

State v. Smith Perpetuates Rape Myths and Should Be Formally Disavowed

Tyler J. Buller*

I.	INTRODUCTION.....	186
II.	THE PROSECUTION.....	186
	A. <i>THE INDICTMENT</i>	186
	B. <i>THE TRIAL</i>	187
	1. Background.....	187
	2. The Disclosures.....	187
	3. The Victims' Trial Testimony.....	188
	i. <i>SAK's Testimony</i>	188
	ii. <i>SMK's Testimony</i>	189
	iii. <i>AK's Testimony</i>	189
	4. The Medical Testimony.....	189
	5. The Defense.....	190
	C. <i>MOTIONS, VERDICT, AND SENTENCING</i>	190
III.	THE APPEAL.....	191
IV.	<i>SMITH'S LEGACY</i>	193
V.	WHY <i>SMITH</i> SHOULD BE DISAVOWED AND OVERRULED.....	194
	A. <i>IOWA LAW DOES NOT REQUIRE CORROBORATION</i>	195
	B. <i>THE OVERWHELMING MAJORITY OF SEX-ASSAULT VICTIMS DO NOT HAVE PHYSICAL INJURIES</i>	196
	C. <i>CHILDREN ARE SOMETIMES ABUSED WHEN OTHER PEOPLE ARE NEARBY</i>	198
	D. <i>IT IS NOT UNCOMMON FOR SEXUALLY ABUSED CHILDREN TO HAVE MIXED OR POSITIVE FEELINGS ABOUT THEIR ABUSERS</i>	198

* Assistant Attorney General, Iowa Department of Justice. J.D., University of Iowa College of Law; B.A., Drake University. As an Assistant Attorney General, the author has prosecuted felony child sex abuse cases in Iowa's district courts and on appeal. The views expressed in this Essay belong solely to the author and do not represent the views of the Attorney General of Iowa or the Iowa Department of Justice. The author thanks Assistant Attorneys General Linda Hines, Susan Krisko, Laura Roan, and Sheryl Soich for their thoughtful comments on the piece.

E. SEXUALLY ABUSED CHILDREN CAN RELIABLY PROVIDE THE CORE DETAILS OF AN EVENT, EVEN IF THEY CANNOT RECITE THE PRECISE CHRONOLOGY	199
--	-----

VI. CONCLUSION	201
----------------------	-----

APPENDIX A: TRANSCRIPT EXCERPTS.....	201
--------------------------------------	-----

I. INTRODUCTION

Sometimes in the law, there are bad cases that just won't go away. In Iowa's sex-crime jurisprudence, that case is *State v. Smith*, a published court of appeals decision from 1993.¹ In *Smith*, two appellate judges—reading a cold record—decided they did not believe the testimony of two little girls who testified that their stepfather had sexually abused them.² The appellate court reversed the trial jury's verdict based on what modern science tells us are myths about rape and sexual assault.³ Reading *Smith* today is jarring. In light of research about child-sex-abuse dynamics, *Smith* is at best wrongheaded and at worst offensive and dangerous. It is time for Iowa's appellate courts to formally overrule *Smith* and banish its sexist commentary on victim testimony to the dustbin of legal history.

II. THE PROSECUTION

To understand the holding of *Smith*, we must start with the facts. As is often the case, the opinion in *Smith* gives only an abbreviated version of the record developed at trial. The following discussion relies exclusively on the pleadings and transcripts contained in the same appendix reviewed by the Iowa Court of Appeals when it overturned Smith's convictions.⁴

A. THE INDICTMENT

In December of 1991, a Palo Alto County grand jury indicted Allen R. Smith on numerous charges for molesting his three stepdaughters.⁵ Following an amendment and bill of particulars, Smith faced seven counts at trial: three counts of second-degree sexual abuse against SMK, two counts second-degree sexual abuse against SAK, one count of assault with intent to commit sex abuse

1. *State v. Smith*, 508 N.W.2d 101 (Iowa Ct. App. 1993).

2. *Id.* at 103–04.

3. *Id.* at 104.

4. *See* Appendix, *Smith*, 508 N.W.2d 101 (No. 92–1343).

5. *Smith*, 508 N.W.2d at 102. In total, Smith was originally charged with 122 counts of lascivious acts with a child, 122 counts of second-degree sexual abuse, 10 counts of assault with intent to commit sex abuse, and 10 counts of indecent contact with a child. Appendix, *supra* note 4, at 1–7. At the State's direction, the grand jury returned an amended indictment the following year, narrowing the charges. *See id.* at 8–13.

against AK, and one count of indecent contact with a child against AK.⁶

B. THE TRIAL

At trial, the State of Iowa was represented by Palo Alto County Attorney Peter Hart and Assistant Attorney General Virginia Barchman.⁷ Smith was represented by Emmetsburg defense lawyer John D. Brown and Rowe P. Stayton, a Colorado lawyer who specialized in defending against child-sex-abuse charges.⁸ Trial began on Tuesday, May 12, 1992, and ended that Friday, May 15.⁹

1. Background

The victims' mother, Pamela,¹⁰ testified that Smith moved in with her and her three daughters in 1987.¹¹ Twins SMK and SAK were seven when Smith moved in, and AK was three.¹² Pamela confirmed there were many instances when Smith had access to the girls without supervision.¹³

2. The Disclosures

SMK twice told Pamela that Smith was abusing her and her sisters.¹⁴ When Pamela asked for specifics, SMK said Smith was “touching” them on their “private parts.”¹⁵ Pamela told SMK that Smith “wouldn’t do that” and SMK’s two sisters—who overheard part of the conversation—responded: “yes, he did, yes, he did.”¹⁶

6. Appendix, *supra* note 4, at 28–32. Because the victims were minors, they are referred to by initials. See IOWA CODE § 915.36(1)–(2) (2015).

7. Appendix, *supra* note 4, at 27. Assistant attorneys general routinely try child-sex-abuse cases statewide on referral or invitation of local county attorneys. See *Area Prosecutions*, IOWA DEP’T OF JUSTICE: OFF. OF THE ATT’Y GEN., <https://www.iowaattorneygeneral.gov/about-us/divisions/area-prosecutions> (last visited Mar. 1, 2017). The author and Barchman were not employed by the Attorney General’s Office at the same time and have not met.

8. Appendix, *supra* note 4, at 27; see *Our Sex Crime Attorneys*, PREMIER DEF. GROUP., <http://www.premierdefensegroup.com/sex-crime-defense-attorney> (last visited Mar. 1, 2017) (“Attorney Rowe Stayton has become one of the most demanded criminal defense attorneys in the country in the area of Child Abuse. Since 1986, he has earned a long string of acquittals and spectacular case results for clients in over 30 states in child sexual abuse case [sic].”). Today, Stayton is part of a firm that is “devoted exclusively to sex crimes defense.” *Welcome to the Leading Sex Crimes Defense Firm*, PREMIER DEF. GROUP, <http://www.premierdefensegroup.com> (last visited Mar. 1, 2017).

9. Appendix, *supra* note 4, at 28, 142.

10. Pamela Smith is referred to by first-name to avoid confusion with her husband, the defendant.

11. Appendix, *supra* note 4, at 35.

12. See *id.*

13. *Id.* at 53.

14. *Id.* at 47–50.

15. *Id.* at 50–51.

16. *Id.* at 52.

The girls also told their biological father, Terry, about the abuse during a car ride in 1991.¹⁷ According to Terry, SMK told her sister: “Tell him,” and SAK disclosed the abuse.¹⁸ Terry recalled that SAK “was crying and blurted it out.”¹⁹ When Terry asked what the girls meant, they said Smith was abusing them by “touching them in their private parts.”²⁰ Terry called the police.²¹

3. The Victims’ Trial Testimony

By the time of trial, twins SMK and SAK were eleven years old.²² AK was seven.²³ The abuse charged in the indictment dated back between one and five years.²⁴

i. SAK’s Testimony

SAK told the jury that Smith did things she did not like, including “touch[] her privates” between her legs.²⁵ SAK could not put a date on when Smith began abusing her, but she knew the abuse started before Smith married Pamela, and she thought the abuse happened both in Ames and in Storm Lake.²⁶ SAK explained that the abuse generally happened at night in her bedroom, which she sometimes shared with her sisters.²⁷ When asked for specifics, SAK explained that Smith “would lick [her] privates” and touch her privates with “[h]is tongue and his finger.”²⁸

On cross, SAK reiterated that the defendant “licked [her] privates” and touched her privates with his finger.²⁹ She said she was not certain which aspects of the abuse happened in Ames and which happened in Storm Lake.³⁰ She did not know the exact number of times the abuse happened, but she did know that it happened at least three times.³¹

SAK also testified that she saw Smith abuse SMK.³² Through holes in a blanket, SAK saw Smith touch SMK’s privates with his finger.³³ From her vantage point, SAK could not tell if the touching was above or below SMK’s

17. *Id.* at 71–72.

18. *Id.* at 74.

19. *Id.*

20. *Id.* at 75.

21. *Id.*

22. *Id.* at 35.

23. *Id.*

24. *Id.* at 14–15, 35.

25. *Id.* at 83.

26. *Id.* at 84.

27. *Id.* at 84–85.

28. *Id.* at 85.

29. *Id.* at 92–93.

30. *Id.* at 93.

31. *Id.* at 98–99.

32. *Id.* at 100.

33. *Id.* at 101–02.

clothes.³⁴

ii. SMK's Testimony

SMK told the jury that Smith “touched [her] private with his hands, his mouth and his penis.”³⁵ She said that the abuse happened more than once in the living room.³⁶ SMK testified that, when she was sitting on Smith’s lap, he touched her, “[s]ometimes with his hands, and sometimes with his penis.”³⁷ SMK was not sure how Smith got his penis out, but she said: “I think he would get [it] out of his panties and put it under mine.”³⁸ SMK said that she felt Smith’s penis with her hand, and it “[f]elt hard.”³⁹ SMK remembered that Smith put his penis “right up to [her] private” but did not penetrate her.⁴⁰

SMK also remembered that, while she was lying in bed, Smith touched her privates with his mouth and finger.⁴¹ Her description: “[H]e touched me with his mouth being on his knees and his head bent down and he’d still be on his knees when he touched me with his fingers.”⁴² Finally, SMK testified that she was not sure if Smith had attempted to penetrate her, but she remembered it hurt when Smith touched her with his penis.⁴³

On cross, SMK said that she did not know exactly how many times Smith had touched her and she was not positive about which abuse happened in which location. But she was sure that Smith touched her at least once in Ames.⁴⁴ She also explained on cross that one of the occasions Smith touched her was under a blanket when other people were opening presents nearby.⁴⁵

iii. AK's Testimony

AK told the jury that Smith would “put his hand” between her legs when she was watching TV.⁴⁶ She said that sometimes it happened when other people were nearby, but they did not see because they were watching TV.⁴⁷

4. The Medical Testimony

Dr. Rizwan Shah, a medical doctor, testified that she did not find physical

34. *Id.*

35. *Id.* at 106.

36. *Id.*

37. *Id.* at 107.

38. *Id.*

39. *Id.* at 108.

40. *Id.* at 108–09.

41. *Id.* at 109, 111.

42. *Id.* at 111.

43. *Id.* at 112–15, 118–20.

44. *Id.* at 113–15, 119–20.

45. *Id.* at 116–18.

46. *Id.* at 121.

47. *Id.*

injuries related to abuse.⁴⁸ She also gave her opinion, however, that the lack of physical injury was consistent with the victims' trial testimony—touching, with limited or no penetration.⁴⁹

Dr. Shah was also asked about how sexual abuse victims interact with their abuser:

Q: Dr. Shah, in your experience is it unusual for a sexually abused child to exhibit love or affection towards her abuser if that person is a family member?

A: No. It is not at all unusual, because a lot of time[s] the relationship between the child and an offender is a supporting, loving, trusting relationship. It is not a relationship that is adverse[]. And children have a natural tendency to please and comply [with] grown-ups that they like and they love.⁵⁰

On cross, Dr. Shah admitted that she would be unable to diagnose abuse in this case solely based on physical evidence.⁵¹ However, she explained that there are no physical findings in 75% of child abuse cases.⁵²

5. The Defense

According to Pamela, Smith's wife and the victims' mother, her girls "loved" the defendant, would want to sit on his lap, and would kiss him goodbye.⁵³ Pamela also said that she never saw Smith spank the girls or use violence in front of her.⁵⁴ On cross, Pamela speculated that her ex-husband might have somehow planted the idea in the girls' heads that Smith was abusing them.⁵⁵ Pamela's ex-husband denied this under oath, and testified that the only direction he ever gave the girls was "to tell the truth."⁵⁶

Smith testified in his own defense and denied the abuse.⁵⁷ Two of Smith's relatives testified that they did not see anything inappropriate during family birthday celebrations.⁵⁸

C. MOTIONS, VERDICT, AND SENTENCING

At the close of the State's evidence, the prosecution agreed to dismiss

48. *Id.* at 125.

49. *Id.* at 124–25.

50. *Id.* at 125.

51. *Id.* at 128–29.

52. *Id.* at 124.

53. *Id.* at 54.

54. *Id.* at 57.

55. *See id.* at 61.

56. *Id.* at 71–72.

57. *Id.* at 139.

58. *Id.* at 133–34 (testimony of Don Schulte, grandfather of the girls); *id.* at 137–38 (testimony of Devon Schulte, aunt of the girls).

Count VI—assault with intent to commit sex abuse against AK—based on the testimony elicited at trial.⁵⁹ When the defense moved for judgment of acquittal, the district court twice concluded there was sufficient evidence to present all of the sex-abuse counts to the jury.⁶⁰

The jury deliberated for about 12 hours straight: from noon until 11:30 PM.⁶¹ Smith was found guilty on two counts of second-degree sexual abuse against SMK,⁶² one count of second-degree sexual abuse against SAK,⁶³ and one count of assault against SAK.⁶⁴

Following trial, the defendant discharged his trial attorneys (Brown and Stayton) and hired Alfredo Parrish of Des Moines.⁶⁵ Parrish filed a post-trial brief seeking a new trial, alleging ineffective assistance of counsel and prosecutorial misconduct.⁶⁶

At sentencing, the assault conviction against SAK was dismissed because it fell outside the statute of limitations.⁶⁷ The district court denied Smith's motion for new trial in all other aspects and sentenced Smith to 25 years in prison for each count.⁶⁸ Smith appealed.⁶⁹

III. THE APPEAL

Smith's appeal was transferred to the Iowa Court of Appeals and heard by a three-judge panel: Chief Judge Leo Oxberger, Judge Allen Donielson, and Judge Maynard Hayden.⁷⁰ Judge Donielson, joined by Judge Hayden, issued an opinion to reverse.⁷¹ Chief Judge Oxberger dissented without written opinion.⁷²

After acknowledging that “[n]ormally, it is for the jury to determine the

59. *Id.* at 130–31. Essentially, the State pointed out there was evidence the defendant had touched AK but not enough evidence that he touched her with the intent to commit sexual abuse. *Id.*

60. *Id.* at 132, 141 (concluding “there is enough evidence in the record to overrule the defendant’s motion [for judgment of acquittal]”). The district court appears to have misspoken in denying the second motion for judgment of acquittal, as the judge referenced the “light most favorable to the defendant,” even though the standard in Iowa is well settled and it seems clear the judge meant to say “light most favorable to the State.” *Compare id.* at 141, *with* State v. Leckington, 713 N.W.2d 208, 212–13 (Iowa 2006).

61. Appendix, *supra* note 4, at 162.

62. *Id.* at 21, 22.

63. *Id.* at 23.

64. *Id.* at 25. The jury also acquitted on one count of lascivious acts with a child. *Id.* at 24.

65. *Id.* at 146.

66. *See id.* at 149–59.

67. *Id.* at 160.

68. *Id.* at 164–65. All three of the second-degree sex-abuse counts were run concurrently, rather than consecutively. *Id.*

69. *Id.* at 167.

70. State v. Smith, 508 N.W.2d 101, 101 (Iowa Ct. App. 1993).

71. *Id.* at 105.

72. *Id.* at 105.

credibility of witnesses,” the court of appeals reached back to 1909 to find a case suggesting a limitation on this rule.⁷³ In *Graham v. Chicago & Northwest Railway Co.*, a witness testified to events in a first trial, then gave a “self-contradictory” version of events at a second trial that was “so manifestly insincere and absurd that no person could candidly believe it.”⁷⁴ In that case, the Iowa Supreme Court concluded, “[t]he testimony of a witness may be so impossible and absurd and self-contradictory that it should be deemed a nullity by the court.”⁷⁵ This language provided the purported basis of the court of appeals’ decision in *Smith*.⁷⁶

According to the *Smith* majority, “[i]n the present case the only evidence against appellant is the statements and testimony of the three girls. When read separately or together, the accounts of alleged abuse are inconsistent, self-contradictory, lacking in experiential detail, and, at times, border on the absurd.”⁷⁷

The court of appeals faulted SAK for not knowing how many times the abuse happened in Storm Lake and criticized her description of the abuse happening in different locations around the house.⁷⁸ The court also rejected SAK’s testimony because she did not know whether Smith removed her underwear every time and she did not know how to describe the way Smith touched her privates.⁷⁹ According to the majority, “[a]ll [SAK] could say definitely was that [Smith] used his finger and that it hurt.”⁸⁰ The court then questioned the veracity of this statement because “there was no testimony at trial by any witness that S.A.K. ever reacted to the hurt such as saying ‘ouch’ or ‘that hurts’” and because there was no “physical evidence of abuse found in a careful medical examination.”⁸¹

Concerning SMK, the court of appeals was similarly critical that she was not able to remember the specific cities or locations inside the house where each act of abuse took place.⁸² The court of appeals acknowledged that SAK

73. *Id.* at 102.

74. *Graham v. Chicago & N.W. Ry. Co.*, 119 N.W. 708, 710–11 (Iowa 1909) (*Graham II*), *opinion supplemented on reh’g*, 122 N.W. 573 (1909). A cynic might note that this was the *Graham* case’s second trip to the Iowa Supreme Court, and the court had found insufficient evidence of negligence in the first appeal. *See generally* *Graham v. Chicago & N.W. Ry. Co.* (*Graham I*), 107 N.W. 595 (1906). There is language in the 1909 opinion that suggests the court was skeptical of a different outcome, despite the admission of somewhat different evidence. *See Graham II*, 119 N.W. at 711–12 (declining to discuss the facts a second time and noting that the court “shut [its] eyes to” evidence inconsistent with the version of events suggested by some of the new evidence).

75. *Graham II*, 119 N.W. at 711.

76. *State v. Smith*, 508 N.W.2d 101, 103 (Iowa Ct. App. 1993).

77. *Id.*

78. *Id.* at 103–04.

79. *Id.* at 104.

80. *Id.*

81. *Id.* at 101, 104.

82. *State v. Smith*, 508 N.W.2d 101, 104 (Iowa Ct. App. 1993).

witnessed one of the incidents of abuse, then discarded SAK's eyewitness account because her details did not entirely match SMK's recollection about the location.⁸³

The court of appeals wrote, "S.M.K.'s testimony, like S.A.K.'s, is almost completely devoid of any experiential detail."⁸⁴ In the following paragraph, the court referred to SMK's detailed testimony about being touched under the blanket while people were opening presents but disregarded the testimony because "no one who was in the room at the time saw or heard anything."⁸⁵ The court found it unbelievable that a man would be able to "get his penis out of his shorts" while under a blanket.⁸⁶ The court also faulted SMK for not crying out and emphasized that the medical testimony "revealed no evidence of stretching, scarring, or loss of elasticity such as would be expected from repeated touches hard enough to hurt."⁸⁷ In the *Smith* majority's view, SMK's testimony was not believable in part because it "describe[d] scenes, such as the birthday party, that border on the surreal."⁸⁸

Finally, the court of appeals looked at the family dynamics and weighed these heavily against believing the girls' testimony. The court highlighted that the victims "enjoyed being with [Smith] and would fight to see who would sit on his lap or kiss him goodbye." The court also described how there were disagreements about child support between the victims' mother, Pamela, and their biological father.⁸⁹ For reasons that are not readily apparent, the court of appeals also emphasized that Smith and the girls' "mother [Pamela] slept cuddled together."⁹⁰

IV. SMITH'S LEGACY

Between 1993 and this writing, *Smith* has been cited in the sufficiency-of-the-evidence discussion of 60 Iowa criminal appeals.⁹¹ Among these cases, more than half (32) concern sex-crime convictions—often the sexual abuse of children. Not one of these cases has followed *Smith's* reasoning or reversed a jury verdict on sufficiency grounds. Despite this, reliance on

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *State v. Smith*, 508 N.W.2d 101, 104 (Iowa Ct. App. 1993).

89. *Id.* at 104–05.

90. *Id.* at 105.

91. *See, e.g.*, *State v. Lusk*, No. 15-1294, 2016 WL 4384672, at *2 (Iowa Ct. App. Aug. 17, 2016); *State v. Schneider*, No. 14-1113, 2015 WL 2394127, at *3 (Iowa Ct. App. May 20, 2015); *State v. Schondelmeyer*, No. 14-0621, 2015 WL 1817030, at *3–4 (Iowa Ct. App. Apr. 22, 2015). Two juvenile-delinquency cases (which are somewhat analogous to criminal cases) have also cited *Smith* and declined to follow its reasoning. *See In re D.L.*, No. 14-1302, 2015 WL 5285658, at *2–3 (Iowa Ct. App. Sept. 10, 2015); *In re J.M.S.*, No. 11-1307, 2012 WL 1612024, at *1–2 (Iowa Ct. App. May 9, 2012).

Smith by defense counsel is almost ubiquitous, both in the district court and on appeal.

But the real consequences of *Smith* cannot be measured by counting cases or looking at the numbers. As discussed below, *Smith* perpetuates rape myths and—because it is a published, controlling case—prevents Iowa’s appellate courts from fully embracing a modern understanding of sexual abuse.

V. WHY *SMITH* SHOULD BE DISAVOWED AND OVERRULED

The time has come for the Iowa Court of Appeals to formally bury *State v. Smith*. The case was wrong when it was decided, and it is even more clearly wrong today. Given our modern knowledge of sexual-abuse dynamics, *Smith* is too dangerous to remain on the books. Unless and until Iowa’s appellate courts affirmatively overrule *Smith*, that case’s specter will continue to reinforce outdated myths that perpetuate rape culture and harm the victims of sexual assault.

Before moving onto sex-crime-specific concerns about *Smith*, it is important to recognize two other serious flaws that were apparent when *Smith* was decided. First, the decision rests on doctrinally shaky ground. Iowa case law overwhelmingly recognizes that questions of fact are for trial juries while questions of law are for appellate review,⁹² and there is hardly a clearer case where the court overstepped in substituting its own judgment for that of a trial jury. Second, the court of appeals never should have published the *Smith* opinion. The court of appeals has historically published only a tiny fraction of its opinions,⁹³ consistent with its role as an error-correcting intermediate appellate court.⁹⁴ Yet in *Smith*, the court of appeals published a case that not only involved (what the court perceived as) error correction, but one that could not garner unanimous support even among the three-judge panel considering the case.⁹⁵ If the court of appeals had correctly recognized it should not publish the opinion, *Smith*’s impact may have already been lost to the ravages of time. Instead, *Smith* lives on and continues to haunt Iowa case

92. See, e.g., *State v. Paredes*, 775 N.W.2d 554, 567 (Iowa 2009) (“[A] court must be careful not to usurp the role of a jury by making credibility determinations that are outside the proper scope of the judicial role.”); *State v. Laffey*, 600 N.W.2d 57, 59 (Iowa 1999) (“[I]t is for the jury to judge the credibility of the witnesses and weigh the evidence.”); *Neighbors v. Iowa Elec. Light & Power Co.*, 175 N.W.2d 97, 101 (Iowa 1970) (“Defendant’s argument is persuasive, but we may not substitute our view of the evidence for that of the jury.”).

93. Rosemary Shaw Sackett & Richard H. Doyle, *History of the Iowa Court of Appeals*, 60 DRAKE L. REV. 1, 16–17 (2011).

94. JOY A. CHAPPER & ROGER A. HANSON, UNDERSTANDING REVERSIBLE ERROR IN CRIMINAL APPEALS 28 (1989) (stating that intermediate appellate courts “are primarily error correctors. Working within the confines of established law, [appellate courts] examine lower court proceedings to determine the correctness of the law applied and the procedures followed in reaching a decision” (footnote omitted) (citation omitted)).

95. See *State v. Smith*, 508 N.W.2d 101 (Iowa Ct. App. 1993). Given that sufficiency was the only issue decided in the appeal, it is a fair inference to think that Chief Judge Oxberger disagreed with both the outcome and the reasoning.

law.

Setting aside those general concerns, the sex-abuse discussion in *Smith* is indefensible. One could make the case that the *Smith* opinion was driven by a fundamental mistrust of the female sex, continuing the historical trend of discounting testimony from women and girls who allege rape or sexual abuse.⁹⁶ But we cannot time-travel and read judges' minds. So we look to the text of their opinion. The court of appeals' rejection of the jury's verdict, and by extension the victims' testimony, purports to be based on the following: (1) the convictions largely turned on the uncorroborated testimony of young girls; (2) the girls did not have any physical injuries; (3) there were people nearby who did not know the abuse was happening; (4) the girls still liked the offender and wanted to spend time with him; and (5) the girls could not describe the abuse in extreme detail.

All five of these points are rape myths packaged in legal terminology, and none of them have any place in an appellate court's sufficiency analysis. Each of these reasons on its own provides a reason to overrule *Smith*; together they render *Smith* dangerous and worthy of demolition.

A. IOWA LAW DOES NOT REQUIRE CORROBORATION

Much of the language in *Smith* seems concerned that the jury returned a guilty verdict based solely on the testimony of the victims.⁹⁷ Yet Iowa juries are explicitly permitted to do just that.

The notion that the law should require corroboration of victim testimony plays on long-held myths that rape victims—and women more generally—cannot be trusted.⁹⁸ During the mid-20th century, most states (including Iowa) required corroboration before a rape conviction could be returned.⁹⁹

96. See, e.g., Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1017–40, 1055–56 (1991); A. Thomas Morris, Note, *The Empirical, Historical and Legal Case Against the Cautionary Instruction: A Call for Legislative Reform*, 1988 DUKE L.J. 154, 154–57, 167–68 (1988); see also G. Geis, Comment, *Lord Hale, Witches, and Rape*, 5 BRIT. J.L. & SOC'Y 26, 42 (1978) (discussing United States appellate courts' treatment of rape cases). Professionals in the 19th and early 20th centuries were also unfairly skeptical of child testimony. John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 108–09 (1989).

97. See *Smith*, 508 N.W.2d at 102 (referring to “direct” evidence); *id.* at 103 (noting “the only evidence against appellant is the statements and testimony of the three girls”); *id.* at 104 (discussing lack of “physical evidence of abuse found in a careful medical examination” and how “no one who was in the room at the time saw or heard anything”); *id.* at 105 (“No one, other than the girls themselves, ever saw or heard appellant do or say anything that would raise any suspicion he was abusing them . . .”).

98. See *supra* note 96 and accompanying text.

99. State v. Taylor, 222 N.W.2d 439, 441–42 (Iowa 1974) (describing Iowa's former corroboration rule); Deborah W. Denno, *Why the Model Penal Code's Sexual Offense Provisions Should Be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207, 214 & n.57 (2003); see also Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 907, 925–26 (2001).

But Iowa abolished the corroboration requirement in 1979, long before *Smith* was decided.¹⁰⁰ Today's law unequivocally recognizes that corroboration is not required.¹⁰¹ And it is good that it does: "Corroborative evidence of sexual assault—such as torn clothes or injuries—is not only uncommon, it is downright rare."¹⁰²

Allowing *Smith* to stand means that modern sex-crime jurisprudence is poisoned by the opinion's suggestion that there is something wrong with prosecuting sex crimes that lack independent corroboration. There is not. Both children and adult victims are unlikely to make any sort of false allegation regarding sexual abuse,¹⁰³ and there is no reason to give children's disclosure of sex abuse heightened scrutiny.¹⁰⁴ Given the rarity of physical evidence (discussed below), perpetuating this rape myth undercuts the prosecution of countless sex assaults, particularly those committed against children.

B. THE OVERWHELMING MAJORITY OF SEX-ASSAULT VICTIMS DO NOT HAVE PHYSICAL INJURIES

In its opinion, the court of appeals condemned the girls' testimony as unreliable in part because there was no "physical evidence of abuse found in

100. IOWA CODE § 782.4 (1950) (repealed 1974); see IOWA CODE § 709.6 (2015) (stating that no jury instruction will "be given in a trial for sexual abuse cautioning the jury to use a different standard relating to a victim's testimony than that of any other witness to that offense or other offense").

101. *State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998) ("We find that the alleged victim's testimony is by itself sufficient to constitute substantial evidence of defendant's guilt."); *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995) ("The only direct evidence is the complainant's testimony. But under today's law that is sufficient to convict. The law has abandoned any notion that a rape victim's accusation must be corroborated.").

102. Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*, 13 NEW CRIM. L. REV. 644, 652 (2010).

103. David Finkelhor, *Child Sexual Abuse: Challenges Facing Child Protection and Mental Health Professionals*, in CHILDHOOD AND TRAUMA—SEPARATION, ABUSE, WAR 101, 108 (Elisabeth Ullmann & Werner Hilweg, eds., Mary Heaney Margreiter & Kira Henschel, trans., Ashgate Publ'g Co. 1999) (noting only 5–10% of children's allegations are false and that such allegations are generally "instigated by adults, who raise a suspicion for malicious purposes"). The research shows that "it is actually rather difficult to get a child, particularly after age 5, to make false allegations, even with encouragement." See *id.* at 109.

104. Gary B. Melton, *Children's Competency to Testify*, 5 LAW & HUM. BEHAV. 73, 79 (1981) ("There is in fact little correlation between age and honesty."). And, as two writers note:

[T]here is little or no evidence indicating that children's reports are unreliable, and none at all to support the fear that children often make false accusations of sexual assault or misunderstand innocent behavior by adults. The general veracity of children's reports is supported by relatively high rates of admission by the offenders. Not a single study has ever found false accusations of sexual assault a plausible interpretation of a substantial portion of cases.

Lucy Berliner & Mary Kay Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOC. ISSUES 125, 127 (1984) (citations omitted).

a careful medical examination.”¹⁰⁵ The court also opined that it “expected” there would be medical evidence of “stretching, scarring, or loss of elasticity” after Smith touched the girls with his penis.¹⁰⁶ The scientific research, however, does not remotely support this view. The court of appeals’ commentary on the medical evidence was based on the unfounded hunch of male jurists,¹⁰⁷ not the research of scientists or the experience of victims. *Smith* thereby perpetuates the unfortunate “myth that a real [rape] victim should be found lying crumpled on the ground in a pool of blood.”¹⁰⁸

Contrary to the *Smith* court’s assumptions, injuries in sex-assault cases are the rare exception, not the rule. Among sex-assault victims admitted to hospital emergency rooms, one study found that 68% of victims showed no injuries whatsoever, 26% had minor injuries that do not require medical treatment, around 5% had moderate injuries, and only 0.2% of victims had severe physical injuries.¹⁰⁹

Statistics for genital injuries are more variable, but the consensus is that—even following forcible penetration—“the examiner will usually not find genital injuries.”¹¹⁰ Injuries are even rarer among child victims. While the trial testimony in *Smith* indicates there are no medical findings in 75% of child-sex-abuse examinations,¹¹¹ modern medical science tells us that number may be closer to 90%.¹¹² This is in part because most child molesters fondle victims or perform oral sex (the sex acts at issue in *Smith*), and this conduct is less likely to cause physical injuries than forcible penetration.¹¹³

105. *State v. Smith*, 508 N.W.2d 101, 104 (Iowa Ct. App. 1993).

106. *Id.*

107. The Court of Appeals panel that decided *Smith* was composed of three men. *See id.* As of 2016, the Iowa Court of Appeals includes four women and five men, while the Iowa Supreme Court consists of seven men and no women. *See generally* Gina M. Messamer, Note, *Iowa’s All-Male Supreme Court*, 98 IOWA L. REV. 421, 426–31 (2012) (discussing the history of women on Iowa’s appellate courts).

108. LEE MADIGAN & NANCY C. GAMBLE, *THE SECOND RAPE: SOCIETY’S CONTINUED BETRAYAL OF THE VICTIM* 95 (1991).

109. LINDA E. LEDRAY, *SEXUAL ASSAULT RES. SERV., SEXUAL ASSAULT NURSE EXAMINER (SANE) DEVELOPMENT & OPERATION GUIDE* 69–70 (1999), https://www.ncjrs.gov/ovc_archives/reports/saneguide.pdf (collecting studies). Given that the cited figures concern emergency rooms—where one can assume medical professionals see somewhat more severe cases of sex assault than the total victim population—these numbers likely overestimate the rate at which physical evidence or injuries can be found after a sex assault or rape.

110. *Id.* at 70; *accord* Myers et al., *supra* note 96, at 37–38 & nn.127–32 (collecting research).

111. Appendix, *supra* note 4, at 124.

112. *See* Wendy A. Walsh et al., *Prosecuting Child Sexual Abuse: The Importance of Evidence Type*, 56 CRIME & DELINQUENCY 436, 443 (2010) (noting 14% of cases referred to a Texas Child Advocacy Center had physical evidence while 9% had other medical evidence).

113. HOWARD N. SNYDER, NAT’L CTR. FOR JUVENILE JUSTICE, *SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS* 2 (2000), <http://www.bjs.gov/content/pub/pdf/saycrle.pdf> (finding juvenile victims had greater proportion of fondling crimes than penetration); David Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse*, 4 FUTURE CHILD. 31, 42 (1994) (noting

Finally, the odds of finding any physical trauma decreases dramatically following the first 24 hours after an attack.¹¹⁴ In *Smith*, the girls were evaluated—at the very earliest—a full week after the last act of abuse.¹¹⁵ Thus, the court of appeals’ emphasis on the lack of “physical evidence” was misinformed, and *Smith*’s vitality as controlling precedent means this incorrect understanding of medical science continues to mislead a new generation of prosecutors, defense lawyers, and judges.

C. CHILDREN ARE SOMETIMES ABUSED WHEN OTHER PEOPLE ARE NEARBY

Next, the court of appeals repeatedly expressed its disbelief that sexual abuse could subtly happen under a blanket while other people are nearby.¹¹⁶ The majority opinion claims this is “incredible” and “border[s] on the surreal.”¹¹⁷ The reality is that sex offenses can—and do—happen with non-offending parents and guardians in close proximity.

In her book, *Predators: Pedophiles, Rapists, and Other Sex Offenders*, Dr. Anna Salter summarizes some of her interviews with real sex offenders who have been incarcerated or committed for treatment.¹¹⁸ One of Salter’s interview subjects said this:

There were times that I raped in a car with the parents in the front seat, me in the backseat with the children. The child would feel such a bond of trust that the child would decide okay, I’d like to go to sleep, and I’d manipulate the child and lay him across the seat and molest the child with my hand on his penis. By forcing my hands on his penis while the parents were in the front seat.¹¹⁹

In other interviews, both victims and offenders reported to Salter that the abuse took place while the child’s mother was “sleeping in the same bed.”¹²⁰ Children in these situations often “freeze” because they “cannot make sense of” the abuse and probably fear telling on a person they know or love.¹²¹ Compared to the child molested in the backseat or with her mother in the same bed, SAK and SMK’s description of abuse under a blanket hardly seems “incredible” or “surreal.”

D. IT IS NOT UNCOMMON FOR SEXUALLY ABUSED CHILDREN TO HAVE MIXED OR

only 20–25% of sexual abuse against female children involves vaginal penetration *or* contact).

114. Ledray, *supra* note 109, at 71.

115. See *State v. Smith*, 508 N.W.2d 101, 104 (Iowa Ct. App. 1993).

116. See *id.* at 103–05.

117. *Id.* at 104.

118. See generally ANNA C. SALTER, PREDATORS: PEDOPHILES, RAPISTS, AND OTHER SEX OFFENDERS: WHO THEY ARE, HOW THEY OPERATE, AND HOW WE CAN PROTECT OURSELVES AND OUR CHILDREN (2003).

119. *Id.* at 28.

120. *Id.*

121. *Id.*

POSITIVE FEELINGS ABOUT THEIR ABUSERS

To support its conclusion that the young victims were not credible, the court of appeals also noted: “The girls enjoyed being with [Smith] and even would fight to see who would sit on his lap or kiss him goodbye.”¹²² Reference to this evidence seems to be premised on the notion that, if Smith had touched the girls inappropriately, they would no longer show him affection. The available research takes the legs out from this assumption.

Whether victims have positive feelings for their abusers has nothing to do with whether the sexual abuse occurred. “The clinical literature discloses that in intrafamilial abuse cases, many abused children are ambivalent about the abuser, feeling warmth and anger at the same time. It is not uncommon for abused children to want to live with and demonstrate affection toward the abusive parent.”¹²³ In one case study, more than half of minor victims interviewed said they “loved . . . , liked . . . , need or depended on” their sexual abuser.¹²⁴ It is thus no surprise that SMK and SAK maintained mixed or positive feelings and behaviors toward Smith. The court of appeals’ insinuation that the girls were lying because they “enjoyed being with”¹²⁵ Smith and wanted to “kiss him goodbye”¹²⁶ is contrary to the science and has no place in a published opinion.

E. SEXUALLY ABUSED CHILDREN CAN RELIABLY PROVIDE THE CORE DETAILS OF AN EVENT, EVEN IF THEY CANNOT RECITE THE PRECISE CHRONOLOGY

The *Smith* majority’s criticism is perhaps most strident in asserting that the girls’ description of the abuse “lack[ed] experiential detail.”¹²⁷ As a threshold matter, the record does not seem to support any claim that the girls’ testimony lacked experiential detail. SAK testified at length about how Smith “touched” and “licked” her privates.¹²⁸ SMK testified that, while she sat on his lap, Smith would take his penis out of his “panties” and “put it right up to [her] private,” but not penetrate her.¹²⁹ She said she felt his penis and it was “hard.”¹³⁰ SMK also described how Smith would perform oral and manual sex acts on her while she was on the bottom bunk bed: Smith was “on his knees

122. *State v. Smith*, 508 N.W.2d 101, 105 (Iowa Ct. App. 1993).

123. Myers et al., *supra* note 966, at 88. With intra-familial abusers (like Smith, who abused his stepdaughters), offenders are also likely to lavish gifts, praise, and love on the victims as part of the grooming process. See Benoit Leclerc et al., *Examining the Modus Operandi of Sexual Offenders Against Children and Its Practical Implications*, 14 *AGGRESSION & VIOLENT BEHAV.* 5, 9 (2009).

124. Lucy Berliner & Jon R. Conte, *The Process of Victimization: The Victims’ Perspective*, 14 *CHILD ABUSE & NEGLECT* 29, 32 (1990).

125. *Smith*, 508 N.W.2d at 105.

126. *Id.*

127. *Id.* at 103.

128. See Appendix, *supra* note 4, at 83–86; see also *infra* Appendix A.

129. Appendix, *supra* note 4, at 107–09.

130. See *id.* at 108

[with] his head bent down” while SMK laid on her back.¹³¹

Perhaps more important than the particulars of the victims’ testimony in this case, faulting children who do their best to describe sexual abuse is an objectively unfair criticism. It should not require much explanation to conclude that most 11 year-olds cannot describe, in detail, an adult male penis or the specifics of various sexual activities. Children often lack the vocabulary, to say nothing of the substantive comprehension, to fully communicate what was done to them.¹³²

The research shows that, while children can remember the core elements of an event with adult-like accuracy, children tend to provide fewer details when asked to spontaneously recall the event.¹³³ In their survey of expert testimony concerning child sex abuse, John Myers and his colleagues gave the following example:

[B]y age three, children are quite adept at narrating autobiographical events from memory, such as eating lunch at McDonald’s. However, a three-year-old’s account of the McDonald’s expedition may be little more than a skeletal outline, whereas the description provided by the preschooler’s big sister might be rich in detail, including the fact that sister had a large order of “fries,” a “vanilla shake,” and a “cheese burger.” The preschooler’s description of lunch provides less detail, but this fact should not be interpreted as undermining the accuracy of what the child does remember.¹³⁴

The research also indicates that children’s occasional inconsistency in the chronological sequence of events is not related to the accuracy with which they recall core events.¹³⁵

Given the presence of so many other rape myths, it is perhaps unsurprising that the *Smith* court also criticized SMK and SAK for not being able to distinguish between locations or give a specific chronology. That criticism is misplaced for a number of reasons. For one thing, science tells us that, “when a child is repeatedly abused for months or years, individual molestations blur together. If the child is asked to describe particular episodes, the child may become confused, and such confusion may lead to inconsistent versions of events.”¹³⁶ For another, the location where the abuse

131. *Id.* at 109, 111. Readers need not take this author’s word for it: some illustrative portions of the *Smith* record are reproduced in Appendix A attached to this piece.

132. Ellen R. DeVoe & Kathleen Coulborn Faller, *The Characteristics of Disclosure Among Children Who May Have Been Sexually Abused*, 4 CHILD MALTREATMENT 217, 225–26 (1999).

133. Myers et al., *supra* note 966, at 95–97.

134. *Id.* at 96 (footnote omitted).

135. *See id.* at 97–100.

136. *Id.* at 88, 104 (“It is very difficult, if not impossible, for young children to specify the date and time of a past event, especially when the memory is embedded in a series of similar ongoing acts.”).

took place is not an element of the crime¹³⁷—it is not even material to the charges. This means the *Smith* majority denigrated the testimony of SMK and SAK concerning dates and times *even though* these facts are collateral to the prosecution. The criticism is particularly stomach-churning considering the court of appeals’ admission that SAK “could say definitely . . . that [Smith] used his finger and that it hurt.”¹³⁸ SAK consistently said that Smith sexually abused her, and a convicted child molester was set free because the court of appeals did not understand that children do not process chronology like adults do. Every time an Iowa court cites *Smith*, there is a risk that error will be repeated, another victim will be re-traumatized by the process, and a guilty man will walk free.

VI. CONCLUSION

The Iowa Supreme Court has recognized that “[a] person should not be able to escape punishment for such a disgusting crime because he has chosen to take carnal knowledge of an infant too young to testify clearly as to the time and details of such shocking activity.”¹³⁹ Yet that is exactly what will happen if judges take *Smith* at face value and continue to reference the decision as a “leading case” on child sex abuse.¹⁴⁰ The *Smith* court misunderstood the nature of children’s testimony and relied on rape myths to override the judgment of twelve Iowans who believed the victims beyond a reasonable doubt. The evil of this error is compounded because *Smith* is a published appellate case and remains controlling precedent.

Child sex abuse is already “exceedingly difficult to prove,”¹⁴¹ and the rape myths regurgitated by *Smith* make it that much harder. Time has shown that the foundations of *Smith* are rotten and contrary to the credible scientific evidence. Iowans deserve better from their appellate courts than rape culture masquerading as legal analysis. The court of appeals should overturn *Smith* at the earliest opportunity.

APPENDIX A: TRANSCRIPT EXCERPTS

Excerpt from SAK’s testimony:¹⁴²

Q: Did Allen Smith ever do things to you that you didn’t like?

A: Yes.

Q: What kinds of things did he do?

137. *State v. Rankin*, 181 N.W.2d 169, 171 (Iowa 1970); *State v. Griffin*, 386 N.W.2d 529, 532 (Iowa Ct. App. 1986).

138. *State v. Smith*, 508 N.W.2d 101, 104 (Iowa Ct. App. 1993).

139. *Rankin*, 181 N.W.2d at 172.

140. *See State v. Fister*, No. 15-1542, 2016 WL 6636688, at *3 (Iowa Ct. App. Nov. 9, 2016).

141. Myers, et al., *supra* note 96, at 3.

142. Appendix, *supra* note 4, at 83–86.

A: He touched my privates.

Q: Okay. Let's get some details. Where on you are your privates?

A: Down here and (indicating) –

....

[Q]: Okay. Between your legs, basically?

[A]: Yeah.

....

Q: When you were living in Ames, when would he touch you? How did that happen?

A: It would be at night.

Q: Where would you be at night?

A: In my bedroom.

....

Q: When Al came into your bedroom, what did he do?

A: He would lick my private.

Q: Okay. Where would you be when Al came into your bedroom?

A: In my bed.

....

Q: What did Al touch you with?

A: His tongue and his finger.

....

Q: Where did he put his fingers?

A: In my private, by my private.

Q: Okay. Under your underwear?

A: Yes.

Q: Where did he put his tongue?

A: On my private.

Excerpt from SMK's testimony: ¹⁴³

Q: Okay. When you were living here in Emmetsburg with your family, with your mom and Al, did Al Smith ever touch you in a way you didn't like?

A: Yes.

143. *Id.* at 105–08, 111–12.

Q: What did he do?

A: He touched my private with his hands, his mouth[,] and his penis.

Q: Did that happen at your house or someplace else in Emmetsburg?

A: My house.

Q: What room did that happen in at your house?

A: The living room and my room.

Q: Let's think about the living room for a minute. Okay? Did Al touch your privates more than one time in the living room?

A: Yes.

Q: How would he do that?

A: When we—when we watched TV, he would get a blanket and put it over us.

....

Q: Where would you be?

A: Sitting on his lap.

....

[Q]: . . . The times that you were on Al's lap and he had the blanket over you, what did he touch you with?

[A]: Sometimes with his hands, and sometimes with his penis.

Q: How did he touch you with his penis?

A: I think he would get [it] out of his panties and put it under mine.

Q: Did you ever see Al's penis?

A: No.

Q: Did you ever touch it with your hands?

A: Yes.

....

Q: What did it feel like?

A: Felt hard.

Q: Okay. What did Al do with his penis when he had it out of his panties?

A: He would put it right up to my private.

Q: Did he touch your privates with it?

A: Yes.

Q: Do you think he put it inside of your body at all?

A: No.

....

Q: When Al came into your room in Storm Lake, what did he do?

A: He touched me with his finger and his mouth.

Q: How did he do that? How did it happen?

A: On the bottom bunk bed and the other bed he touched me with his mouth being on his knees and his head bent down and he'd still be on his knees when he touched me with his fingers.

Q: Did he touch you on your bare skin?

A: Yes.

....

Q: And you said he touched you with what? With his mouth and his—his mouth and his fingers?

A: Sometimes his mouth, his penis and his fingers.

....