center in Greenville County.

² The circuit court admitted the tape of the forensic interview into evidence.

³ Victim was ten years old at the time of trial.

she reported Makins threatened to kill her if she disclosed the abuse. Although the jury found Makins "not guilty" on the CSC (first) and lewd act indictments, it found him guilty of CSC (third) with a minor. The circuit court sentenced Makins to ten years' imprisonment.

Standard of Review

"A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion. An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions." *State v. Chavis*, 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015) (citation omitted).

Law and Analysis

Kristin Rich's Testimony

Makins argues the circuit court erred in allowing therapist Kristin Rich to indirectly bolster Victim's testimony by permitting Rich to testify as both an expert in child sexual abuse trauma and as a fact witness regarding Victim's allegations of sexual abuse. We agree.

"Expert testimony on rape trauma may be more crucial in situations where children are victims. The inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior." *State v. White*, 361 S.C. 407, 414-15, 605 S.E.2d 540, 544 (2004). While our supreme court has recognized an expertise in child abuse assessment, it has cautioned that "allow[ing] 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." *State v. Anderson*, 413 S.C. 212, 218-19, 776 S.E.2d 76, 79 (2015). The better practice "is not to have the individual who examined the alleged victim testify, but rather to call an independent expert." *Id.* at 218, 776 S.E.2d at 79.

"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). "[A] witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim." *Briggs v. State*, 421 S.C. 316, 324, 806 S.E.2d 713, 717 (2017). "Specifically, it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse

matter." *State v. Kromah*, 401 S.C. 340, 358-59, 737 S.E.2d 490, 500 (2013). A witness should avoid statements:

- explaining that the child was told to be truthful;
- expressing a direct opinion as to a child's veracity or tendency to tell the truth;
- indirectly vouching for the child's believability, such as a statement that the interviewer has made a "compelling finding" of abuse;
- indicating to a jury that the interviewer believes the child's allegations in the current matter; or
- providing an opinion that the child's behavior indicated the child was telling the truth.

Id. at 360, 737 S.E.2d at 500.

During the pretrial discussion of Rich's proposed testimony, the circuit court stated it was not necessarily concerned with her qualifications as an expert witness, but with the substance of the opinion she would offer. The State explained, "We'll certainly stay far, far away from [*Kromah*]," and Rich would not be testifying as to the Victim's credibility. The State's plan was for Rich to testify about the symptoms a child sexual abuse victim might display, as well as certain treatment techniques, and discuss the concepts of delayed disclosure and piecemeal disclosure.

And then we will move into some details of her treatment of this victim. You know, was she diagnosed with anything? What was that diagnosis? What symptoms did Minor exhibit? What therapy model she exhibited? And then, whether or not there was, in fact, a disclosure and time and place of that disclosure.

Makins's counsel responded that he was "very likely to object to most all of that" because while the questions themselves might be appropriate as outlined by the solicitor, he had no idea what Rich's answers would be. The circuit court replied:

This is my concern about this witness and why I'm somewhat circumspect. We have a long line of cases which discuss expert witness buttressing and credibility of minor witnesses. And although I think that most of what she talked about in a vacuum is okay, my concern is that she begins to talk about the specific treatment and discussions with this child and without saying "that makes her believable" she is suggesting that that makes her believable.

And I want to make sure that what we're not doing is an end run around forensic interviewers being qualified as expert witnesses and thereby buttressing the credibility of witnesses.

The court further explained that while it had not seen a case specifically disallowing the testimony the solicitor sought to offer, "on the other hand, I haven't seen one where the court has accepted anything, other than the blind testimony." The State responded that Rich would not testify "about a diagnosis of child sexual abuse. She will discuss a diagnosis of post-traumatic stress disorder. But we will not get into the diagnosis of child sexual abuse." Makins again objected, noting:

'My one concern then is why is she being offered as an expert on child sexual abuse dynamics?

As soon as she gets into saying anything about this is what we see for child sexual abuse, 'these are the symptoms, I found them, they exist in this case', we're going to have trouble.

The circuit court took the matter under advisement, noting the defense would be ready to make the necessary contemporaneous objections. Still, the court expressed its preference for a blind expert, reiterating the State would have to walk a tight line in offering the testimony. The circuit court again expressed its concern about Rich's proposed testimony prior to opening statements, explaining, "I'm concerned that if she starts matching up her testimony with [Victim's] symptoms, we are essentially establishing a circumstance where she is vouching for the credibility of [Victim]. If that happens, I don't think that I have any choice but to declare a mistrial and I don't want to get there."

The circuit court qualified Rich as an expert "in the treatment of child trauma and child sexual abuse dynamics," and Rich testified about the symptoms child victims of sexual abuse may exhibit, the concepts of delayed disclosure and piecemeal disclosure, and therapy methods for treating child victims of sexual abuse. In describing the use of therapy to help child victims express themselves, Rich explained, "Oftentimes, with younger children what we do, they have a hard time talking about things so we allow them to draw or just introduce that to a way—can you draw what happened. And they're much more likely to draw rather than just to talk." The solicitor then asked:

Q. I want to move a little more specifically. Have you provided therapy to the victim in this case, Minor?

A. Yes.

Makins advised the circuit court he had a motion to discuss outside the presence of the jury. Makins moved for a mistrial because Rich had just testified that she treated people diagnosed with trauma due to several causes, including sexual abuse; she had described the symptoms of sexual abuse, including the phenomena of delayed and piecemeal disclosure; and she then answered, more specifically, that she had treated Victim. Makins asserted this testimony essentially implied Victim suffered trauma from sexual abuse, "[s]o she is vouching for the credibility of the witness by saying in essence, 'if she didn't suffer trauma, I wouldn't be working with her. I only work with people who have suffered a trauma.'"

The circuit court found Rich had not "gotten to the point of vouching yet," but she could testify only that she treated Victim for the purpose of reporting that Victim disclosed the sexual abuse to her.⁴ Although the circuit court had previously ruled Rich could testify that she treated Victim and Victim was diagnosed with post-traumatic stress disorder (PTSD)—with no discussion of Victim's symptoms—the court modified this ruling, determining Rich would not be permitted to testify about her specific treatment and diagnosis of Victim because such testimony would be the equivalent of vouching. Back in the presence of the jury, Rich's direct examination continued:

⁴ Section 17-23-175 of the S.C. Code permits the admission of some "out-of-court statements by child sexual abuse victims under the age of twelve when certain conditions are met." *Kromah*, 401 S.C. at 360 n.7, 737 S.E.2d at 500 n7.

Q. Ms. Rich, did you provide treatment to the victim in this case, Minor?

A. Yes.

Q. And did Minor disclose sexual abuse to you?

A. Yes.

Q. And how did she tell you about this?

A. She told me in the context of a therapy session.

Q. And did she talk about it? Did she do anything else?

A. She drew a picture.

The State then produced State's Exhibit 4, which Rich identified as the picture Victim drew when Rich asked her "to talk about or to share, draw a picture about the worst time of the sexual abuse that she reports that happened." Rich further testified this was Victim's original drawing, bearing some of Rich's notes, and she had Victim draw it as part of Victim's therapy. Rich then discussed the drawing and the open-ended questions she asked Victim pursuant to the therapy model. The drawing contains graphic descriptive language, and it is compelling evidence.

At the close of the case, Makins renewed his motion for a mistrial, arguing again that Rich indirectly vouched for Victim's credibility. The circuit court denied the mistrial motion but stated Makins could ask for a curative instruction to state an expert witness cannot vouch for the veracity of a witness. Later, within the jury charge, the circuit court instructed, "Also understand that no witness, even an expert witness can vouch for the credibility of another witness'[s] testimony."

Initially, we note that even though Rich was not the designated forensic interviewer, her testimony was akin to that of a forensic interviewer, rather than a blind expert. Rich testified she treated Victim, and the content of much of her lay testimony was similar to that of a forensic interviewer—i.e. Victim's disclosure of the details of the alleged abuse. *See, e.g., State v. Brown*, 411 S.C. 332, 345, 768 S.E.2d 249, 253 (Ct. App. 2015) (distinguishing improper bolstering in cases involving witnesses who performed the forensic interview, interviewed minor victims, or commented on the credibility of minor victims from those involving independent mental health experts who "offered admissible expert testimony

regarding the general behavioral characteristics of child sex abuse victims" and did not testify about the applicability of such testimony to the victim), *abrogated on other grounds by State v. Jones*, 423 S.C. 631, 817 S.E.2d 268 (2018).

We find Rich's opinion testimony addressing the various manifestations of child sexual abuse, followed immediately by her affirmative response that she treated Victim, implied she believed Victim was telling the truth with respect to her allegations of sexual abuse. If Rich believed Victim had not been telling the truth, Rich would not have needed to treat her. As the circuit court warned, Rich's testimony implied she was treating Victim for sexual trauma because Victim had suffered such trauma. *See Briggs*, 421 S.C. at 324, 806 S.E.2d at 717 ("[A] witness may not give an opinion for the purpose of conveying to the jury—directly *or indirectly*—that she believes the victim." (emphasis added)); *State v. Dawkins*, 297 S.C. 386, 393, 377 S.E.2d 298, 302 (1989) (holding treating psychiatrist improperly bolstered the credibility of the victim when "the solicitor posed the following question-'Based on your examination and your observations of Pamela, are you of the impression that her symptoms are genuine?', to which the doctor answered, 'yes'"); *McKerley*, 397 S.C. at 465, 725 S.E.2d at 142 (holding that although the forensic interviewer "never testified directly that she believed what the victim stated in her interviews or in her testimony . . . [her] testimony in this case describing what forensic interviewers do demonstrates that virtually all of her testimony indicates she believed victim was truthful").

Allowing this improper testimony was not harmless because the State's case hinged on Victim's credibility. *See State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94-95 (2011) ("The only evidence presented by the State was the children's accounts of what occurred and other hearsay evidence of the children's accounts. Because the children's credibility was the most critical determination of this case, we find the admission of the [forensic interviewer's] written reports was not harmless."). Moreover, "although an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts." *Kromah*, 401 S.C. at 357, 737 S.E.2d at 499; *see also Briggs*, 421 S.C. at 334, 806 S.E.2d at 722 ("In addition, as we explained in *Kromah*, the 'impermissible harm' from improper bolstering 'is compounded' when the witness is 'qualified as an expert.'").

"To deem an error harmless, this court must determine 'beyond a reasonable doubt the error complained of did not contribute to the verdict obtained.'" *McKerley*, 397 S.C. at 467, 795 S.E.2d at 143. In light of Rich's testimony discussing the therapy

needed by child sexual abuse victims, the drawing method therapists use to obtain disclosures from young victims, Rich's treatment of the child Victim here, and the way Rich obtained Victim's most detailed disclosure—the drawing—we cannot say "beyond a reasonable doubt" that Rich's indirect bolstering did not contribute to the verdict obtained when considered in the context of the other evidence in this case.

Finally, we find the circuit court's jury instruction was insufficient to cure this error, in part because the court did not immediately instruct the jury when the error occurred. *See State v. Sweet*, 342 S.C. 342, 349-50, 536 S.E.2d 91, 95 (Ct. App. 2000) (noting that "because the trial judge did not give an immediate curative instruction, this case is distinguishable from those cases where a curative instruction given in conjunction with a general jury instruction was sufficient to cure the improper comment on a defendant's failure to testify"). An isolated statement, buried in the midst of the circuit court's jury instructions and unconnected to any specific witness or statement, could not cure the prejudice here. *Cf. State v. Dempsey*, 340 S.C. 565, 571, 532 S.E.2d 306, 310 (noting trial court's curative instructions *during and immediately following* child sexual abuse counselor's bolstering testimony cured any prejudice flowing from the improper vouching).

For these reasons, we reverse Makins's conviction and remand for a new trial.⁵

REVERSED AND REMANDED.

KONDUROS and HILL, JJ., concur.

⁵ Because we find the admission of Rich's testimony requires reversal, we decline to address Makins's additional assignments of error. *See Futch v. McAllister Towing of Gerorgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address remaining issues when determination of a prior issue is dispositive).

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Robin B. Stillwell, Circuit Court Judge

THE STATE,

Respondent,

vs.

ONTARIO STEFON PATRICK MAKINS,

Appellant.

Appellate Case No. 2016-002495

**STATE'S PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC**

Pursuant to Rules 221 and 240, SCACR, the State now requests a rehearing on the following points that this Court may have overlooked or misapprehended. In so doing, the State maintains all its prior arguments as set out in its brief of respondent. Additionally, the State respectfully suggests that the rehearing be heard en banc pursuant to Rule 219, SCACR, as the State respectfully suggests that this Court's decision is in contravention of State v. Barrett, 416 S.C. 124, 130, 785 S.E.2d 387, 390 (Ct. App. 2016) and effects the ability of the State to present testimony from therapists, other mental health professionals, and other medical professionals who provided treatment for the victims of sexual abuse. The opinion further prevents the State

from presenting evidence of trauma that the Supreme Court indicated is admissible evidence to prove a sexual assault occurred. State v. Schumpert, 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993) *overruled on other grounds by* State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016).

I.

This Court found that the therapist, Rich, who treated Victim for trauma, and was qualified as an expert in the treatment of trauma and in child abuse dynamics, “bolstered” the Victim’s testimony by testifying she treated Victim because, this Court surmised, she would not have treated the child if she did not believe the child was sexually abused. Rich never testified before the jury that she was treating Victim for trauma or that Victim suffered any symptoms of trauma. She certainly did not testify she would not have treated Victim unless she believed Victim.

Further, this Court’s opinion conflates the distinct investigative role of a forensic interviewer with a therapist treating a child for trauma related to sexual abuse. Additionally, this Court’s opinion contradicts the holding in State v. Barrett, 416 S.C. 124, 130, 785 S.E.2d 387, 390 (Ct. App. 2016), which held a forensic interviewer who interviewed the victim may be qualified as an expert and provide behavioral testimony so long as the expert does not comment directly or indirectly on the credibility of victim’s account of the sexual assault. Finally, this Court misapprehends the evidentiary role of presenting evidence of trauma resulting from sexual abuse in contravention of State v. Schumpert, 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993) *overruled on other grounds by* State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016).

In the instant opinion, this Court opined:

We find Rich’s opinion testimony addressing the various manifestations of child sexual abuse, followed immediately by her

affirmative response that she treated Victim, implied she believed Victim was telling the truth with respect to her allegations of sexual abuse. **If Rich believed Victim had not been telling the truth, Rich would not have needed to treat her.** As the circuit court warned, Rich's testimony implied she was treating Victim for sexual trauma because Victim had suffered such trauma.

State v. Ontario Makins, Op. No. 5683 (S.C. Ct. App. filed September 4, 2019) (emphasis added).

Therefore, this Court found that testimony by the expert that she treated Victim is bolstering because she would not treat Victim if she did not believe her. The problem with this assertion is that any therapist treating a child as a result of sexual abuse would be considered to "bolster" the victim's testimony regardless of whether the therapist provided expert testimony. The logic of this holding, taken to its natural conclusion, is that a therapist could never testify that the therapist treated a victim of child abuse for trauma. This contravenes our Supreme Court's longstanding approbation of this sort of testimony.

A therapist may provide both expert testimony on trauma and fact testimony about the therapist's treatment of a patient suffering from trauma.

This Court erred in finding Rich's testimony was improper because it "implied she was treating Victim for sexual trauma because Victim suffered such trauma" because it is proper for a person qualified as a mental health counselor to testify a victim suffered symptoms of trauma. If Rich's testimony "implied she was treating Victim for sexual trauma," such testimony is not impermissible. This Court misapprehends that rape trauma evidence is admissible "to prove the elements of criminal sexual conduct since such evidence may make it more or less probable the offense occurred." State v. White, 361 S.C. 407, 415, 605 S.E.2d 540, 544 (2004). "[B]oth expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a

sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect.” Schumpert, 312 S.C. at 506, 435 S.E.2d at 862. “Expert testimony on rape trauma may be more crucial in situations where children are victims. The inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior.” White, 361 S.C. at 414-15, 605 S.E.2d at 544 (finding testimony is admissible in prosecutions where the victim of sexual abuse is an adult).

In White, Coles Badger, a psychotherapist treating the adult victim of a sexual assault, was qualified as an expert in post-traumatic stress disorder and the assessment and treatment of sexual abuse. The Supreme Court rejected the appellant’s argument that Badger should not have been allowed to testify that the symptoms Victim suffered were consistent with a person suffering trauma, finding the testimony was “consistent with the probative purpose of admitting rape trauma evidence, i.e., to refute the defendant’s contention that the sex was consensual **and to prove that a sexual offense occurred.**” Id. (emphasis added).

In Schumpert, the victim was interviewed by Heather Odell, from the Department of Social Services, and Ruth Strait, described in the opinion as a “mental health counselor.” Odell’s qualification as an expert was not challenged at trial. However, the appellant did object to Strait’s qualification as an expert “in the field of sexual abuse” and she testified as to the symptoms victim disclosed to her and opined the behavioral symptoms were typical for sexual abuse. Appellant contended Strait was not qualified to give expert testimony on rape trauma syndrome and Strait’s testimony on rape trauma evidence “to prove a rape actually occurred.” Schumpert, 312 S.C. at 505-06, 435 S.E.2d at 861.

The Supreme Court found no error, noting that it already determined in State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991) that “trauma testimony of a rape victim is relevant to prove the elements of criminal sexual conduct since such evidence makes it more or less probable that the offense occurred.” Id. at 506, 435 S.E.2d at 861-62.

Note that due to the trial court’s [erroneous] ruling, Rich never testified she treated Victim for trauma, Victim suffered trauma, or Victim suffered symptoms of trauma. She was unduly prevented from testifying she diagnosed Victim with PTSD. Instead the jury was required to infer Victim suffered trauma from factual testimony from other witnesses, not Rich.¹ See State v. Johnson, 637 S.W.2d 157, 161 (Mo.App. 1982) (“[I]t was inferable from the testimony that these major voluntary changes in the victims’ lives were made because of the sexual activities testified to and that such changes would not have been made if the activities had been consented to.”) (cited with approval in Alexander, 303 S.C. at 381, 401 S.E.2d at 148).

Alexander held, “Evidence of behavioral and personality changes tends to establish or make more or less probable that the offense occurred.” Alexander, 303 S.C. at 381, 401 S.E.2d at 149; see also State v. Henry, 329 S.C. 276, 277-78, 495 S.E.2d 463, 469 (Ct. App. 1997) (noting the State’s expert was allowed to opine that the victim suffered from PTSD based on history provided from the victim, her mother, and the symptoms exhibited by the victim’s behavior).

¹ Indeed, trial counsel attacked the prosecution’s case by arguing to the jury that Rich never testified Victim suffered from the symptoms “children perhaps suffer” and that “nobody has said [Victim] suffered this symptom or had this symptom because of this.” R. p. 328, lines 8-10; p. 329, lines 1-10.

Rich did not link her testimony about the behaviors of sexually abused children to the Victim's behavior.

In addition to generalized testimony about trauma and trauma resulting from sexual abuse, Rich testified generally about delayed disclosure and piecemeal disclosure. However, Rich did not relate this general behavioral testimony to Victim. Rich did not testify as to whether Victim delayed disclosure or why Victim delayed disclosure. Further, Rich did not discuss whether Victim's disclosure was consistent with piecemeal disclosure or suggest piecemeal disclosure occurred in the instant case. She did not testify that any symptoms of trauma were present or that the phenomena or circumstances of delayed and piecemeal disclosure occurred in the instant case, separating the instant case from State v. Anderson, 413 S.C. 212, 218 776 S.E.2d 76, 79 (2015), discussed further below. See State v. Jones, 417 S.C. 319, 790 S.E.2d 17 (Ct. App. 2016) (finding expert witness never commented on the credibility of victim or her mother but merely offered reasons why children might delay disclosing instances of sexual abuse and why a non-offending caregiver may have an unusual reaction when learning about the abuse. The testimony assisted the jury's understanding of the complex dynamics of sexual abuse cases).

Bolstering defined

At the heart of the problem in this Court's opinion is this Court's misapprehension of what constitutes improper bolstering. Improper bolstering simply does not include Rich's alleged subliminal messaging to the jury as suggested in this opinion. All relevant evidence in some way "bolsters" the strength of the offering party's case, and a trial court may not exclude evidence that bolsters other evidence absent a constitutional, statutory or rule-based principle of

law providing for exclusion. State v. Perry, 410 S.C. 191, 763 S.E.2d 603, 611 (Ct. App. 2014) (Few, C.J., concurring in part and dissenting in part). “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. Taylor, 404 S.C. 506, 745 S.E.2d 124, 128 (Ct. App. 2013) (*quoting State v. Douglas*, 367 S.C. 498, 626 S.E.2d 59 (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.’” Taylor, at 514-515, 745 S.E.2d at 128 (*quoting State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)). The idea that Rich recounting that she treated Victim is bolstering – especially without Rich actually testifying why she was treating Victim – extends far beyond Kromah’s concerns of obvious indirect comments on credibility extant in an expert’s opinion finding abuse occurred or finding that a disclosures of abuse is “compelling.” Rich’s testimony is clearly more akin to Coles Badger’s testimony approved by the Supreme Court in White.

Anderson does not prohibit the testimony in this case

Further, this Court misapprehends the Supreme Court’s ruling in State v. Anderson, 413 S.C. 212, 218 776 S.E.2d 76, 79 (2015). In Anderson, the person who conducted a forensic interview of the child victim was qualified “as a forensic interviewer in child abuse assessment” without the trial court holding a hearing to determine if the forensic interviewer possessed the requisite experience in child abuse assessment. The Court recognized the validity of the

expertise, referencing Schumpert and Weaverling, but found it was error for the trial court to not hold an in camera hearing to determine if the forensic interviewer possessed the requisite expertise. The Supreme Court also noted the forensic interviewer's behavioral expert testimony vouched for the Victim's credibility because she testified "only to those characteristics which she observed in the minor." Id. at 219, 776 S.E.2d at 79. Rich did not testify that Victim possessed any characteristics she referenced during her testimony.

The Anderson Court further found that witnesses should not be qualified as experts in forensic interviewing or testify as to techniques in forensic interviewing before the jury. The Supreme Court set out a procedure for admitting forensic interviews where the interviewer would testify in camera to determine if the recording met the "particularized guarantees of trustworthiness" under S.C. Code 17-23-175, but if the recording was admitted, the forensic interviewer would not be able to provide this same in camera testimony and the forensic interviewer's testimony would be limited to only authenticating the interview and describing the behaviors and demeanor the child exhibited during the interview: "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 that purpose of the interview is to allow law enforcement to determine whether a criminal investigation is warranted." Id. at 220-21, 776 S.E.2d at 80.

The Supreme Court also made a suggestion on presenting generalized behavioral testimony from an expert:

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 he expert will vouch for the alleged victim's credibility.

Id. at 218-19, 776 S.E.2d at 79 (emphasis added). Even though suggesting the better practice of an independent expert, rather than a forensic interviewer, to provide behavioral testimony, the Supreme Court did not outright ban the practice, as it noted in Briggs v. State, 421 S.C. 316, 806 S.E.2d 713 (2017). The Supreme Court explained:

Since Anderson, the Court of Appeals has on at least two occasions affirmed a trial court's qualification of a forensic interviewer as an expert to testify as to the behavior of child sex abuse victims. See State v. Barrett, 416 S.C. 124, 130, 785 S.E.2d 387, 390 (Ct. App. 2016) *cert granted* (Mar. 24, 2017)² (finding "no error" in qualifying a forensic interviewer as an expert to testify "regarding general behavioral characteristics" of child sex abuse victims); State v. White, 416 S.C. 135, 138, 784 S.E.2d 695, 696 (Ct. App. 2016) (finding "the trial court acted within its discretion" when it qualified "the forensic interviewer as an expert in the dynamics of child abuse").

Id. at 332-33, 806 S.E.2d at 722.

Barrett controls the result

This Court in the instant case did not address the applicability of Barrett, even though the State argued in its brief that Barrett was the controlling law. In Barrett, this Court rejected arguments that the trial court should not have qualified the forensic interviewer as an expert in child abuse characteristics and allowed the forensic interviewer to provide testimony on the behaviors of sexually abused children. This Court found it was not an error to admit the interviewer as an expert, the testimony she offered regarding general behavioral characteristics was admissible, and she did not improperly vouch for the victim's credibility. Id. at 130, 785 S.E.2d at 389.

² Subsequently, the Supreme Court found the writ was improvidently granted.

This Court compared the case before it to Anderson and noted an important distinction from Anderson was that in Anderson, the witness was qualified as an expert in both forensic interviewing and child abuse assessment, while in Barrett, the witness was only qualified as an expert mental health professional. Id. at 130, 785 S.E.2d at 390. Barrett further noted a hearing was held to determine if the expert was qualified, unlike in Anderson. Id. Barrett also noted that the expert's testimony fell within the parameters of Kromah. Id. (examining State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013)).

The testimony did not violate Kromah – Kromah specifically allows Rich's testimony.

In the instant case, this Court cited Kromah, noting a forensic interviewer should avoid statements: (1) explaining that the child was told to be truthful; (2) expressing a direct opinion as to a child's veracity or tendency to tell the truth; (3) indirectly vouching for the child's believability, such as a statement that the interviewer has made a "compelling finding" of abuse; (4) making any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter; or (5) providing an opinion that the child's behavior indicated the child was telling the truth. Makins (citing Kromah, 401 S.C. at 360, 737 S.E.2d at 500).

However Rich did not: (1) testify she told the Victim to be truthful; (2) express an opinion about the Victim's veracity or tendency to tell the truth; (3) make any findings or offer any opinions that indirectly vouched for the Victim such as a "compelling finding" of abuse (Rich did not make any findings or conclusions at all); (4) make a statement indicating she believed the child's allegations; or (5) provide an opinion that Victim's behavior indicated she was telling the truth (Rich did not testify about Victim's behavior at all). Kromah, supra.

The Supreme Court in Kromah specifically allowed for forensic interviewers to testify as to (1) “the time, date, and circumstances of the interview;” (2) “any personal observations regarding the child’s behavior or demeanor;” or (3) “a statement as to events that occurred within the personal knowledge of the interviewer.” Id. (emphasis added). Therefore, the prosecutor complied with Kromah, as well as Anderson and Barrett, and the trial court’s preemptive concerns about bolstering never materialized, as evidenced by trial counsel’s lack of objection. The reality is the trial court unduly limited the State’s testimony in contravention of Schumpert and what this Court called bolstering – testimony that Rich treated Victim – is specifically allowed in Kromah.

This Court discussed State’s Exhibit 4, a drawing Victim drew during a therapy session with Rich. It is important to note that trial counsel indicated he did not object to the drawing and made no objection to any of the testimony surrounding it. R. pp. 275-79. When Rich provided further foundational testimony and explained her discussion with Victim as she drew the drawing, counsel never interposed an objection. Therefore, any complaint about the drawing or testimony surrounding it is not preserved for review. Additionally, Rich’s testimony explaining why she suggested Victim draw rather than explain the incident of abuse is hardly the sort of technique prohibited by Kromah such as swearing the Victim to tell the truth. It is not testimony that impacts the jury’s exclusive role in determining credibility and it is not bolstering.

Any time an expert testifies or provides evidence which supports the underlying charge levied by the victim, it does not result in improper or impermissible bolstering or vouching. It is only when the testimony invades the province of the jury and makes a comment on the

credibility or veracity of the victim. Case law from the Supreme Court and this Court does not support that such testimony was bolstering as suggested in the opinion.

II.

Further this Court misconstrued Anderson and Kromah when it complained that Rich's testimony was the functional equivalent of a forensic interviewer. In Kromah, the Supreme Court recognized that a forensic interviewer is tasked with collecting facts, not providing therapy. Kromah, 401 S.C. at 357, 737 S.E.2d at 499. The Supreme Court, in a footnote, observed, "Forensic interviewers might be useful as a tool to aid law enforcement officers in their initial investigative process, but this does not make their work appropriate for use in the courtroom." Id. at 401 S.C. at 499 n. 5, 737 S.E.2d at 358, n. 5. Likewise, the Supreme Court in Anderson recognized one "purpose of [a forensic] interview is to allow law enforcement to determine whether a criminal investigation is warranted." Anderson, 413 S.C. at 221, 776 S.E.2d at 80. Briggs cited both Kromah and Anderson in noting the dual purpose of forensic interviews was to collect facts for court and serve an investigatory purpose for law enforcement.

However, Rich's role in this case was to provide therapy, she was not part of the investigative team and her role was not to collect facts for court but to help Victim. She did not testify why she was treating the victim. She never testified, as trial counsel claimed, that she only treated children suffering from trauma. Her testimony showed that only roughly a quarter of her patients were children being treated for trauma related to sexual abuse.

This Case also, in Footnote 4 of the opinion, mistakenly cited S.C. Code § 17-23-175 as the basis for Rich being allowed to testify as to the abuse reported by Victim. The disclosure of abuse is admissible under the outcry exception to the hearsay rule. Section 17-23-175 provides:

(A) In a general sessions court proceeding or a delinquency proceeding in family court, an out of court statement of a child is admissible if:

(1) the statement was given in response to questioning conducted **during an investigative interview** of the child;

(2) **an audio and visual recording of the statement is preserved on film, videotape, or other electronic means**, except as provided in subsection (F);

(3) the child testifies at the proceeding and is subject to cross examination on the elements of the offense and the making of the out of court statement; and

(4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.

(D) For purposes of this section **an investigative interview** is the questioning of a child by a law enforcement officer, a Department of Social Services case worker, or other professional interviewing the child on behalf of one of these agencies, or in response to a suspected case of child abuse.

S.C. Code Ann. § 17-23-175 (Supp. 2010) (emphasis added). In the instant case, because Rich was providing Victim therapy and not conducting an investigative interview, and because the sessions were not recorded, the testimony was not elicited pursuant to section 17-23-175. Instead, the basis for allowing Rich to testify that Victim disclosed abuse to her is the outcry exception to hearsay which allows limited corroborative testimony in criminal sexual conduct cases when the victim testifies. See Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006). This exception allows hearsay testimony that a victim complained of a sexual assault but is limited to the victim's report of the time and place of the sexual assault, and should not include the identity of the perpetrator or particulars of the assault; however, counsel made no objection that the testimony exceeded this exception, certainly for strategic reasons. See Watson (finding

counsel was not ineffective for failing to object to testimony exceeding the outcry exception where counsel did not object for strategic reasons). Makins did not argue on appeal that the testimony exceeded the outcry exception.

This misapprehension of the applicability of section 17-23-175 represents this Court's further conflation of the role of a forensic interview as an investigative tool with the mental health treatment provided by therapists for symptoms of a victim's trauma.

III.

This issue should not be reviewed because counsel failed to object to the sufficiency of the curative instruction. At trial, Makins made a motion for mistrial, alleging Rich's testimony bolstered Victim's testimony. The trial court declined to grant a mistrial, finding the prosecution did not elicit any improper testimony. Makins renewed the motion after the State rested its case. The trial court offered a curative instruction. Tr. pp. 288-89; p. 376. During the trial court's instructions to the jury, the trial court advised the jury, "[U]nderstand that no witness, even an expert witness, can vouch for the credibility of another witness' testimony." R. p. 344, lines 11-13. Following instructions, not only did Makins not make any exceptions to the instructions to the jury, Makins did not challenge or object to the sufficiency of the "curative" instruction. R. p. 354, lines 18-23. Only after the jury began deliberating did Makins object to the sufficiency of the curative instruction. R. p. 360, lines 5-9.

"Our law is clear that a party must make a contemporaneous objection that is ruled upon by the trial judge to preserve an issue for appellate review." State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011). "A contemporaneous objection to the sufficiency of a curative charge must be made to preserve the issue for appellate review." State v. Greene, 330

S.C. 551, 557, 499 S.E.2d 817, 820 (Ct. App. 1997) (emphasis added). Because counsel failed to object to the sufficiency of the curative instruction, the issue was not preserved for review.

IV.

Additionally, the trial court provided a remedy to the substance of trial counsel's complaint by not allowing testimony about Rich's specific treatment for, and diagnosis of, trauma. Because Makins did not renew his mistrial motion following this ruling, the issue is not preserved for review. See State v Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) (where appellant objects, but fails to request further relief or object to the court's failure to give a curative instruction, no issue is preserved for review).

When the prosecution began to ask about the therapy Rich provided to Victim, defense counsel interposed the first objection to the testimony, pretrial or before the jury. Once the jury was out, defense counsel moved for a mistrial. R. pp. 257-59. Defense counsel claimed Rich's testimony conveyed she believes the child because she is saying to the jury she would not have treated the child if the child was not suffering trauma. R. pp. 260-61 (Rich never said that and counsel's recollection of that testimony was inaccurate). The prosecution noted at that point in Rich's testimony, the testimony was the equivalent of "blind expert" testimony and Rich did not testify she believed the victim. R. p. 261. The trial court denied the mistrial motion. R. p. 270. The trial court then returned from a brief recess and announced it would limit the State's inquiry into Rich's specific treatment and diagnosis. R. pp. 271-72. Defense counsel made no objection at that time to the trial court's ruling or the sufficiency of its limitation on Rich's testimony in lieu of mistrial. R. p. 273-74.

V.

Finally, any error is harmless beyond a reasonable doubt. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial). To the extent it was even likely a jury could infer that Rich admitting she treated Victim is an indication that Rich believed her report of sexual abuse, this jury did not let it interfere with their role in determining credibility as the jury acquitted Makins of Criminal Sexual Conduct in the First Degree, which was based on the conduct Victim reported to Rich, but not the forensic interviewer. This alleged bolstering, as oblique as it is, simply was not reasonably likely to have changed the outcome of trial.

WHEREFORE, the State requests this Court to grant the petition for rehearing and affirm the convictions and sentences.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

BY: 

David Spencer
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ATTORNEYS FOR RESPONDENT

September 19, 2019

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
The Honorable Robin B. Stillwell, Circuit Court Judge

Appellate Case No. 2016-002495

THE STATE,RESPONDENT.

v.

ONTARIO STEFON PATRICK MAKINS,APPELLANT.

PROOF OF SERVICE

I, Shana Montgomery, Legal Assistant, hereby certify that I have served the State's Petition for Rehearing and Petition for Rehearing EN BANC, dated September 19, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Taylor D. Gillam, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served. This 19th day of September, 2019.



Shana Montgomery
Legal Assistant
Office of the Attorney General
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Columbia, SC 29211-1549
(803) 734-3727

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

ONTARIO STEFON PATRICK MAKINS,

APPELLANT

APPELLATE CASE NO 2016-002495

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

Opinion No. 5683

RETURN TO PETITION FOR REHEARING

Respondent's chief complaint appears to suggest that this Court's decision in this matter contravened State v. Barrett, 416 S.C. 124, 785 S.E.2d 387 (Ct. App. 2016) wherein this Court affirmed the trial court's qualification of a witness, Kendra Twitty, as an expert mental health professional "[u]nder the specific facts of [that] case." Id. at 130, 785 S.E.2d 390. Notably different from the testimony at Makins' trial, "Twitty's testimony did not vouch for Victim's veracity or improperly bolster her testimony." Id. at 131, 785 S.E.2d at 390. Unlike the case at bar, "Twitty did not limit her testimony to explaining the exact behavioral characteristics Victim exhibited." Id. at 133, 785 S.E.2d at 391. Rich, however, directly mirrored preceding testimony

by reaffirming changes in Minor's behavior and attributing them to symptoms of trauma associated with sexual abuse. Because Rich implied Minor was telling the truth with respect to her allegations of sexual abuse, this Court correctly held that the admission of her testimony was improper.

Following a question from the solicitor regarding "changes or any particular symptoms," Minor's mother testified that Minor was "acting out a lot," that Minor was wetting the bed, that Minor avoided going over to her sister's house where the alleged abuse took place, and that Minor was not sleeping well at night. R. 153, l. 16 – R. 155, l. 9.

At trial, Rich listed various symptoms of trauma, including the exact same ones Minor's mother mentioned: avoidance, hypervigilance, sleep difficulties, emotional and behavioral disturbances, somatic symptoms, and intrusive thoughts. R. 251, l. 4 – R. 252, l. 13. Regarding sexual abuse trauma in particular, Rich testified that the symptoms would be similar, including bedwetting, pulling out hair, avoidance, and fear. R. 252, l. 14 – R. 253, l. 1. As noted, many of these symptoms matched Minor's behavior as previously established at trial. A Venn diagram of the symptoms of trauma described by Rich and the symptoms noted by Minor and her family members would simply be a single circle.

As this Court correctly deduced, Briggs v. State precludes the admission of Rich's bolstering testimony: "[A] witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim." 421 S.C. 316, 324, 806 S.E.2d 714, 717 (2017). This holding is not limited to forensic interviewers, nor does it pave the way for evidence of trauma which also bolsters the testimony of a minor witness to be admitted.

Rich testified that her job and duties at the time of Makins' trial entailed meeting with children and their parents to "do an evaluation and assessment of any difficulties they might

have.” R. 242, l. 10 - R. 243, l. 8. She specialized in “trauma-focused cognitive behavioral therapy, which is particularly related to childhood trauma.” R. 243, ll. 2 - 8. She defined trauma as “a very bad event where somebody feels like they might be hurt or killed or something very bad might happen to them.” R. 243, ll. 9 - 20. She indicated that trauma is “something that tragically shifts your life.” Id. Two of the examples of trauma she listed were physical and sexual abuse. R. 243, l. 21 - R. 244, l. 5.

Rich testified that she used an evidence-based model called “trauma-focused cognitive behavioral therapy” which “focuses on the trauma.” R. 244, ll. 6 - 12. Seemingly suggesting that the acts described by patients actually occurred, she opined that “the most important part of the trauma is to talk about what happened.” R. 244, l. 6 - R. 245, l. 5. The solicitor questioned Rich regarding her treatment models and protocols, asking whether they are “based on evidence-based studies.” R. 247, l. 22 - R. 248, l. 9. This question-and-answer combination was particularly egregious:

Q: And are your treatment models and protocols based on evidence-based studies?

A: Yes. So evidence-based means that what I’m providing for a client is based on scientific evidence, not just a kind of ‘feel good, oh, I think this might help.’ But it’s based on a model to say this is how you approach this. And that it has been studied to say that it produces results and there’s scientific evidence for that. And so the TFCBT is a scientific evidence based model that you use with children who have undergone a type of trauma.

Id.

Rich testified that she had provided therapy to approximately five hundred children during the course of her career at the time of trial. R. 248, ll. 22 - 25. Around one fourth of those children had experienced trauma “as a result of sexual abuse” according to Rich. R. 249,

ll. 1 – 5. Rich also stated that as part of her training regarding trauma, she participated in a year-long learning collaborative effort. R. 246, l. 11 – R. 247, l. 8. During those sessions, she was assigned “a client .. that has trauma.” Id. She indicated that she “provid[ed] the treatment ... [a]nd then there’s consultation calls with experts.” Id. In other words, she would not have treated Minor unless abuse had occurred.

Echoing the testimony of witnesses before her and seeming zeroing in on Minor’s case, Rich justified delayed disclosure of minors regarding alleged sexual abuse. R. 253, l. 24 – R. 256, l. 17. Immediately thereafter, the solicitor asked Rich if she provided therapy to Minor. R. 257, ll. 6 – 12. As Rich answered in the affirmative, defense counsel objected. Id.

Following the trial judge’s denial of defense counsel’s motion for a mistrial, the solicitor elicited from Rich the fact that she treated Minor and Minor disclosed sexual abuse in the context of a therapy session. R. 275, ll. 8 – 16.

Respondent attempts to distinguish Rich’s role from a forensic interviewer by suggesting that her role was not to collect facts, although her trial testimony revolved around alleged factual disclosures by Minor. Pet. for Reh’g 12. Such a contention overlooks the crux of Rich’s testimony and likely the reason she was called as a witness at trial: she provided treatment to Minor, who allegedly disclosed sexual abuse during a therapy session. R. 275, ll. 8 – 16. The picture Minor drew was made an exhibit at Makins’ trial. Thus, the claim that Rich’s role in this case was simply to provide therapy is easily disproven. A picture drawn during the therapy session was undoubtedly part of a fact-finding endeavor. Accordingly, the only purpose of Rich’s testimony was to improperly bolster Minor’s testimony.

Respondent further contends that this Court’s erred because the state should be allowed to present evidence of trauma under State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993)

overruled by State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). The solicitor noted pretrial that the state would avoid eliciting testimony from Rich regarding a diagnosis of “victim of childhood sexual trauma.” R. 48, l. 3 – R. 49, l. 12.

Reliance on Schumpert, supra, is disingenuous following the South Carolina Supreme Court’s opinion almost twenty years later in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). Such an assertion belies the point of Kromah: to prevent witnesses from bolstering the credibility of a minor witness. As this Court correctly noted, Rich’s testimony improperly indicated to the jury that she believed Minor’s allegations in the current matter. Violating the holdings of many recent opinions, including Kromah, Rich’s testimony indicated she was providing therapy to Minor and thereby directly implied Minor had suffered trauma. The two focal points of Rich’s testimony—trauma and therapy—were inextricably intertwined. Without the former, the latter was unnecessary. Rich’s testimony implied she was providing therapy to Minor because she believed Minor had suffered trauma. Rich’s remarks were correctly held to be improper by this Court.

This Court correctly held that “Rich’s opinion testimony addressing the various manifestations of child sexual abuse, followed immediately by her affirmative response that she treated Victim, implied she believed Victim was telling the truth with respect to her allegations of sexual abuse.” The state attempted to circumvent recent case law which sharply limits the use of forensic interviewers by presenting Minor’s therapist, who was presumably familiar with Minor’s expected testimony and specific allegations. Rich’s testimony perfectly aligned with prior testimony regarding symptoms of sexual abuse trauma such that the jury was led to the inescapable conclusion that Rich was only treating Minor because she had suffered abuse. The jury very likely interpreted Rich’s testimony as an overt indication that Minor’s behavior was

typical, her delayed disclosure acceptable, and her testimony believable. The state's petition for rehearing should be denied.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Taylor D Gilliam', written over a horizontal line.

TAYLOR D GILLIAM
Appellate Defender

This 30th day of September, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

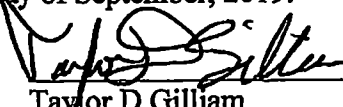
V.

ONTARIO STEFON PATRICK MAKINS,

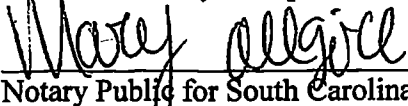
APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Return to Petition for Rehearing in the above-entitled case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Ontario Stefon Patrick Makins, ##370725, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 30th day of September, 2019.


Taylor D Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 30th day of September, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Robin B. Stillwell, Circuit Court Judge

THE STATE,

Respondent,

vs.

ONTARIO STEFON PATRICK MAKINS,

Appellant.

Appellate Case No. 2016-002495

**REPLY TO RETURN TO
STATE'S PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC**

In response to Appellant Makins' return to the State's petition for rehearing, the State would respectfully point out a glaring inaccuracy in the return. Makins claims "At trial, Rich listed various symptoms of trauma, including the exact same ones Minor's mother mentioned: avoidance, hypervigilance, sleep difficulties, emotional and behavioral disturbances, somatic symptoms, and intrusive thoughts. . . . A Venn diagram of the symptoms of trauma described by Rich and the symptoms noted by Minor and her family members would simply be a single circle." Ret. to Pet for Rhg. p. 2. This is simply misleading because Rich offered examples of symptoms that other witnesses testified Victim suffered, and she offered examples of symptoms

of trauma which no witnesses testified to. The supposed Venn diagram would not be a single circle. The first sentence of that paragraph in the return is interesting because it states Rich testified to “various” symptoms, “including the exact ones.” The sentence seems specifically designed to obfuscate that the symptoms Rich testified to did not match exactly with the symptoms testified to by lay witnesses in a desperate attempt by Makins to implicate State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015).

Rich testified to several examples of symptoms to which no testimony was provided no testimony was elicited that Victim pulled her hair out, suffered nightmares, suffered intrusive thoughts, was frightened, or avoided men generally. See R. pp. 251-53. Makins’ implication that the testimony was tailored to Victim’s symptoms is simply false and misleading.

A further distinction from Anderson is that Rich did not testify to any symptoms to which Victim suffered. Makins also overlooks that evidence of trauma is admissible to prove a sexual assault occurred. State v. Schumpert, 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993) *overruled on other grounds by* State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). Finally, Makins incorrectly claims Rich provided an opinion. Rich did not provide any opinion or make any findings. No bolstering occurred.

Makins also claims Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) overruled this aspect of Schumpert. However, Schumpert and its progeny were reaffirmed in Anderson, specifically approving of expert testimony on the behaviors of sexually abused children. Anderson, at 218-19, 776 S.E.2d at 79 (citing Schumpert). Kromah did not prevent this kind of testimony, the Kromah opinion does not even cite Schumpert. See also State v. White, 361 S.C. 407, 415, 605 S.E.2d 540, 544 (2004) (finding rape trauma evidence is admissible “to prove the elements of

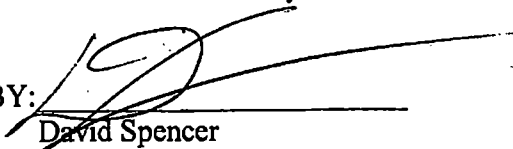
criminal sexual conduct since such evidence may make it more or less probable the offense occurred.”).

WHEREFORE, the State requests this Court to grant the petition for rehearing and affirm the convictions and sentences.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

BY: 
David Spencer
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S.C. Bar No 68571

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ATTORNEYS FOR RESPONDENT

October 7, 2019

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
The Honorable Robin B. Stillwell, Circuit Court Judge

Appellate Case No: 2016-002495

THE STATE,

Respondent,

v.

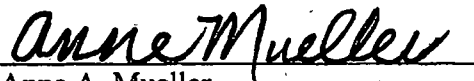
ONTARIO STEFON PATRICK MAKINS,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Reply to Return to State's Petition for Rehearing and Petition for Rehearing En Banc on Appellant by delivering two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Taylor D. Gilliam, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29201.

I further certify that all parties required by Rule to be served have been served.
This 7th day of October, 2019.



Anne A. Mueller
Legal Assistant

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The South Carolina Court of Appeals

The State, Respondent,

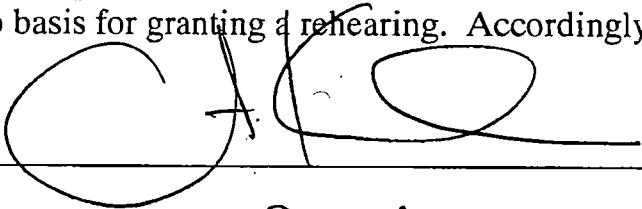
v.

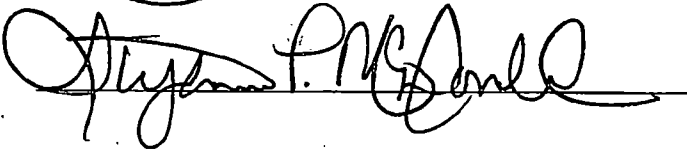
Ontario Stefon Patrick Makins, Appellant.

Appellate Case No. 2016-002495

ORDER

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


_____ J.


_____ J.

For i
_____ J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire
David A. Spencer, Esquire
Taylor Davis Gilliam, Esquire
William Walter Wilkins, III, Esquire

FILED

December 16, 2019