IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. JUSTICE MATHIS, Defendant-Appellant.	)))))))))	S.CT. NO. 20-0464

APPEAL FROM THE IOWA DISTRICT COURT
FOR DECATUR COUNTY
HONORABLE DUSTRIA A. RELPH, JUDGE

APPELLANT'S REPLY BRIEF AND ARGUMENT

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CERTIFICATE OF SERVICE

On the 15th day of December, 2020, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Justice Mathis, 305 W Monroe, Mount Ayr, IA 50854.

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STATEMENT OF THE CASE

COMES NOW Defendant-Appellant Justice Mathis, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the State's amended brief filed on December 1, 2020.

While the defendant's brief adequately addresses the issues presented for review, a short reply is necessary to address the State's attack on State v. Smith, 508 N.W.2d 101 (Iowa Ct. App. 1993).

ARGUMENT

I. The Court of Appeals decision in State v. Smith represents the application of established case law to a criminal case involving non-credible testimony. There is no basis to revisit it.

The State spends considerable effort relitigating the facts of a Court of Appeals decision issued 27 years ago. But what the State is really doing is asking this Court to discard a long-standing rule well-recognized in case law. The courts have always had the inherent power to consider incredible witness testimony to be a nullity, though they exercise that power

cautiously. There is no basis for revisiting this rule, or State v. Smith.

State v. Smith was an Iowa Court of Appeals decision released in 1993. State v. Smith, 508 N.W.2d 101 (Iowa Ct. App. 1993). Smith was initially charged with 264 counts of sexual abuse, lascivious acts, indecent contact, and assault with intent to commit sexual abuse relating to his three step-daughters, ages 11 and 8. Id. at 102. A jury ultimately convicted him of two counts of sex abuse in the second degree and one count of indecent contact with a child, and Smith was sentenced to three concurrent terms of 25 years in prison. Id.

The Smith Court began with the unremarkable statement that it looks at the evidence in a light most favorable to the State but also looks at all the evidence presented at trial and not just the evidence of guilt. Id. at 102. But then it also recognized:

> Normally, it is for the jury to determine the credibility of witnesses. State v. Allen, 348 N.W.2d 243, 247 (Iowa 1984) (citing State v. Jones, 271 N.W.2d 761, 763 (Iowa 1978)). We have adopted a

limitation, however, on this rule. The supreme court established this exception in Graham v. Chicago & Northwestern Ry. Co., 143 Iowa 604, 119 N.W. 708 (1909) stating:

> This court has gone its full length to protect the right of jury trial against encroachment by the courts under any guise, and one of the rights of jury trial is the right to have the credibility of the witness determined by the jury. Generally speaking there are no limitations upon this rule, but there are limitations upon the application of it. The testimony of a witness may be so impossible and absurd and self-contradictory that it should be deemed a nullity by the court.

Id. at 615, 119 N.W. at 711. In Graham, a witness testified at one trial, then gave a "different and self-contradictory" account of certain facts at a second trial.

The supreme court interpreted the Graham limitation in State ex rel. Mochnick v. Andrioli, 216 Iowa 451, 249 N.W. 379 (1933):

> The rule that it is for the jury to reconcile the conflicting testimony of a witness does not apply where the only evidence in support of a controlling fact is that of a witness who so contradicts himself as to render finding of facts thereon a mere guess. We may concede that, ordinarily, contradictory statements of a witness do not make an issue of fact; and that such

> situation may deprive the testimony of all probative force.
>
> Id. at 453, 249 N.W. at 380. In Andrioli, the court found other corroborating testimony allowed the witness to correct her earlier testimony.

Id. at 102-03. Without question, the opinion in Smith did not rest on newly proclaimed authority to "usurp the role of the jury," but long-standing precedent to treat incredible witness testimony as a nullity.

The early case cited by Smith for such a proposition, Graham v. Chicago and N.W. Railway Company, was a personal injury case involving a young man who died after trying to jump aboard a moving train. Graham v. Chicago and N.W. Ry. Co., 143 Iowa 604, ___, 119 N.W. 708, 709 (1909). The Court found one of his cohort's testimony to be not just subject to some discrepancies with his former testimony, but to be "so manifestly insincere and absurd that no person could candidly believe it." Id. at 711. The Court held that it had never seen a "more marked case" where the testimony of a witness was so "absurd and self-contradictory

that it should be deemed a nullity by the court." Id. To hold otherwise, the Court said, would "make a farce of judicial proceedings." Id.

Graham itself cites to an 1871 case in which the Iowa Supreme Court recognized that witness testimony needed to have some connection to undisputed facts or, at the very least, reality:

> But, it is urged by the appellee's counsel that the plaintiff testifies that he did both look and listen to see and hear the train, but did not; and that this testimony shows that he was not guilty of contributory negligence, or, at the very least, it made that a question of fact for the jury. The difficulty, however, with the position is that the conceded or undisputed facts being true, this testimony cannot, in the very nature of things, be also true. It constitutes, therefore, no conflict. Suppose the fact is conceded that the sun was shining bright and clear at a specified time, and a witness, having good eyes, should testify that at the time he looked and did not see it shine. Could this testimony be true? The witness may have been told that it was necessary to prove in the case that he did look and did not see the sun shine; he may have thought of it with a desire that it should have been so; he may have made himself first believe it was so, and this belief may have ripened into a conviction of its verity, and, possibly, he even may testify to it in the self-consciousness of integrity. But, after all, in

> the very nature of things, it cannot be true, and hence cannot, in the law, form any basis for a conflict upon which to rest a verdict.

Artz v. Chicago, R.I. & P.R, 34 Iowa 153, 159-60, 1872 WL 200 (1871).

The principle that there is a limit to the appellate courts' deference to jury determinations of credibility was established long ago and continues to this day. The Iowa Supreme Court acknowledged the existence of the Graham Rule in State v. Mitchell, though the Court determined the witness testimony in Mitchell was more credible and better corroborated than the testimony in Smith. State v. Mitchell, 568 N.W.2d 493, 503-04 (Iowa 1997). See also Susie v. Family Health Care of Siouxland, P.L.C. 942 N.W.2d 333, 345 (Iowa 2020)(Appel, J., dissenting)(noting the Graham rule).

Iowa is not alone in having a Graham rule. The Utah Supreme Court addressed its similar rule in 2009 in a sex abuse case involving a man and his step-daughter. State v. Robbins, 210 P.3d 288 (Utah 2009). The Robbins Court

noted its usual deference to jury determinations of credibility, but also acknowledged its discretion to disregard such deference when the witness' testimony was "improbable." Id. at 293. "In a criminal case, where the burden of proof is beyond a reasonable doubt, the trial court may afford less deference to inherently improbable, inconsistent, uncorroborated witness testimony than in a civil case where the plaintiff must only establish its claim by a preponderance of the evidence." Id.

> To prevent unappealable injustice, we hold that the definition of inherently improbable must include circumstances where a witness's testimony is incredibly dubious and, as such, apparently false. Accordingly, when considering a motion to arrest judgment, a trial judge may reevaluate the jury's determination of testimony credibility in cases "where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion, and there is a complete lack of circumstantial evidence of guilt." Bowles, 737 N.E.2d at 1152; see also Iowa v. Smith, 508 N.W.2d 101, 103 (Iowa Ct.App.1993) (" 'The testimony of a witness may be so impossible and absurd and self-contradictory that it should be deemed a nullity by the court.' " (quoting Graham v. Chi. & Nw. Ry. Co., 143 Iowa 604, 119 N.W. 708, 711 (Iowa 1909))). We stress, however, that the court may choose to

> exercise its discretion to disregard inconsistent witness testimony only when the court is convinced that the credibility of the witness is so weak that no reasonable jury could find the defendant guilty beyond a reasonable doubt.
>
> Contrary to the court of appeals' view, such a rule would not allow defendants to challenge witness testimony for "generalized concerns about a witness's credibility." Robbins, 2006 UT App 324, ¶ 17, 142 P.3d 589. Rather, the trial court could reevaluate the jury's credibility determinations only in those instances where (1) there are material inconsistencies in the testimony and (2) there is no other circumstantial or direct evidence of the defendant's guilt. The existence of any additional evidence supporting the verdict prevents the judge from reconsidering the witness's credibility. See White v. Indiana, 706 N.E.2d 1078, 1080 (Ind.1999) (refusing to reconsider witness testimony when other witness testimony and circumstantial evidence supported the conviction).

Id. at 294. The Utah Supreme Court noted the "inherent improbability" standard had been adopted in several jurisdictions, including Iowa. Id. See also Gamble v. State, 576 P.2d 1184, 1185-86 (Okla. Crim. Ct. App. 1978) (articulating improbability standard).

The State proclaims "It would be illogical or sexist to find that appellate courts must respect jurors' credibility

determinations in all cases except sex crimes." State's Brief p. 30. Smith, of course, suggests no such exception. Appellate courts give considerable deference to jury determinations of credibility, but they are by no means blindly bound by them. Appellate courts can exercise – and have exercised -- their discretion to disagree with juror credibility findings in any type of case. See, e.g., Graham v. Chicago and N.W. Ry. Co., 143 Iowa 604, ___, 119 N.W. 708, 709 (1909); Artz v. Chicago, R.I. & P.R, 34 Iowa 153, 159-60, 1872 WL 200 (1871).

The statistics proffered by the State further undermine its argument. According to those statistics, Smith has been cited in 68 appellate opinions and never used to invalidate a conviction, 70 percent of which involved claims of sexual abuse. State's Brief pp. 26-29. By the State's own admission, Smith is not being liberally applied to overturn sexual abuse convictions on a whim. Instead, appellate courts are doing what they are supposed to do – look at the

evidence presented at trial, determine if witness testimony could rightly be deemed a nullity, and then consider the remaining evidence. The lack of reversals based upon Smith is not based upon any shortcoming with Smith itself, but the distinguishing facts of each individual case.

Mathis does not intend to go into a point by point repudiation of the State's attack on Smith – an attack he considers misdirected. Mathis' argument relies on the broader Graham rule rather than any a carbon-copy adoption of Smith. Nonetheless, Mathis deems it necessary to make a few clarifying remarks.

Smith does not hold that corroboration is necessary to support the testimony of sexual abuse complainants. Instead, it holds what other cases have long held – that if witness testimony is not credible, then corroboration of that testimony will be necessary to support it. See, e.g., State ex rel. Mochnick v. Andrioli, 216 Iowa 451, 249 N.W. 379 (1933) (acknowledging Graham rule and inconsistencies in witness'

statements, but holding corroborating evidence supported the testimony). The problem in Smith was that the only undisputed evidence in the case weighed against the State. State v. Smith, 508 N.W.2d 101, 104-05 (Iowa Ct. App. 1993) (noting acrimonious relationship between girls' natural parents, previous threats by the girls' natural father to report Smith and his wife for abuse, steps taken by Smith and his wife to limit any contact between Smith and the girls that might appear inappropriate, and girls' stepmother teaching them about good and bad touches prior to the allegations). As a result, the girls' incredible testimony could not support the guilty verdict. Id. at 105.

As for the State's other criticisms of Smith, many appear to have more to do with the presentation of the State's case at trial than any hard and set rule on how to assess the credibility of sexual abuse complaints. It is true that the Smith opinion referred to the lack of any injury to the complainants. Id. at 104. Had there been an injury, that

certainly would have provided independent corroboration to support the noncredible testimony and, accordingly, the guilty verdict. But it is unclear from the opinion whether any medical doctor testified as to whether a child can be sexually abused and yet not suffer an injury. Without such testimony, there would be no basis for a jury or reviewing court to connect the lack of injury to sexual abuse rather than to an absence of sexual abuse.

The State likewise faults Smith for not contemplating that children may be groomed for abuse and mixed feelings toward their abusers. Again, it is unclear from the Smith opinion what, if any, evidence of grooming was presented to the jury. The same can be said when it comes to evidence as to whether children can be sexually abused while in the same room with others.

The State had the chance to litigate State v. Smith 27 years ago. This Court should reject the State's invitation to revisit the case. The facts of Smith are irrelevant to this

appeal. The underlying law for which Mathis cites Smith – that the appellate courts will not blindly defer to jury findings of credibility when those findings are not supported by the evidence – remains intact, even if sparingly applied.

Contrary to the State's baseless assertion, Mathis is not asking this Court to perpetuate rape myths. State's Brief p. 42. It is not a myth that the absence any physical injury to the children is logically consistent with the absence of sexual abuse. (Tr. Day 4 p. 14 L.3-15, p. 16 L.22-p. 17 L.7). It is not a myth that the children's testimony in this case contradicted itself and each other. (Tr. Day 3 p. 38 L.8-19, p. 39 L.4-11, p. 43 L.21-p. 44 L.23, p. 54 L.22-p. 59 L.22, p. 64 L.10-p. 66 L.7, p. 84 L.21-p. 85 L.23). It is not a myth that both children identified Mickie Atkins as their abuser and did not mention Mathis until later. (Tr. Day 3 p. 106 L.14-p. 109 L.9). It is not a myth that Mathis flatly denied committing any acts of abuse. (Tr. Day 4 p. 160 L.17-p. 164 L.8).

If Mathis is asking this Court to perpetuate anything, it would be our core constitutional concepts of presumption of innocence and proof beyond a reasonable doubt. Blind deference to jury determinations of witness credibility does not do justice to those concepts or to defendants when witness testimony is not believable. All Mathis is asking is for this Court to make a fair assessment of the evidence presented to the jury, which in this case extends to the credibility of the complainants' testimony.

The complainant's testimony in this case is not credible enough to support Mathis' conviction for the reasons cited in his brief. His convictions, sentence, and judgment should be vacated.

II. The law requires no corroboration of the testimony of sexual abuse complainants if that testimony is credible. The District Court's instruction on this point was erroneous.

Mathis does not take significant issue with the State's recitation of the purpose and history of the noncorroboration rule for sexual assault complainants. Where the parties

diverge is in the application of and instruction regarding the rule in this case.

Mathis' argument must be considered in the context of his challenge to the credibility of the complaining witnesses' testimony as addressed in Issue I. Mathis reiterates that the law requires no corroboration of *any* witness' testimony so long as the jury could reasonably deem the testimony to credible. See, e.g., Graham v. Chicago and N.W. Ry. Co., 143 Iowa 604, ___, 119 N.W. 708, 711 (1909)(applying rule in personal injury case); Artz v. Chicago, R.I. & P.R, 34 Iowa 153, 159-60, 1872 WL 200 (1871) (same). And in determining the credibility of witness testimony, jurors were instructed to consider whether the testimony was consistent with other evidence they believed. (Inst. 13)(App. p. 33). In this case, the complainants' testimony was not credible, but jurors were explicitly told no corroboration was required for their testimony. (Inst. 24)(App. p. 44).

The cases from other jurisdictions cited by the State in fact illustrate Mathis' point. The instruction most recently upheld by the Mississippi Supreme Court in Pitts v. State informed the jury that "the uncorroborated testimony of a sex-crime victim is sufficient to support a conviction *if accepted as true by the finder of fact*." Pitts v. State, 291 So.3d 751, 757 (Miss. 2020)(emphasis added). The Court explained that the "if accepted as true by the finder of fact" language included in the instruction allowed the jury the freedom "to accept or reject [the complainant's] testimony, especially in light of other instructions given." Id. at 758. Other instructions directed the jury to assign the weight and credibility to the testimony of *each* witness and "not to single out any certain witness or individual point or instruction." Id. The instructions in Pitt were significantly better at explaining the noncorroboration requirement than the instructions in this case.

Likewise, many of the cases cited by the State contain additional language in their noncorroboration instruction not

present here. See, e.g., Mency v. State, 492 S.E.2d 692, 699-700 (Ga. Ct. App. 1997)(jury instructed "the uncorroborated testimony of the victim is sufficient to sustain a conviction of the charges of child molestation and aggravated child molestation as contained within this bill of indictment *if that testimony is sufficient to convince you of the defendant's guilt beyond a reasonable doubt*")(emphasis added); Gaxiola v. State, 119 P.3d 1225, 1231-32 (Nev. 2005)(jury instructed "There is no requirement that the testimony of a victim of sexual offenses be corroborated, and his testimony standing alone, *if believed beyond a reasonable doubt,* is sufficient to sustain a verdict of guilty.")(emphasis added); State v. Clayton, 202 P.2d 922, 923 (Wash. 1949)("You are instructed that it is the law of this State that a person charged with attempting to carnally know a female child under the age of eighteen years may be convicted upon the uncorroborated testimony of the prosecutrix alone. That is, the question is distinctly one for the jury, *and if you believe from the evidence and are satisfied*

beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act.")(emphasis added).

It is true that in People v. Gammage, the Supreme Court of California upheld a noncorroboration challenge given in a sexual abuse case without the clarifying language mentioned in the cases above. People v. Gammage, 828 P.2d 682, 687-88 (Cal. 1992). At the same time, two concurrences recognized that a noncorroboration instruction specifically targeting a particular type of witness was unnecessary, if not inappropriate. Id. at 702-05 (Mosk, J. concurring); id. at 707-07 (Kennard, J., concurring). The same goal behind the targeted noncorroboration instruction could be accomplished through the use of a different model instruction:

> "You should give the [uncorroborated] testimony of a single witness whatever weight you think it deserves. However, testimony by one witness which you believe concerning any fact [whose testimony about that fact does not require corroboration] is sufficient for the proof of that fact. You should

> carefully review all the evidence upon which the proof of such fact depends."

Id. at 704 (Mosk, J. concurring)(citing CALJIC No. 2.27 (1991 rev.) (5th ed. pocket pt.)). An instruction such as this properly enlightens jurors as to the lack of need for corroboration when they otherwise believe the witness's testimony without giving undue emphasis to any particular testimony.

In fact, at least one other state has rejected targeted noncorroboration instructions for the reasons cited by Mathis. In State v Stukes, the South Carolina Supreme Court overturned precedent and held that an instruction that ""The testimony of a victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence" was an "impermissible charge on the facts. State v. Stukes, 787 S.E.2d 480, 482-83 (S.C. 2016). The Court determined that the law upon which the instruction was based was more directed at guiding trial and appellate courts as to how to view the sufficiency of the evidence. Id. at 482. The Court went

on to adopt a similar argument to the one Mathis urges on appeal:

> By addressing the veracity of a victim's testimony in its instructions, the trial court emphasizes the weight of that evidence in the eyes of the jury. The charge invites the jury to believe the victim, explaining that to confirm the authenticity of her statement, the jury need only hear her speak. Moreover, it is inescapable that this charge confused the jury. Specifying this qualification applies to one witness creates the inference the same is not true for the others.

Id. at 483 (footnotes omitted).

As Mathis argues in his original brief, the instruction presented in his case created a different standard for the complainants' testimony as compared to the testimony of the defense witnesses. Def.'s Brief pp. 91-94. While trying to address one ill – the idea that testimony by sexual assault complainants must *always* be corroborated – it created another – that it *never* requires corroboration. This instruction did not adequately state the applicable law and would have confused the jury into giving greater deference to

the complainants, to the prejudice of Mathis. (Tr. Day 5 p. 10 L.1-13).

Finally, to the extent the State suggests a due process argument was not preserved for appeal, Mathis respectfully suggests the State mixes apples with oranges. State's Brief p. 55. Mathis is appealing instructional error by the District Court as preserved by trial counsel's objections. "Error in jury instructions is reversible only if the error is prejudicial." Condon Auto Sales & Serv., Inc. v. Crick, 604 N.W.2d 587, 593 (Iowa 1999). This court's prejudice analysis is guided by whether the challenged error is of a constitutional magnitude. State v. Hanes, 790 N.W.2d 545, 550-51 (Iowa 2010). Accordingly, to determine the appropriate prejudice analysis, this Court must necessarily determine whether the error was or was not of constitutional magnitude. Mathis' reference to due process should be understood in this context.

The District Court erred in instructing the jury as to the noncorroboration requirement for sexual assault

complainants. Mathis was prejudiced by the error. He should receive a new trial.

CONCLUSION

For all of the reasons discussed above and in his Brief and Argument Defendant-Appellant Justice Mathis respectfully requests this Court vacate his convictions, sentence and judgment and remand his case to the District Court for dismissal or, alternatively, a new trial.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $2.85, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 3,870 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Theresa R. Wilson Dated: *12/15/20*

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